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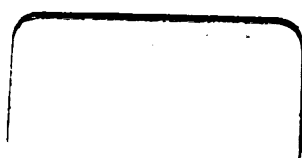
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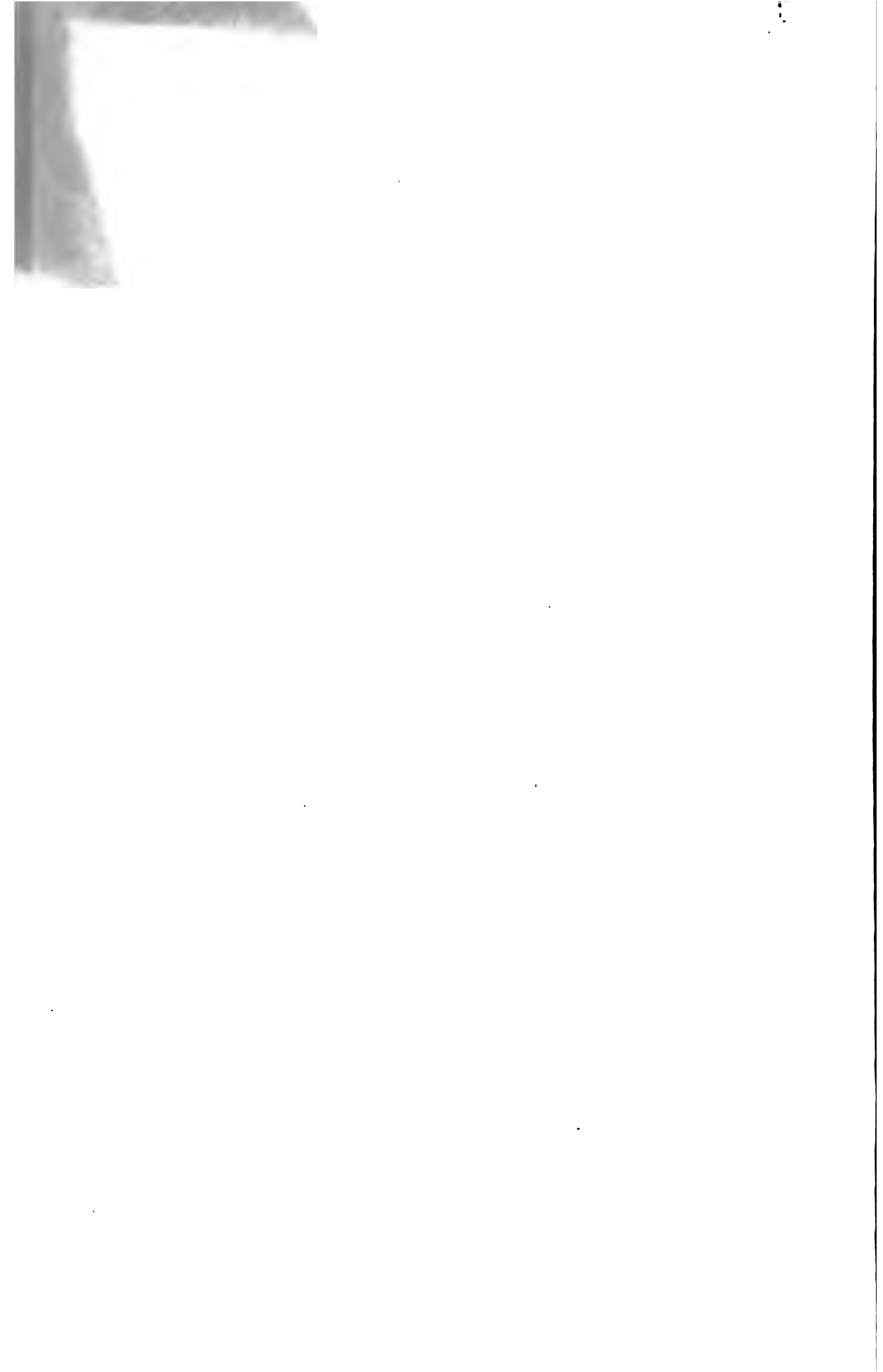
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I R I S H J U R I S T.

VOL. XV. (VOL. VIII. NEW SERIES.)

CONTAINING

REPORTS OF CASES DECIDED IN THE SEVERAL COURTS OF EQUITY AND COMMON
LAW, THE LANDED ESTATES COURT, COURT OF PROBATE, COURT OF
BANKRUPTCY & INSOLVENCY, AND COURT OF ADMIRALTY.

With a Digest,

OF THE CASES REPORTED DURING THE YEARS 1862 AND 1863 IN THE JURIST, AND
IN THE 13 IR. CHAN. AND 13 IR. C. L. REPORTS.

AND AN

Appendix of the Statutes relating to Ireland.

BY WILLIAM WOODLOCK, ESQ., BARRISTER AT-LAW.

DUBLIN:

E. PONSONBY, 116 GRAFTON STREET.

1863.

Reports of Cases

DECIDED IN ALL

THE COURTS OF EQUITY AND COMMON LAW IN IRELAND, AND IN THE HOUSE OF LORDS.

Court of Appeal in Chancery.

[Reported by Edmund T. Bowley, Esq., Barrister-at-Law.]

[BEFORE THE LORD CHANCELLOR, THE LORD JUSTICE
OF APPEAL, AND MR. JUSTICE O'BRIEN.]

SHAW v. TURBITT.

An executor having paid a large excess of legacy duty out of the assets of the testator, in consequence of an erroneous, but bona fide representation made by him to the Government official—Held, (dissentiente O'Brien, J.,) that on refunding the money so overpaid to the person entitled to it, he was properly charged with interest also.

And Held (per curiam) that in a suit against the executor for an account, the question of his liability to pay this interest could be discussed and determined on further directions.

THIS was an appeal from a portion of a decree of the Lord Chancellor, made under the following circumstances:—William Alexander Shaw having duly made his will, dated August 17, 1829, thereby devised certain real estate to the use of William Shaw during his life, with remainder to his first and other sons in tail male, and in default of such issue, to the use of William John Alexander during his life, with remainder to his first and other sons in tail male, with remainder over in default of such issue. He further bequeathed the residue of his personal estate, after the payment of his debts, funeral expenses, and legacies, to James Turbitt and Edward Beere, upon trust, to invest the same in the purchase of real estate, and directed that, upon this investment being made, the trustees should stand seised of the real estate so to be purchased to the like uses as were declared of the real estate devised as before-mentioned, and in the meantime to lay out the residuary personal estate in the Government Funds, or other good securities, at interest, and to pay the interest to the person who should for the time being be entitled to the rents and profits of the lands thereby directed to be purchased; and the testator appointed James Turbitt,

William John Alexander, and Robert Turbitt, his executors. On the 22nd of October, 1829, the testator died, and on the 29th of November following the will was proved by the executors. The debts, funeral expenses, and legacies having been paid, the clear residue of the personal estate was ascertained, and, on the 18th of February, 1830, the usual account was passed at the Stamp Office, and was signed by James Turbitt alone. James Turbitt and James Beere having accepted the office of trustees of the will, received the residuary personal estate of the testator, and from time to time invested the principal part of it in the purchase of real estate, in conformity with their duty as trustees. William Shaw, who was an illegitimate son of the testator, and the first tenant for life under the will, died without issue in 1846, and thereupon William John Alexander, the second tenant for life under the will, antecedent to the receipt of the rents and profits of the real estate devised by the testator, and purchased by the trustees. William J. Alexander died in the year 1856, and was succeeded in the possession of the estates by William Alexander Shaw, the next tenant for life, and one of the respondents in this appeal. The other respondent, William F. A. Shaw, was his son, and, as such, the first tenant in tail of the estates. About the 18th of August, 1858, James Turbitt and Edward Beere being desirous of retiring from the office of trustee, filed an affidavit under the provisions of the Trustee Relief Act, and transferred into the Court of Chancery to the credit of a certain matter, the sum of £359 12s. 8d. Bank of Ireland Stock, and the sum of £466 12s. 3d. Government New Three per Cent. Stock, and lodged in the Bank of Ireland to the same credit the sum of £111 12s. 2d. cash, being the income received from these sums of stock in the interval between the death of William J. Alexander and the lodgment, supposing that these sums of stock and cash were the only residue of the personal estate of the testator subject to the trusts for investment. These proceedings under the Trustee Relief Act were equivalent to a resignation of their office as trustees. Some time after William Alexander Shaw succeeded to the estates, it was ascertained that, in consequence

of a mistake on the part of James Turbitt, as one of the executors, a large sum had been paid for legacy duty above the amount legally and properly chargeable against the assets of the testator. On the 25th of August, 1860, a petition was presented to the Lord Chancellor by William A. Shaw and William F. A. Shaw, which, after reciting the facts already noticed, prayed, amongst other things, that new trustees might be appointed of the will of the testator, William A. Shaw, in the room of James Turbitt and Edward Beere, and that it might be referred to one of the masters in ordinary to appoint proper persons for the purpose, and that the trust premises might be vested in such new trustees upon the trusts contained in the testator's will, and that all proper inquiries and accounts might be directed and taken, and James Turbitt and Edward Beere were named as respondents. On the 3rd of November, 1860, James Turbitt and Edward Beere filed their affidavits in answer to the cause petition, admitting the main facts stated in the petition, and acknowledging that James Turbitt had made a mistake in preparing the residuary account, and in paying a large sum of money in excess of the legacy duty properly payable; but it was stated he had done so, acting under the advice of the confidential legal adviser of the testator, who was in communication with the Government officers appointed to collect the legacy duty. It was further alleged that James Turbitt had received instructions from the Legacy Duty Office as to the amount of duty to be paid, and that accordingly, acting *bona fide*, and in obedience to the directions given him, he had paid out of the personal estate of the testator the sum of £2,770, being duty at the rate of 5 per cent. on the full amount of the residue as then ascertained, and it was submitted that although an excess might have been paid, yet that these payments were made according to the requirements of the Government officers. The affidavit further stated that an offer had been made by the Government to refund the duty so paid, after deducting the proper amount payable by the first and second tenants for life under the will. The matter of the cause petition came on to be heard before the Lord Chancellor, on the 16th of November, 1860, when his Lordship ordered that it should be referred to Master Litton to appoint new trustees of the will in the room of James Turbitt and Edward Beere, and it was further ordered that the Master should inquire into, and report the nature and amount of the trust property and premises comprised in the will, and the manner in which it was invested, and his Lordship reserved the consideration of all further directions, and the question of the costs, until the Master should have made his report. By a report dated the 22nd of May, 1862, Master Litton found, amongst other things, that in consequence of an error in the residuary account returned to the Stamp Office, James Turbitt had paid a large sum for legacy duty in excess of the sum chargeable against the assets of the testator, and that the trustees were chargeable with the excess so made, of which £2,289 18s. 10d. had been refunded to them by the Crown. No exception was taken to this report, and on the 10th of June, 1862, the matter of the cause petition came on to be heard before the Lord Chancellor, on report unexcepted to and

merits, and by a decretal order of that date it was ordered that the report should stand confirmed, and that Godfrey E. Alexander and John T. Madden were thereby appointed trustees, in the place of James Turbitt and Edward Beere, and that the lands and hereditaments should vest in Godfrey E. Alexander and John T. Madden, upon the uses and trusts declared by the will, or such of them as were then capable of taking effect. And the decretal order continued in the following terms—"And his Lordship doth declare that the said respondent, James Turbitt, is chargeable with the sum of £2,770, being the amount paid by him for legacy duty on residuary personal estate of the testator, in excess of the amount legally and properly payable for such legacy duty, together with interest on said sum of £2,770, at the rate of 4 per cent. per annum, from the 14th day of May, 1856." An appeal was now brought from that portion of this decree, whereby it was ordered that James Turbitt should pay interest at 4 per cent. on the money erroneously paid away for legacy duty.

The Solicitor-General (with him *A. Henderson*) for the appellant.—There are two points to be dealt with in the present case. In the first place Turbitt was not chargeable with interest, and in the next place, even if he were, the court had no power to make such an order on further directions. Turbitt paid away the money under the advice of the confidential agent of the testator, and the present, therefore, is a case of *bona fide* payment from a mere mistake. There was no improper retention of money in his hands, and in order to charge an executor or trustee, it must have been proved that the money remained actually in his hands. *Bruere v. Pemberton* (12 Vesey, 386,) is a stronger case than this. There it was held that an executor who has brought in his account, fairly making a claim that appears to him to be just, will not be chargeable with interest, as on a balance improperly retained, even though the money may have been actually in his own hands. In that case it was a claim of his own—here it is a claim of the Crown. The court had all the information at the first hearing that it had at the second, but at the first a reference was made to the Master merely to take an account, and to appoint new trustees, and the court did not then charge Turbitt with the interest. No inquiry was asked for wilful default on the first hearing, and *Jones v. Morrall* (2 Sim., N.S., 241) decides that the court cannot make any decree for wilful default on further directions. In the same case the Vice Chancellor observes at p. 252, that in order to give a claim for interest, "there must be a clear case of improper retention of balances to a considerable and substantial amount." In *Saltmarsh v. Barrett* (8 Jur., N.S., 467), two-thirds of the trust funds were paid to two of the executors under a *bona fide* mistake as to their rights, considering them as residuary legatees, and the Master of the Rolls, Sir J. Romilly, considered that, under such circumstances, an executor was not properly liable for interest—*Edgar v. Reynolds* (4 Drewry, 269).

Brewster, Q.C., (with him *Warren, Q.C.*, and *Dawes*,) for the respondents.—The first indisputable fact is, that Turbitt had the money in his hands. This is not a case of wilful default which, strictly speaking,

is equivalent to want of exertion in bringing in the assets; but though Turbitt was not guilty of wilful default in its legal sense, he was so in its ordinary and popular meaning. He made an improper payment from the absence of proper care and investigation. If an executor paid £2,000 to A. B. as being a creditor of C. D., and he should turn out not to be a creditor, I apprehend the executor's liability to pay interest on refunding the money could be almost unquestioned.—*Woodhead v. Marriott* (1 C. P. Cooper, 62). Moreover, it is an established principle that interest can be charged on further directions, even though it be not prayed for in the bill.—*Hollingsworth v. Shakeshaft* (14 Beav. 492). [*Lord Justice of Appeal*.—It is always premature to pay for interest until the facts are known.] Even though the representation made by him to the Crown was due to the advice of others, it is settled that bad advice will not excuse a trustee. The first take under the will was illegitimate, and the second legitimate; but he appears to have made a totally erroneous return, nor does he state in his answer how he was misled. [*Lord Chancellor*.—In fact he induced the Crown to ask him for money.] I allow that the case would have been quite different if he had made the right return, and the Crown had charged the duty wrongfully. This is a disposition of money for a wrongful purpose, and if even an executor spends too much on funeral expenses, no matter how good his intentions may be, he will be compelled to refund the money with interest. [*O'Brien, J.*—Is there any case where interest was charged on a payment made *bona fide*?] In *Turner v. Maule* (3 De G. & Sm. 497), and in *The Attorney-General v. Köhler* (8 Jur., N.S., 467), a number of general principles are laid down, making out the duties and liabilities of executors and administrators.

Warren, Q.C., for the same parties.—There is a distinction between negligence and wilful default.—*Smith v. Chambers* (2 Phil., 221). In *Saltmarsh v. Barrett* there was no fault, nothing but pure ignorance; but here there must have been an actual misrepresentation of facts. Unless the court acts on the decision of the House of Lords in *The Attorney-General v. Köhler*, the law will be unsettled. [*O'Brien, J.*—In that case Reynolds would not have been liable for either principal or interest if he had not admitted his liability. The interest was charged also during the time that Matford was in office, and thus it would appear that it was substantially the Crown that was held liable.] [*The Lord Chancellor*.—The principles are plainly directed to an ordinary administration.]

Henderson in reply.—When the case is made by the petition, and answering affidavit, and no directions as to interest are given at the first hearing, the question should not be raised on further directions.—*Green v. Badley* (7 Beav. 274). *Turner v. Maule* and *The Attorney-General v. Köhler*, are virtually the same, both in facts and in principles. They are both treasury cases, and unless Reynolds, in the latter case, had, by arrangement with the Crown, consented to be held liable, he could not have been in any way considered responsible. [*Lord Chancellor*.—The judgments say nothing about the rights and liabilities of

the Crown.] Reynolds seems to be regarded not as an administrator, but as the solicitor of the treasury. The general observations in the judgments must be taken in reference to the subject matter, and *Hill v. Evans* (8 Jur., N.S., 528), shews that everything said by a Lord in advising the House of Lords, is not to be taken as part of the decision of the House.

THE LORD CHANCELLOR.—I still retain the opinion which upon the authorities I held before. The questions raised in the present case are two: first, whether it was too late on further directions to make this charge against the appellant; and secondly, his liability to be charged with interest at all. Here is a large sum of money either actually or constructively in his hands, and for which he is called on to account; and in determining questions of interest on balances the ordinary course undoubtedly is, to do so on the second hearing when the account itself came before the court. It would be inconvenient and a cause of great confusion if the court entered on the consideration of such questions at the first hearing; and although, perhaps, in the present case the question might have been decided on the materials present on the first occasion, still there was no sufficient reason why the general principle of discussing such matters at the second hearing should be departed from. That being so, we now come to the question of the interest. And here in the first place we must observe that in the present case the executors are called on to invest the money resulting from the personal estate of the testator. Thus by this special direction, and by a trust cast upon him by the will itself, the money came into the hands of Turbitt. It was erroneously and improperly paid out by him; for whether it was done *bona fide* or not, it is admitted that it was improperly disbursed. What account does he give of this transaction? Simply none. He says literally and truly nothing. He appears to have been actually in partnership with the testator; and even if he did not know the relationship subsisting between the testator and the devisees under the will, which is improbable; he might easily, with reasonable diligence, have inquired and ascertained it. He then appears to have made a representation himself to the Crown, by reason of which a large excess of legacy duty was demanded and paid. This goes beyond a mere mistake, and in that respect differs materially from the case of *Saltmarsh v. Barrett*. There the mistake arose from the construction of a rather obscure will, which required two courts to decide it finally; but here there is a voluntary and wilful error, of which the appellant gives us no satisfactory information. Thus, as it were, on principles independent and irrespective of the case of *The Attorney-General v. Köhler*, in the House of Lords, I find that Turbitt would be justly considered liable to pay interest; and having regard now to the principle case of the House of Lords, and to the principle laid down there in the judgment of the Lords, the decision I had already arrived at is considerably strengthened. That was, perhaps, in some respects an extraordinary case; but it seems, however, to have been determined on the abstract responsibilities of administrators.

LORD JUSTICE OF APPEAL.—I entirely concur with the view of the case taken by the Lord Chancellor.

Here was an express trust to invest the personal estate, a large portion of which, by the appellant's conduct, has been rendered unproductive. It was clearly the duty of the executors to give the requisite information to the Crown; and if this be given without due consideration or circumspection, it appears to me quite plain that a liability to pay the interest is incurred.

O'BRIEN, J.—On the first question I entirely concur with the Lord Chancellor and the Lord Justice of Appeal—namely, as to the point of form; but with respect to the second I confess I should feel some difficulty in arriving at the same conclusion as they have without a careful consideration of the authorities. My present impression is, that the appellant was not liable to pay interest. I asked the learned counsel for some case preceding that in the House of Lords, in which an executor had been held liable for interest on moneys paid over *bonâ fide*, as, for instance, when assets retained were invested in trade, but no such cases have been cited, because I believe no such cases are to be found in the reports. Taking into consideration then the case of *Saltmarsh v. Barrett*, I agree with the general principles laid down there by Sir J. Romilly, who in the course of his judgment observed that “every retainer of money not required for the purposes of the estate was an improper retainer, but there were degrees of impropriety. . . . Although if a trustee or executor, acting *bonâ fide*, paid a sum of money to a wrong person, the court would decree him to make good the fund, yet it would not make him restore it with £4 per cent. interest. The distinction was between the two classes of cases, where money was retained in the hands of an executor, when he was chargeable with interest at £4 per cent., and where money was paid away under a *bona fide* mistake as to the legal rights of the persons interested when he could not be charged with interest.” I cannot see how the decision in *The Attorney-General v. Köhler* affects the facts of the present case. The House of Lords dealt with the question as if the person in possession was liable, or as if the Crown was in reality the party to be held responsible. That being so, I think that it would be difficult to deduce from it any fixed general principles; and it appears to me that the statements made in it must be taken in reference to the very peculiar circumstances of the case.

Decree below affirmed without costs.

Rolls Court.

[Reported by Arthur Houston, Esq., Barrister-at-law.]

CRAWFORD v. PILSON.—Nov. 18, 1862.

Practice—Costs—Affidavit—Eighth G. O. of May, 1857.

Where an affidavit violates the eighth order of May, 1857, directing that the facts deposed to as being within the deponent's own knowledge are to be distinguished from those believed by reason of information derived from other sources: Semble—That

the costs of such portions only as are not in conformity with that order are to be disallowed on taxation.

This was an application for an order directing Master O'Dwyer to review his taxation of the costs in this case. The respondent had filed an answering affidavit, containing forty-three paragraphs, of which two violated the eighth order of May, 1857, which is in the following terms: “All affidavits . . . are to state distinctly what facts or circumstances deposed to are within the deponent's own knowledge, and his means of knowledge, and what facts or circumstances deposed to are known to or believed by him by reason of information derived from other sources than his own knowledge, and what such sources are; and the costs of affidavits not in conformity herewith are to be disallowed on taxation, unless the court or Master, as the case may be, shall otherwise direct.” Master O'Dwyer decided that the costs of the entire affidavit should be disallowed. Certificates from the other two taxing masters of the court were produced disapproving of Master O'Dwyer's ruling. On the same day as Master O'Dwyer decided the construction of the clause of the order relating to costs, one of them, Master Reilly, had decided the case of *Spread v. New* on an opposite principle. With this exception, there had been no decision on the point, and no practice had grown up by which it could be governed.

Shaw contended that, according to the analogy presented by the following cases, viz., *Dryden v. Frost* (8 Simon, 380); *In Re Kernaghan* (5 Ir. Jur. N.S., 51); *Haig v. Ousey* (3 Eng. Jur., N.S., 634), the general words should receive modification. In a former case, the Court of Exchequer were of opinion that if there were one or two items of an attorney's bill of costs objectionable, the entire should be rejected. But Lord Campbell held otherwise, in the case of *Haig v. Ousey*. The true meaning of the order can be gathered from this fact. It was copied from the third and fourth rules of the eighteenth English general order of 1860. These rules have now been abrogated, and in their place the 23rd rule of the fifth order of the Feb., 1861, has been substituted, to the effect that the costs of such portions only as are not in conformity with the rule shall be disallowed.

F. Walsh, Q.C., and *Dowse*, contra, contended that the very fact of such a rule being repealed showed that the construction put upon it by Master O'Dwyer was that adopted in England, for else where was the hardship of the rule? Further, the rule was manifestly penal, the object being to prevent the confusion of the two sources of information in those paragraphs containing the essential points in the case.

THE MASTER OF THE ROLLS.—It appears that the original petition in this case was dismissed for want of prosecution. That petition, thus admittedly unfounded, necessitated the filing of this voluminous affidavit. The petitioner now wishes to fasten the costs of that document on the respondent, because in two out of forty-three paragraphs, it does not comply with the eighth order. If an affidavit were in conformity with that order in all but a single line, would it not be most unjust to disallow the costs of the entire? The

rules should receive a reasonable construction. However, without expressly deciding what that construction should be, I have power to make an order consistent with the justice of the case, under the concluding words of the order, viz., "unless the court or master, as the case may be, shall otherwise direct."

The order made declared that the respondent was entitled to the costs of his answering affidavit, save and except the costs of the eighth and fortieth paragraphs, which were not in conformity with the eighth general order of May, 1857, and it was referred to the master to review his taxation accordingly.

Court of Criminal Appeal.

[Reported by William Woodcock, Esq., Barrister-at-Law.]

[CORAM MONAHAN, C.J., KEOGH, O'BRIEN, AND FITZGERALD, JJ., AND FITZGERALD AND DEASY, BB.]

THE QUEEN v. JOHN FARRELL.—Dec. 8.

Indecent exposure—Indictment—Evidence.

An indictment for indecent exposure, charging the offence to have been committed on a highway, is not sustained by evidence that the offence was committed in a place near the highway, though in full view of it.

An indecent exposure seen by one person only, and capable of being seen by one person only is not an offence at common law. Secus, if there are other persons in such a situation as that they may be witnesses of the exposure.

CASE reserved by Deasy, B., from the last commission at Green-street held by Deasy and Fitzgerald, BB. The prisoner was tried for indecent exposure of his person. The first count of the indictment charged that the prisoner on the 27th September, 1862, being a scandalous and evil disposed person, and devising contriving, and intending the morals of divers liege subjects to debauch and corrupt, on a certain public and common highway situate at Rathgar-road, in the county of Dublin, in the presence of divers liege subjects, and within sight and view of divers other liege subjects through and on the said highway then and there passing, unlawfully, &c. did expose his person. The second count charged the prisoner with committing the same offence on the 24th September on the public highway aforesaid. The third count charged the commission of the like offence on the 25th September in presence of and within sight of divers liege subjects, without stating the offence to have been committed on the public high road. On the trial a policeman named Reynolds was examined, who stated that on the 27th September he saw the prisoner expose his person in a piece of ground near the road, he being turned so that people passing on the road could see, but there being no person on the road. This was repeated, there being then, also, no person on the road. On a third occasion, on the same day, he did the same, there being then two females coming up the road. A woman was also examined, who de-

posed that, on the 25th September, she was in a house adjoining the road, cleaning the parlour, when she saw the prisoner commit the offence in the piece of ground spoken of by the first witness. She also deposed that she saw him commit the offence on the 24th September. Counsel for the prisoner objected that there was no evidence to sustain the allegation in the indictment, that the prisoner exposed his person on a public highway. Counsel for the Crown contended that the first count was sustained, but applied to amend the second count, by inserting the words "on a place in view of a public high road." The amendment was allowed. At the close of the case, counsel for the prisoner objected, first, that there was no evidence to sustain the allegation in the several counts that the prisoner exposed his person on a public highway; second, that there was no evidence of any public exposure; third, that the court had no jurisdiction to amend the second count in the manner specified; fourth, that, even upon the second count as amended, there was no evidence of a public exposure; and he called upon the court to direct an acquittal. This the court refused to do, but left the case to the jury, who convicted the prisoner, who was then sentenced to twelve month's imprisonment; but the questions raised on his behalf were reserved for the Court of Criminal Appeal.

Curran, for the prisoner, opened the case, but was stopped by the court, who called upon

Sullivan, Serjt. (with him Beytagh), for the Crown, to sustain the conviction.—The first count, charging the offence to have been committed on the 27th September is sustained by the evidence of Reynolds. [Monahan, C.J.—Is there any authority to show that when the indictment is for exposure on a public road, evidence of an exposure near the road will sustain the indictment?] There is not. The indictment might be read as expressing that the prisoner meant to corrupt, &c., persons on the road. [Monahan, C.J.—We cannot give the indictment that meaning.] Then, as to the second count as amended. No doubt, the exposure was seen only by one person, but the prisoner exposed himself in such a way as that any persons who might be passing by might see him—*The King v. Webb* (2 C. & K., 933); and the case mentioned by Parke, B., at p. 935 of the report. [Monahan, C.J.—It is evident that there were persons on the road in the case mentioned by Parke, B.] *The King v. Crumden* (2 Campb., 89); *The Queen v. Watson* (2 Cox. C.C., 376); *The King v. Sedey* (Sid., 168).

MONAHAN, C.J.—We must quash the conviction; but it is not to be taken that we lay it down, that if the prisoner was seen by but one person, but there was evidence that others might have witnessed the offence at the time, we would not uphold the conviction; but, in this case, there is no evidence that any one could have seen the prisoner commit the offence on the 24th September, except the one female. Therefore, all that we say is, that an exposure seen by one person only, and being capable of being seen by one person only, is not an offence at common law. If there had been others in such a situation as that they could have seen the prisoner, there would have been a criminal offence.

Court of Queen's Bench.

[Reported by William Woodcock, Esq., Barrister-at-law.]

BLAND v. CARVILL.—Nov. 11.

*Staying proceedings—Action and Cross-action—
Lodging money to abide order of court.*

In an action for the price of a cargo of timber by A., a foreigner, against B., and a cross-action by B. against A, claiming damages for the detention of a ship, the court, before judgment, refused to stay the former action upon the terms of the defendant in it bringing into court the amount of the damages claimed by him in the cross action, to abide the result of the cross-action, and undertaking to pay the balance claimed in the former action above the amount of such damages claimed in the cross action

W. Monk Gibbon, on behalf of the defendants, moved that further proceedings in the action should be stayed, and that the defendants might be at liberty to lodge in court to the credit of the cause the sum of £600, or such other sum as the court might order, and that a stay might be put on the paying out of said sum until the result of a trial of an action in the nature of a cross-action brought and now pending in this court, wherein the present defendants were plaintiffs, and the present plaintiffs were defendants; the defendants in the present cause undertaking to prosecute said cross-action, and bring the same to as speedy a hearing as possible, and if there should be a verdict for the defendants in said cross-action, or if the plaintiffs therein should make default in going to trial in said cross-action, the plaintiffs in the present action should be at liberty to draw the said sum of £600 without further order; but if there should be a verdict for the plaintiffs in said cross-action, then they should be at liberty to make such application as they should be advised against the said sum brought into court, the defendants in the present action also undertaking forthwith to pay the balance claimed by the summons and plaint in the present action, together with the costs of this action, to the plaintiff. The present action, in which judgment had not been marked, was brought to recover the sum of £1,715 3s. 8d., being the price of a cargo of timber sold and delivered by the plaintiffs to the defendants. The cross-action by the defendants against the plaintiffs in the present action, was brought to recover £600 damages, on the ground that it was agreed, upon the sale of the cargo above-mentioned, that the same should be ready for shipment on or before the 25th of April last, and that the defendants in the present action had their ship, "Henry Cooke," at Portland in America (being the port of shipment for said cargo) on the 8th day of April last, in readiness to receive said cargo, but that said cargo was not ready on the day agreed on, nor was it finally delivered to said ship until the 24th day of May last, and that said ship was thereby detained for that period, and also on the ground that portions of the cargo, when delivered, were inferior in quality, and not equal to the specifications agreed on. The plaintiffs in the present action were resident in England, and had no property in this country.

W. M. Gibbon for the defendants, in support of the motion, cited *Smith v. Adams* (8 Ir. Com. L. Rep. App. xxi), and *Apostolu v. White* (8 Ir. Com. L. Rep., App. xxii).

Clarke, Q.C., and M. Morris, contra.—The parties here admit a demand of £1,715 against them, to which they have no defence, but they want the court to set off against that admitted liquidated demand, the unliquidated damages which perhaps they may recover in their cross-action. *Apostolu v. White* was a case upon consent. [Fitzgerald, J.—We cannot act upon that case; we do not know who reported it, or whether it is *ex relations* of any one. It appears to be a mere note given by one of the counsel in the case.] If the motion is granted, the court will really be legislating, by extending the statutes of set-off.

W. M. Gibbon replied.

LEFROY, C.J.—In this case we are called upon to make an order, which, if we were to make it, would show that the Legislature had passed a very unnecessary act, when they passed a statute enabling parties to set off one liquidated demand against another. Here we have a purely unliquidated demand, be liquidated or not, what is the authority for our impounding this money? We are told that the plaintiffs live in England, but the defendants knew that perfectly well when they began to deal with them, and whatever disadvantage arises from the circumstance, the defendants have exposed themselves willingly to it; but that affords no grounds for the present application. The application is totally without precedent, and I should say, even if perchance there was a single case produced, I should not know how to follow it, for it would be assuming to this court what would amount to a legislative authority to make new laws—an authority which the Legislature alone has hitherto exercised. So far, therefore, as my opinion goes, the application appears to be unfounded.

O'BRIEN, J.—I think we have no jurisdiction to make the order. It may be a fair thing to do, but we have no authority to do it.

HAYES and FITZGERALD, J.J., concurred.

Motion refused with costs.

BRABAZON v. POTTS.—Nov. 24; Dec. 13, 1862.

Libel—Justification.

Where a libel charged a landlord with harshness and oppression in evicting his tenants, and the writer added that he had seen the tenants' receipts for payment of rent up to the 29th September, two months and a half preceding the eviction—Held, that the statement formed matter of aggravation which should be justified, that a statement in the defence that the tenants had paid their rents up to the March previous, was not a sufficient justification, and that therefore the defence was bad, though covering other parts of the libel.

Where the charge in a libel was, that the writer had seen in the hands of tenants receipts for rent up to a certain period, a defence that the writer had seen documents purporting to be those receipts, is bad.

A libel must be justified in the sense charged by the innuendo.

DEMURRER:—The first paragraph of the summons and plaint complained that the defendant falsely and maliciously printed and published of the plaintiff in a newspaper, called *Saunders's News-Letter and Daily Advertiser*, the words following, that is to say:—"It is idle to look for any real progress in a people whose tenure is so insecure as that of the tenant farmers of Erris. How can they rear and feed cattle in such a way as to be really profitable if they have no proper steadings? If the landlords do not provide these, can they expect that the tenant will go to the expense of doing so, even if he were able, with the prospects of having his improvements confiscated in strict accordance with the law, or his rent increased year after year as his circumstances appear to improve, until at last a rack rent is reached, which effectually debars further progress, if it does not again reduce him to the condition of pauperism out of which he had emerged? Major Brabazon's (meaning the plaintiff) recent eviction of seventeen families, numbering at least eighty individuals on the townland of Sranaplaia, about fifteen or sixteen miles from Belmullet, shews the slender and uncertain nature of the tenure by which the inhabitants of Erris hold their land. Why the gallant gentleman (meaning the plaintiff) thought proper to send those unfortunate people adrift upon the world, it is difficult to conceive. They had paid their rent punctually before notice to quit was served upon them, and they paid a year's rent afterwards. I visited the scene of the eviction a few days ago. I saw the ruined and roofless houses, in the corners of which the people had constructed little shanties, where they sought shelter until they had their potatoes dug, and their few stacks of oats threshed, and found some other place in which to lay their heads. I saw their receipts for payment of the rent up to the 29th September last, two months and a half before they were turned out of house and home, and their cabins pulled down." And in a subsequent part of said libel so published as aforesaid, the words following:—"When I visited Sranaplaia, a wild mountain district, with only a few patches of arable land scattered here and there, I was surrounded by the evicted tenantry, men and women, who appeared to be quite resigned to their fate, but spoke strongly of the way in which they had been treated. The townland was a recent purchase of Major Brabazon's (meaning the plaintiff's), and it is said by those acquainted with the country that he had paid about double its value for it. The purchase-money was £2,800, and the ordnance valuation is £43 1s. The rents had been raised by the previous owner until they had reached an excessive amount; nevertheless the people were willing to pay more. I accidentally saw in Belmullet the original draft of a memorial, written subsequently to the eviction of the tenants, to Major Brabazon (meaning the plaintiff), entreating his honour to let them remain on the lands, and offering to pay any rent his honour might be pleased to name. How can it be expected that a people thus situated can ever make any progress in improvement, or be otherwise than the most back-

ward amongst European populations in the industrial virtues?" The second paragraph complained that the defendant falsely and maliciously printed and published of the plaintiff in a certain newspaper called, &c., in the form of a letter from a correspondent, the words following, that is to say:—"It is idle to look for any real progress in a people whose tenure is so insecure as that of the tenant farmers of Erris. How can they rear and feed cattle in such a way as to be really profitable, if they have no proper steadings? If the landlords do not provide these, can they expect that the tenant will go to the expense of doing so, even if he were able, with the prospect of having his improvements confiscated in strict accordance with law," (meaning that if plaintiff's tenants at Erris, or any of them, made improvements, or provided steadings for cattle on their farms, plaintiff would, by a harsh and oppressive use of his strict legal rights, appropriate same to himself, and harshly and oppressively exclude such tenants from the benefit of them,) "or his rent increased year after year, as his circumstances appear to improve, until at last a rack-rent is reached, which effectually debars further progress, if it does not reduce him again to the condition of pauperism out of which he had emerged," (meaning that plaintiff would watch any improvement in the condition of the tenants at Erris, and harshly and oppressively increase their rents as they prospered, until he not only prevented any further progress by them, but also reduced them to the condition of paupers). "Major Brabazon's (meaning the plaintiff's) recent eviction of seventeen families, numbering at least eighty individuals, on the townland of Sranaplaia, about fifteen or sixteen miles from Belmullet, shews the slender and insecure nature of the tenure by which the inhabitants of Erris hold their land," (meaning that plaintiff had harshly and oppressively evicted seventeen families, numbering at least eighty individuals, from said townland of Sranaplaia). "Why the gallant gentleman" (meaning the plaintiff) "thought proper to send these unfortunate people adrift upon the world, it is difficult to conceive. They had paid their rent punctually before notice to quit was served upon them" (meaning that the plaintiff had wantonly, oppressively, and cruelly evicted the said seventeen families from the said townland of Sranaplaia, although they had punctually paid their rents up to the time of the service upon them of the notice to quit, upon which they were subsequently evicted), "and they paid a year's rent afterwards." And in a subsequent part of said libel the words following:—"I saw their" (meaning the said evicted tenants') "receipts for the rents up to the 29th September last, two months and a half before they were turned out of house and home, and their cabins pulled down" (meaning that although said evicted persons duly paid their rents up to and for a period within two months and a half before their eviction, yet the plaintiff wantonly, harshly, and oppressively evicted them from their holdings, and pulled down and destroyed their dwellings). And in a subsequent part of said libel the words following:—"The townland was a recent purchase of Major Brabazon" (meaning the plaintiff), "and it is said by those acquainted with the country that he paid about double its value for it. The purchase-money was £2,800, and the

ordnance valuation is £43 1s. The rents had been raised by the previous owner until they had reached an excessive amount; nevertheless the people were willing to pay more" (meaning that although said lands were already held at an exorbitant rent, and although the said evicted persons were willing to advance even upon such excessive rent, yet that the plaintiff wantonly and oppressively refused to accept their terms, and harshly and cruelly expelled them from said lands). "I accidentally saw in Belmullet the original draft of a memorial written subsequent to the eviction by one of the tenants to Major Brabazon, entreating his honour in the most abject terms to let them remain on the lands, and offering to pay any rent his honour might be pleased to name" (meaning that although said evicted persons had offered to pay any rent however exorbitant which plaintiff might think proper to impose, yet that plaintiff had harshly, cruelly, and oppressively refused said offer, and refused to let said lands to them or any of them). "How can it be expected that a people thus situated can make any progress or improvement, or be otherwise than the most backward amongst European populations in the industrial virtues?" (meaning that plaintiff's mode of dealing with his tenants at Erris aforesaid, is such as to debase, degrade, and impoverish them, to retard or prevent their progress or improvement, and to render them the most backward in Europe in the pursuits of industry. The plaintiff claimed £2,000 damages. The defendant pleaded thirdly, for a further defence to the first paragraph, that before and at the time of the publishing by the defendant of the words complained of in the first paragraph, the condition of the people in certain parts of the West of Ireland, and the existence of famine, and of severe distress amongst them were matters of great public interest and discussion, and that as the proprietor of said newspaper, he, the said defendant, was anxious to give the public a true statement of the condition of the said people, and true information as to the extent of the distress and famine prevalent amongst them, and that accordingly he despatched one Henry Coulter to travel through the said West of Ireland, and to forward to defendant, in communications intended for publication in said newspaper, reports of his personal observation of the condition of said people, and of the extent of the distress prevalent among them, which the said Henry Coulter, from time to time, accordingly did, and which communications the said defendant printed and published in the said newspaper; and said defendant further said that the words complained of in the said first count of the summons and plaint formed a portion of one of the said communications so forwarded by the said Henry Coulter, and printed and published by the said defendant as aforesaid; and the said defendant further said that before the printing and publishing of the said words in the said count set forth, to wit, on the 16th December, 1861, the said plaintiff did eject seventeen families theretofore, and then being tenants on the townland of Sranaplaia, numbering upwards of 80 individuals with their families. And the defendant averred that the said plaintiff obtained ejectment decrees against the said tenants at the quarter sessions held in Ballina in or about the month

of July, 1861, upon notices to quit served by or on behalf of the said plaintiff upon the said tenants, that is to say, in or about the month of July, 1860; and the defendant averred that said tenants had paid punctually to the said plaintiff their rents falling due on the 25th March, 1860, that is to say, in or about the month of June, 1860, and previously to the service of said notice to quit; and the defendant further averred that the said tenants did pay to the said plaintiff a year's rent after the services of the said notice to quit, that is to say, in or about the month of October, 1861; and their receipts for the same were seen by the said Henry Coulter; and the defendant further averred that the said Henry Coulter did visit the scene of the said eviction, and did see the ruined and roofless houses, in the corners of which the said tenants or some of them had constructed little shanties; and that the said Henry Coulter was then and there surrounded by the said evicted tenants, both men and women; and the defendant averred that the said tenants or some of them did speak to the said Henry Coulter strongly of the way in which they had been treated; and the defendant further averred that the said townland of Sranaplaia, a wild mountain district, was purchased by the plaintiff in the latter end of the year 1859; and the gale of rent falling due on the said 25th March, 1860, and so paid to the plaintiff by the said tenants in the month of June, 1860, as aforesaid, was the first gale of rent which the said tenants were bound to pay to said plaintiff; and the defendant further averred that the said tenants were willing to pay to the said plaintiff increased rents in excess of the rents which had been previously obtained from the said tenants, provided they were left in possession of their holdings; and the defendant further averred that the original draft of a memorial addressed by one of said tenants to the said plaintiff was seen in Belmullet by the said Henry Coulter, entreating on the part of the said tenants that they should be left in possession of their holdings, and offering to pay any rent that the said plaintiff should be pleased to name; and the defendant averred that the said memorial or the substance thereof was transmitted to the said plaintiff, and that the plaintiff did not comply with the prayer of said memorial; and the defendant averred that under the circumstances aforesaid he did print and publish the said words in the said first count set forth, believing the same to be true, to illustrate the condition of the said people, and to communicate intelligence to the public as to the state of that part of the west of Ireland, and as to the insecurity of the tenure of land in Erris, as it was lawful for him to do for the cause aforesaid. Fourthly,—For a further defence to the second count of the summons and plaint, defendant said, as to so much of the publication in the said second count set forth commencing with the words "it is idle," and ending with the words "from which he had emerged," that the same were not printed and published by the said defendant: of and concerning the plaintiff; and as to the rest and residue of the said publication in the said second count set forth, save and except the following, that is to say, "I saw their (meaning the said evicted persons') receipts for the rents up to the 29th Septem-

ber last, two months and a half before they were turned out of house and home and their cabins pulled down (meaning that though said evicted persons had duly paid their rents up to and for a period within two months and a-half before their eviction, yet that the plaintiff wantonly, harshly, cruelly, and oppressively evicted them from their holdings, and pulled down and destroyed their dwellings)," the defendant said that before the printing and publishing thereof by the said defendant, to wit, on the 16th December, 1861, the said plaintiff did eject seventeen families theretofore and then being tenants on the townland of Sranaplaia, numbering upwards of 80 individuals, with their families. And the defendant averred that the said plaintiff obtained ejectment decrees against the said tenants at the quarter sessions held in Ballina in or about the month of June, 1861, upon notices to quit previously served by or on behalf of said plaintiff upon the said tenants in or about the month of July, 1860; and the defendant further averred that the said tenants had punctually paid to the said plaintiff their rents falling due on the 25th March, 1860, that is to say, in or about the month of June, 1860, and previously to the service of the said notice to quit; and the defendant further averred that the said tenants did pay to the plaintiff a year's rent after the services of said notices to quit, that is to say, in or about the month of October, 1861, and their receipts for the same were seen by the said Henry Coulter; and the defendant averred that the said townland was purchased by the said plaintiff in the latter end of the year 1859; and that the gale of rent falling due on the said 25th March, 1860, and paid by the said tenants in June, 1860, as aforesaid, was the first gale of rent which the said tenants were bound to pay to the said plaintiff as such purchaser of said townland; and the defendant further averred that the said tenants were willing to pay to said plaintiff increased rents, although excessive rents had previously been obtained from the said tenants, provided they were left in possession of their holdings; and the defendant averred that the original draft of a memorial addressed by one of the said tenants to said plaintiff was seen in Belmullet by the said Henry Coulter, praying on the part of the said tenants that they should be left in possession of their holdings, and offering to pay any rent that the said plaintiff might be pleased to name; and the defendant averred that the said draft memorial or the substance thereof was forwarded to said plaintiff, and that he never replied thereto or expressed his willingness to accede thereto, which the said defendant averred to have been harsh and oppressive towards said tenants; and the said defendant said that under the circumstances stated the said tenants were harshly and oppressively evicted from the said lands by the plaintiff; and the defendant averred that he did print and publish the said words in said second count set forth, believing the same to be true, as it was lawful for him to do for the cause aforesaid. Fifthly,—For a further defence to the second count, and as to so much of the words therein set forth, that is to say, the words following:—"I saw their (meaning the said evicted persons) receipts for the rents up to the 29th September last, two months and a-half before they were

turned out of house and home and their cabins pulled down (meaning that although said evicted persons had paid their rents up to and for a period within two months and a-half before the eviction, yet that the plaintiff wantonly, harshly, cruelly, and oppressively evicted them from their holdings and pulled down their cabins)," defendant said that before the printing and publishing of the said words by the said defendant the said Henry Coulter did see receipts purporting to be receipts for the rents payable by said tenants to said plaintiff up to the 29th September, 1861, two months and a-half before they were turned out of house and home and their cabins pulled down, and which receipts were duly signed by the agent of the said plaintiff; and the defendant averred that under the circumstances aforesaid the eviction of the said tenants from their holdings and the pulling down of their cabins by the said plaintiff was wanton, harsh, cruel, and oppressive. And the defendant said that he did print and publish the said words in the said second count set forth, believing the same to be true, as it was lawful for him to do for the cause aforesaid. To these 3rd, 4th, and 5th defences the plaintiff demurred, and assigned as grounds of demurrer, to the 3rd, that although it was pleaded generally to the first paragraph of the plaint, yet said defence did not justify the whole but a part only of the libel therein complained of, leaving many material statements contained in said libel wholly uncovered by any justification; to the 4th, that it did not justify the whole of that part of the libel in the second paragraph to which it purported to be pleaded, but a part only thereof, leaving many material statements of said portions of said libel wholly uncovered by any justification; and also that said defence did not justify the portion of the libel to which it purported to be applied in the sense imputed to said libel in the second paragraph; to the 5th, that although it purported to be pleaded to the whole of the second paragraph, yet it set forth and purported to justify a portion only of the libel stated in said second paragraph, and that it did not justify the statement of the libel to which it was applied in the sense imputed to them in said second paragraph.

Beylagh (with him *Sullivan, Serjeant*) in support of the demurrer.—As to the third defence, the general rule is, that a defence justifying a libel must justify the whole of it, and that is not done here—*Roberts v. Brown* (10 Bingh. 519); *Eaton v. Johns* (1 Dowl. N. S. 602); *Edsall v. Russell* (4 M. & G. 1090); *Helsham v. Blackwood* (11 C. B. 111); shews that where a libel states matter of aggravation that matter must be justified. The matter of aggravation here is that the rents were paid up to a particular day, and that matter is left uncovered. The whole libel is one continued charge of cruelty and oppression against the plaintiff. The fourth defence leaves a large part of the libel uncovered. The fifth defence comes exactly within the decision in *Roberts v. Brown* (10 Bingh. 519). When a person says that he saw the receipts of tenants for rent up to a certain day, the meaning plainly is that the rent was actually paid up to that day.

Todd (with him *Whiteside, Q.C.*) in support of the defences.—All the authorities establish that where

a libel is indivisible and contains but one single charge it is sufficient to justify the sting of the libel, and that it is not necessary to justify every incidental circumstance of the charge. If there were several charges there should be a justification for each of them—*Clark-ton v. Lawson* (6 Bingh. 266 and 593); *Craft v. Boie* (1 Wms. Saund. 246); *Tighe v. Cooper* (7 Ell. & Bl. 639); *O'Connor v. Wallen* (6 Ir. C. L. Rep. 378); *Lavelle v. Oranmore* (in Error, not reported). The libel first complained of is nothing more than a commentary upon the effects of an insecure species of tenure. There is no innuendo in the first paragraph, and the court will not of itself put a bad meaning on the passage. The paragraph merely states the exercise of a legal right by the plaintiff. The statement as to the receipts is a mere statement of the writer's personal experience—*Morrison v. Harmer* (3 Bingh. N. C. 759); *Clarke v. Taylor* (3 Bingh. N. C. 664); *Edwards v. Bell* (1 Bingh. 408). *Sullivan, Serjeant*, replied, citing in addition to the cases already cited, *Hemmings v. Gason* (9 Ell. & Ell. 346), to show that since the Common Law Procedure Act it is for the jury only, not for the court, to say whether a libel is susceptible of the meaning given to it.

Cur. adv. vult.

Dec. 13.—O'BRIEN, J.—This case comes before the court on demurrers taken by the plaintiff to three of the defences; and we are all of opinion that the defences, one and all, are bad, and that the demurrers must be allowed. The first paragraph of the summons and plaint, to which the first of these defences applies, states the libel without the innuendoes, save stating that the person alluded to is the plaintiff. It commences by general observations as to the consequences likely to result from landlords not making certain improvements on their lands for their tenants—that it could not be expected that the tenant would make them himself in the uncertain state of his tenure, with the prospect of having his improvements confiscated, in accordance with law, or of having the rent raised till it reached a rackrent, beyond which it could not be raised any more. It then goes on to state certain acts done by Major Brabazon with respect to his tenants—that "his recent eviction of seventeen families, numbering at least eighty individuals, on the estate mentioned, shows the slender and uncertain nature of the tenure by which the inhabitants of Erris hold their land;" and proceeds—"Why the gallant gentleman thought proper to send these unfortunate people adrift upon the world it is difficult to conceive. They had paid their rent punctually before notice to quit was served upon them, and they paid a year's rent afterwards. I visited the scene of the eviction a few days ago. I saw the ruined and roofless houses, in the corners of which the people had constructed little shanties where they had sought shelter until they got all their potatoes dug, and their few stacks of oats threshed, and found some other place in which to lay their heads." Now, the whole of that part of the libel, with the exception of the general observations at the commencement, is justified by the defences in question; but the libel, after saying that they had paid a year's rent after the service of the notice

to quit, goes on to state—"I saw their receipts for the payment of the rent up to the 29th of September last, being two months and a half before they were turned out of house and home, and their cabins pulled down." That passage is not justified by the defence in question. It then goes on to state that when he visited their places of abode the tenants assembled about him and showed him, or told him, of a memorial they had sent to Major Brabazon, the purport of which was that they were willing to pay an increased rent if left in occupation; it states also that Major Brabazon had recently purchased the land as an overvalue; and it concludes with general observations as to the results likely to be expected from such a mode of treating tenants, by saying—"How can it be expected that a people thus situated can make any progress in improvement or be otherwise than the most backward amongst European populations in the industrial virtues?" I have read, so far as is material, the whole of this libel; and it is to be observed, as I have already stated, that no particular meanings are assigned by innuendo; nor do we think that necessary, for the effect of the whole of it is to hold up Major Brabazon as a harsh, oppressive, and tyrannical landlord, who treats his tenants with great severity, and in a manner certainly calculated to call down upon him more or less of reproach. The defences put in justify the whole of the libel, with the exception of the general observations at the beginning, and what I may call also the general observations at the end, stating the consequences likely to result from the conduct alluded to; but they omit to justify the statement that Mr. Coulter saw the tenants' receipts for the payment of the rent "up to the 29th September last." That is left in this manner. The defences, after stating facts which I need not repeat, justify all the other parts of the libel by stating that in June, 1860, these men had paid their rent for March, 1860; that in July, 1860, after paying that rent, they were served with notice to quit; that on those notices to quit civil bill decrees were obtained in June, 1861; and that in October, 1861, they paid a year's rent, and their receipts for the same—that is, the year's rent up to March, 1861—were seen by Mr. Coulter. The libel having charged that they had paid their rent and produced receipts for it up to September, 1861, two months and a-half immediately before the eviction, the justification is that the tenants had their receipts for rent, and produced them, up to March, 1861. Now, the grounds of this demurrer are that the three passages to which I have referred, namely, the introductory statement, the concluding observations as to general consequences, and also this statement, as to the receipts for the September rent, are not justified. I need not refer to authorities for the purpose of showing that as a general rule, if a defence purports to go to the whole of a paragraph of the summons and plaint it must be an answer to the whole; and that, if there is any material part of the summons and plaint that is not answered by the defence, the defence is bad. With regard to the first and last paragraphs of the libel—what I call the general observations—I should be of opinion, if the objection to the defences related to these alone, that the defence would be good, because I look upon it that the state-

ment at the beginning, anticipating what the result would be if the state of facts about to be mentioned were to continue, and the concluding observations, asking how could it be expected that a people thus circumstanced would improve, or that they would not fall back, are merely statements of the natural consequences likely to result from the conduct stated in the other parts of the libel; and that, consequently, if the other parts of the libel stating that conduct were justified, there would be no necessity at all for justifying either the beginning or the conclusion. On this part of the case I would refer only to one authority, which appears to me very much in point. It is the case of *Edwards v. Bell* (1 Bingham 409). The libel there charged that the plaintiff, a dissenting clergyman, addressed from the pulpit strong terms of invective against a lady—a school-mistress, I believe—attending in one of the schools connected with his church, and said that serious consequences were likely to result from it—that the matter was to be taken up seriously. The libel was justified in the defences, so far as it stated that the plaintiff had used those terms of invective towards this young lady from the pulpit, but the concluding passage was not justified; and one of the objections to the defences—there were others that I need not refer to—was, that they omitted to justify that concluding passage. But Gifford, Chief Justice, said that the concluding statement as to the matter being about to be taken up seriously (it was represented that the parishioners were going to bring an action against the clergyman, and that the matter was certainly one which aggravated the libel) was merely a statement of what would naturally follow from the plaintiff's conduct, and that the charge on the subject of her conduct was met substantially and answered in the justification. Park, Justice, said in like manner that this passage could not be considered as libellous, though part of a libellous publication; and the other judge—Mr. Justice Burrough—stated that it was quite sufficient if the substance of the libellous statement was justified, and that it was unnecessary to repeat every word of the original. Now, on that authority, which has been followed in several cases, I should hold that if it were not for the omission of a justification of the material statement about the receipts for the September rent, the defences would not be objectionable on the grounds of any omission to justify the first and the last paragraphs of the libel. The case of *Helsham v. Blackwood* has been referred to. It is very true that the facts of the cases are different; but the principle laid down and acted on by the court in that case does, in my opinion, apply very materially to the one now before us. Captain Helsham fought a duel and killed his adversary. That was in the eye of the law unquestionably murder. The article in *Blackwood's Magazine* charged him with that, and stated the circumstances of the trial in a very powerful manner; but it went on to state that there was a damning piece of evidence of which they understood the counsel for the Crown were in possession, namely, that the prisoner, meaning the plaintiff, had spent nearly the entire of the night immediately preceding the deed in the practice of pistol-firing. That passage was not justified. All the other statements of the libel—the death of the party, what took

place at the trial, the charge of the judge, and everything calculated to show that legally Captain Helsham was guilty of the crime of murder, with which he was charged, were stated and justified. The objection to the plea of justification was, that it omitted to justify the passage first referred to; and the court, in giving judgment, without calling on the counsel for the plaintiff to apply themselves to this point, said that the charge in question, which was not justified, was one that materially aggravated the charge of murder—that, though legally it may not have affected it, that is to say, it would not have been less murder without it, though murder with greater circumstances of aggravation with it—still it was calculated to produce on the public mind a strong unfavourable impression against Captain Helsham, and to aggravate the feeling against him; and, therefore, they held that it was necessary to be justified. There is another case, that of *Clarkson v. Lawson* (6 Bingham, 266), where a man was charged with having been three times suspended as a proctor, and the justification was that he was once suspended. In that case the demurrer was allowed on the ground that a material averment had not been justified. Now, it is impossible to say in this case, the sting and gist of the libel being to hold up the conduct of Major Brabazon as harsh and oppressive to his tenants—that the statement of their having paid their rent up to September, instead of up to March, would not materially aggravate the libel. There may be enough in the libel otherwise to justify and warrant the charge of Major Brabazon being a harsh and oppressive landlord; and it was contended here for the defendant that the fact of the tenants having paid their rent up to March, 1861, having made that payment of a year's rent after the civil bill decrees were obtained against them—it was contended that the fact of turning out the tenants after this was so harsh and oppressive a proceeding that it was perfectly immaterial whether they had or had not paid the September rent. Now, with that argument I cannot agree. It may be that the conduct of Major Brabazon in either case may be harsh and oppressive, but unquestionably the harshness and oppression of the conduct imputed to him is increased by the allegation—if it were true—that after the civil bill decrees were obtained, and from a period subsequent to the expiration of the year, Major Brabazon had received rent—namely, from March to September, 1861. Therefore, on this ground, we are of opinion, the gist and sting of the libel being to represent Major Brabazon as a harsh, and oppressive, and tyrannical landlord—and as that harshness, and severity, and oppression would be far greater if the rents were paid up to September, 1861, than if they were merely paid up to March, 1861, that it was necessary to justify that portion of the libel, and that the omission to justify it renders the defence objectionable. As to the fourth and fifth defences, the observations I have already made render it unnecessary for me to say much. The fourth defence is clearly open to this objection, that it professes to answer the entire of the second paragraph, and it omits to justify the passage to which I have already referred, about the receipts for the September rent. Why the fourth and fifth defences were

split in the manner they have been, I am at a loss to imagine; but, however, be that as it may, the fourth defence professes to go to the whole of the paragraph, and it omits to justify this passage. There is a stronger objection to it, for this reason—that in the second paragraph the libel is stated with innuendoes, and it is clear if you justify, or profess to justify, the libel, you must justify the use of the words in the sense in which they are charged by the innuendoes—that is, if they are capable of bearing that meaning. Well, here the innuendoes say that the meaning of the statement complained of was to impute harsh, and oppressive, and tyrannical conduct to Major Brabazon, and that it is wholly passed over. As to the last defence, it is enough almost to mention what the charge is that it is professed to be justified, and what the justification is, to show that it is bad. The charge professed to be justified is, that the writer saw in the hands of the tenants their receipts for the rent up to September, 1861; the justification is, that he saw documents purporting to be those receipts. That is no justification at all. It is enough to mention it to see that it is bad. It is bad otherwise, also, as it picks out a portion of the libel; and although there are cases in which a libel may be divided, there would be an objection to dividing it in this case. For the reasons I have stated, I am of opinion that the demurrers taken to the defences in this case should be allowed.

HAYES, J.—My brother O'Brien has stated so fully the grounds on which he thinks that these demurrers ought to be allowed that it is unnecessary for me to do more than express a general concurrence in the views he has stated. The first thing that any man of common sense would do on reading a libel is to see what is the sting of it. Now, this libel consists of a parcel of general observations remarkably well suited for some person writing a treatise on political economy, or to inflame an audience from the platform; and if it rested with those general observations it would excite little attention and do little harm. It does not do a man any great harm to call him a harsh man, or an oppressive man, or anything of that kind; but, if you go on to give dates and facts, and show that he did so and so; that in a proceeding against his tenants he evicted them in the middle of December when they had paid their rents up to the 29th Sep., that furnishes every man in society who might wish to do an ill turn to that person with facts that may prove of infinite injury to him, whilst general observations would pass unnoticed. That is, therefore, the sting of this libel; and it is an extraordinary thing how, in these three defences, that sting has not been met as it ought to have been. The first defence would seem to go generally to the whole of the libel, but with reference to the sting of it—"I saw their receipts for the payment of the rents up to the 29th of September." Now, is that attempted to be justified? The defence is, "Oh, I saw them up to the 25th of March." That is a material difference. The case of *Clarkson v. Lawson*, in which it was decided that it was no justification of an allegation that a proctor had been suspended from practising three times to prove that he had been suspended only once, applies here, and shews that such a justification is not suf-

ficient. The fourth defence specially excludes from it the passage about seeing the receipts for rent up to the 29th September; and the last defence says that he saw documents purporting to be receipts. The court could not for a moment hold that these pleas of justification were sufficient, and one wonders at and admires the ingenuity of counsel that made so much of the matter in argument. For these reasons I am of opinion that the demurrers should be allowed.

FITZGERALD, J., concurred.

Demurrers allowed.

Court of Common Pleas.

[Reported by J. Field Johnston, Esq., Barrister-at-Law.]

M'DONALD v. BULWER.—Nov. 5, 6, 1862.

Trespass—Demurrer—Construction of 12 Vic. c. 16.

A justice's search-warrant by which a party is arrested must be founded on an information which discloses a charge of felony, or contains a statement of facts from which it may fairly be inferred that a felony has been committed.

*And therefore where the information stated that A. B. had neglected to return a gun which had been lent to him, and for which he had been repeatedly asked; and that the person swearing the information had reason to believe it was in the possession of C. D., and nothing more; and the magistrate, knowing C. D. to be a pawnbroker and residing within his jurisdiction, issued a warrant, by virtue of which the pawnbroker was arrested, he was held to have exceeded his jurisdiction and to be liable in an action of trespass (following *Lawrenson v. Hill*, 10 Ir. C. L. R. 177).*

The second section of the Justices of the Peace Protection Act, 12 Vic. c. 16, did not contemplate a case as where A. B. is plaintiff and C. D. defendant, where there be technicalities to be adhered to.

And therefore a defence to an action of trespass under the circumstances stated above that it was afterwards ordered in the same matter that the gun should be restored to the person who swore the information, and that that order had not been quashed or reversed, was held to be good on general demurrer, notwithstanding that the title of the information was different from the title of the certificate of the order.

A search-warrant by which the property when found is directed to be brought together with the person in whose possession it is found becomes, so soon as the property is so found, a warrant to secure the personal attendance of such party, and therefore falls within the provisions of the 12 Vic. c. 16, s. 2.

THE 3rd count of the summons and plaint complained that the defendant on the 13th of September, 1859, caused and procured the plaintiff to be arrested and taken into custody, and to be detained in such custody, and to be taken in such custody in and along divers public streets in the town of Athy to a court-house, and there to be detained in custody for the space of four hours then next following. The 4th count complained that the defendant on the said 13th of September, 1859, assaulted the plaintiff and unlawfully imprisoned him for four hours. To these, and to each of them respectively as a distinct defence, the defendant pleaded that at the respective times of

committing the respective acts in said counts respectively mentioned the defendant was a justice of the peace duly assigned to keep the peace in and for the county of Kildare; and that on the 13th day of September, 1859, one Francis A. Mills, of Athy, in the said county, came before the defendant as such justice and duly made an information upon oath before the defendant, as such justice, in the words following, that is to say, that "he the said Francis A. Mills, about two months previous to the said 13th day of September, 1859, lent a gun to one Patrick Leonard; and that upon several occasions he the said Francis A. Mills asked the said Patrick Leonard to return the said gun to him, the said Francis A. Mills, but the said Patrick Leonard neglected so to do; and that he, the said Francis A. Mills, had reason to believe that the said gun was then in the possession of the plaintiff in the town of Athy," the said plaintiff then being a pawnbroker in the said town, and within the petty sessions district of Athy to the knowledge of the defendant, whereupon the defendant, as such justice, issued a search-warrant under his hand and seal, directed to one C. H. Lawson, then being a sub-inspector of the authorized constabulary of the said county, and authorizing and requiring him on receipt of the said warrant to enter in the day-time with the necessary and proper assistance into the house of the plaintiff and make diligent search there for the said gun; and if the said constable should find the same, or any part thereof, to bring it together with the person in whose possession the same should be found before the defendant or some other of the magistrates, justices of the peace for the said county, to be further dealt with according to law, by virtue of which warrant the constable therein named entered the house of the plaintiff, being situate within the jurisdiction of the defendant as such justice, in the day-time, to search for the said gun, and did accordingly search therefor and found the said gun in the possession of the plaintiff, which gun the plaintiff then stated to the said constable had been pawned by the said Patrick Leonard, and was then held in pawn by him, the plaintiff, as such pawnbroker, whereupon the said constable took the said gun and arrested the plaintiff, using no unnecessary violence in so doing for the purpose of bringing the plaintiff before the defendant or some other justice of the peace of the said county, to be dealt with according to law; and did accordingly bring him in such custody along the streets in the said county mentioned to the court house of Athy, in the said county, before the defendant and one Benjamin Lefroy, then duly assembled at the petty sessions in the said court-house in and for the district of Athy, for the purpose of being dealt with by the said justices according to law, at which court-house the plaintiff was in due course of business of the said petty sessions in and for the said district, under and by virtue of the said warrant, detained for a short time in the custody of the said constable until the said plaintiff and the said gun should be dealt with according to law in respect of the premises. And the plea averred that the said several acts were respectively done after the passing of a certain statute passed in the 12th year of her present Majesty, entitled "An Act to protect Justices of the

Peace in Ireland from vexatious actions for acts done by them in the execution of their office;" and that the said respective acts so complained of were respectively done in the manner hereinbefore stated by the defendant in the execution of his duty as such justice of the peace for the county of Kildare, and with respect to a matter within his jurisdiction as such justice. The defendant pleaded a further defence to each of these counts respectively, which stated in addition to what was contained in the above plea that it was afterwards, to wit, on the 13th day of September, 1859, ordered in the same matter by the said justices that the plaintiff should enter into a recognizance to appear at the said court-house on the next day for holding the petty sessions at said court-house in and for the said county and answer the charge of having in his possession a gun which was feloniously and fraudulently pawned by the said Patrick Leonard, and that the said plaintiff having entered into such recognizance appeared at the said court-house according to the exigency of the said recognizance, whereupon an order was made in said matter and duly recorded by the justices of the peace for the said county then and there assembled in the presence of the plaintiff, that the said gun should be restored to the said Francis A. Mills; and that said orders respectively were in full force and effect, and had not, nor had either of them, nor had the said warrant been quashed or reversed. The plaintiff demurred to the first defence on the ground that the several matters therein alleged in fact showed that the acts complained of were done in a matter of which by law the defendant as such justice either had not jurisdiction or in which he exceeded his jurisdiction and that the averment that the said acts were done with respect to a matter within his jurisdiction, was an inference of law not only unsustained by the preceding averments but contradicted by them. The plaintiff demurred to the 2nd defence, for that the warrant was not the subject of a certiorari, and could not be quashed as it was not an adjudication; and neither of the orders was an order or conviction within the meaning of the 2nd section of the 12th of Vic. cap. 16.

Byrne (with him *Serjeant Armstrong*), in support of the demurrers.—This first defence does not disclose any case of a criminal character sufficient to warrant the arrest of the plaintiff. The 11th section of the 26 Geo. III. c. 43 (the Pawnbrokers' Act) contemplates the law being put in motion by the pawnbroker. [*Monahan, C. J.*—The pawnbroker may arrest a party coming to pledge whom he suspects, but in this instance it was not the pawnbroker who arrested.] The 13th section requires a sworn information, which must state an unlawful pawning; but in this information there is no mention made of a pawnbroker nor of an unlawful taking, so that there was no subject-matter for the justice's jurisdiction; nor had he a right to arrest either the plaintiff or the person who pawned the gun. The gun was stated to have been lent, and the justice could do no more than issue a search-warrant. But supposing there was a subject-matter of jurisdiction so far as Leonard was concerned there was such an excess of jurisdiction as justifies this action. The first section of the "Jus-

tices of the Peace Protection Act," the 12 Vic. c. 16, requires that for any act done by a justice within his jurisdiction the action shall be on the case, and shall allege malice and want of probable cause; but what the defendant did here was not with respect to a matter within his jurisdiction. The second section preserves the action of trespass where the matter was not within his jurisdiction, or where he has exceeded his jurisdiction. *Lawrenson v. Hill* (10 Ir. Com. Law Rep. 177) is an authority in point, and decides that an information which discloses no criminal offence cannot be helped out by parol evidence, and that a general jurisdiction over the subject-matter of inquiry will not protect a magistrate from an action of trespass under this second section if in the particular instance of issuing the warrant he acted without or in excess of jurisdiction. This case is indistinguishable from *Lawrenson v. Hill*. It was argued there that if there was jurisdiction at all the action did not lie. The cases of *Barton v. Bricknell* (13 Q. B. 393), and *Leary v. Patrick* (15 Q. B. 266), underwent a great deal of discussion in *Lawrenson v. Hill*; and in the latter of these there plainly was a subject-matter of jurisdiction. Lord Denman's observation in *Caudle v. Seymour* (1 Q. B. 892), that the magistrate's "protection depends not on jurisdiction over the subject-matter but jurisdiction over the individual arrested," is pertinent to the present case; because so far as this information is personal it only points to the possession of the gun. It cannot be validated by subsequent evidence of facts—Paley on Convictions, 55,—but the averment in this defence that the acts complained of were done with respect to a matter within the defendant's jurisdiction as a justice is an inference of law not only unsustained by the preceding allegations of fact but contradicted by them. With regard to the second defence we cannot deny that the second order made—the order to restore the gun—was a judicial act, but we submit that in this second section what the Legislature contemplated was judicial procedure against the person. Here the proceeding was against a thing, and the warrant is not the subject of a certiorari—*R. v. Lediard* (Sayers' Rep. 6), nor any act other than judicial acts—*R. v. Lloyd* (Caldecott's Rep. 309). The section requires that the order be made "in the same matter;" but the matter wherein the warrant was issued was a matter in which Francis A. Mills was complainant, and Patrick Leonard was defendant, whereas the matter in which the alleged orders were made was a matter in which Francis A. Mills was complainant, and the present plaintiff was defendant. The language of the information as well as its title, and the language used in the certificates of the orders, as well as their titles, show that it was not the same matter. The matter wherein the alleged orders were made was the matter of a complaint not begun till after the issuing of the warrant and the commission of the acts complained of. We submit that the defendant should produce the originals or certified copies of the information, warrant, and orders upon the argument of this demurrer.

H. P. Jollett (with him *J. T. Ball, Q.C.*) contra.—It is sufficient if a legal offence can be inferred from the warrant—*Cave v. Mountain* (1 Man. & Gr.

262). A justice is not liable in trespass for having issued a search-warrant upon facts sufficient. There need not be a positive and direct averment upon oath that goods are stolen—*Elsee v. Smith* (1 Dowl. & Ry. 102). What a search-warrant ought to contain will be found in 2 Hale's Pleas of the Crown, pp. 113 & 150. A criminal offence could not by any means have been inferred from the information in *Lawrenson v. Hill*; and it was on this ground that Pigot, C. B., held the magistrate was not protected from an action of trespass. By the 20 & 21 Vic. c. 54, s. 4, any bailee of property fraudulently converting the same to his own use is made guilty of larceny. What are the facts disclosed upon the face of this information? That a gun was lent two months previously and was repeatedly asked for. It is not necessary to show that a jury must make this out to have been a larceny. All that is necessary is to show that the justice might fairly apprehend a larceny had been committed. *Cave v. Mountain* decides this case. [*Ball, J.*—There a felony was charged.] And here it was committed. A felony is only a conclusion of law. The facts amounted to felony. [*Monahan, C. J.*—The information does not charge a conversion of the property.] A neglect under such circumstances amounted to a refusal. Leonard was asked repeatedly. The magistrate may be sued in an action on the case for improvidently issuing the warrant, but he is not liable in trespass. A search-warrant is partly a ministerial and partly a judicial act—*Webb v. Ross* (4 Hurl. & Norm. 115). With regard to the second defence, I submit the search-warrant will be held to have been against the person in whose possession the gun was. Therefore the subsequent orders are truly stated to have been made in the same matter. The plaintiff seeks to avoid this consequence by insisting that we are to produce the originals or attested copies of these orders to be compared by the court on this demurrer. The records of an inferior court cannot be inspected—1 Saunders's Reports, 8 b. The plea contains an averment which states the information, and the plaintiff seeks to contradict the record on the argument of this demurrer.

J. T. Ball, Q.C.—As to the first defence I admit there is no felonious charge in the information; but that is irrelevant. It might be otherwise as between Leonard and the magistrate, but not where a pawnbroker was concerned. [*Monahan, C. J.*—The information does not state the plaintiff was a pawnbroker.] No; but every pawnbroker is amenable to the justices in whose district he is. This man was not only a pawnbroker, but a pawnbroker within the defendant's jurisdiction. Every search-warrant must contain an order to bring before the justice the person with whom the property is found. The pawnbroker tells the constable the gun has been pawned with him. [*Monahan, C. J.*—Would not that be making the validity of the warrant depend upon *ex post facto* circumstances? I could understand that argument if the plea stated the constable had himself arrested the pawnbroker.] The 13th section of the Pawnbroker's Act has no word of felony in it; it is enacted "for the better enabling all persons to recover their goods and chattels." The object of that Act was the restoration of the property, not the detection of felony.

in the person pawning. Unlawfully, in that section, does not mean feloniously; it means improperly. No one but the owner of a thing can legally pawn it. The words of the Act ought rather to be strained to import what may be necessary to maintain the magistrate's jurisdiction. If the subject matter upon which a magistrate is engaged be within his jurisdiction, he is protected from an action of trespass, and can only be sued in an action on the case for a malicious use of his authority. The whole controversy turns upon these words in the first section of the Justices' Protection Act, "with respect to a matter within his jurisdiction." These two sections, the first and second, were intended to provide for three cases. 1. Where the subject-matter is within the magistrate's jurisdiction. 2. Where the case is *ultra vires* of the magistrate. 3. Where there is excess of jurisdiction. There is no English case which decides that if there be jurisdiction, the magistrate is not protected. As to *Barton v. Bricknell*, there was no jurisdiction in that case to put a man in the stocks for two hours. Where the duty of a magistrate is not simply ministerial, he is not liable in an action unless he can be fixed with malice.—*Linford v. Fitzroy* (18 Q. B., 247). [*Monahan, C. J.*—If neither the facts nor the charge authorized the act, can it be said to be within his jurisdiction? There is no statement that Leonard unlawfully got the gun, or pawned the gun, or that the gun was claimed by the pawnbroker *quod* pawnbroker. If neither the charge nor the facts amount to what would authorize a warrant, can there be jurisdiction?] Given a jurisdiction over the subject-matter, and a state of facts which convince the magistrate in his conscience that he has jurisdiction, he is to be protected except from an action for a malicious use of that jurisdiction. The question here is, must the court not take it that the facts were proved when the warrant states them? The warrant is legal on the face of it. To hold with the plaintiff, the court must go behind the warrant.—*Brittain v. Kinnaird* (1 Brod. & Bing., 432); *In re Clarke* (2 Q. B., 619). [*Christian, J.*—The information being deficient, the magistrate makes up for the deficiency by recitals in the warrant.] [*Ball, J.*—It seems to me that he has imagined persons, places, and transactions.] The imagination was not greater than that instanced in *Brittain v. Kinnaird*. As to the second defence, it is founded on the following clause in the second section of the Justices of the Peace Protection Act—"Nor shall any such action be brought for anything done under any such warrant which shall have been issued by such justice to procure the appearance of such party, and which shall have been followed by a conviction or order in the same matter, until after such conviction or order shall have been so quashed." A search-warrant is not a warrant of decision, or of condemnation, or of punishment. What was the object of this warrant? It was to bring the man with whom the property was found, that the magistrates might adjudicate on whose property it was. This, and all that followed, was subject to be quashed in the Court of Queen's Bench. There that order must have stood or fallen by the facts. [*Monahan, C. J.*—In the case of wages being due, &c., a magistrate may order them to be paid. Now, I imagine he has no right to

issue a warrant to bring a party before him, to the end that he may order him to pay the wages.] The clause never included such a case. It applies only where the warrant is a preliminary step. The magistrate could not take the gun from the pawnbroker without issuing a warrant, without bringing him before him to investigate the facts.

Serjeant Armstrong in reply.—The doctrine laid down in *Lawrenson v. Hill* that a general jurisdiction is not sufficient, but that the particular thing done by the magistrate must be within his jurisdiction, was not new.—*Grady v. Hunt* (1 Ir. Jur., N.S., 10); *Newbould v. Colman* (6 Exch., 199). The facts disclosed here are insufficient to authorize this proceeding under either the 20 & 21 Vict., c. 54, or the Pawnbrokers' Act, 26 Geo. 3, c. 43. There is no conversion of the property alleged. Innocence is compatible with all the facts, and the information would make a bad count in trover. The goods, not the person, may be taken under the Pawnbrokers' Act, and that upon a sworn information that they were unlawfully obtained. There is none such here, and if there were, the jurisdiction is exceeded by directing the body to be taken. The 9 Geo. 4, c. 55, s. 56, requires the oath of a credible witness that a felony has been committed. The whole foundation is a felony charged. [*Monahan, C. J.*—How can that be when the section speaks of offences punishable upon summary conviction?] They are all felonies nevertheless.—1 Nunn & Walsh, 253. As to the second defence, it is unnecessary to say anything about the warrant being quashed, for the second section of the Justices of the Peace Protection Act does not require it. According to the plea, the warrant is a search-warrant, and search-warrants are not within the meaning of the Legislature in this section at all. The difference between warrants and search-warrants is old and clear. This second section contemplates a person known and charged with an offence. How can there be a process to compel a party to appear where there is no *persona nominata*? The ordinary warrant to bring up a person charged with an offence, is the warrant meant in this section. What was the exigency of this search-warrant? Not to bring up any person in particular. Suppose when the plaintiff was brought up, the gun had been ordered to be given back to him, what would be said of his going into the Court of Queen's Bench to quash that order, an order to get back his own property? Again, even if search-warrants were meant to be included, the subsequent order must be made in the same matter. There is no matter here. There is no defendant. Until the order to restore the gun, no matter existed. We are out of this section altogether, but if not, then that section requires that the order be in the same matter; and the allegation in the plea that it was in the same matter makes no matter, for there was no matter to make it in.

Cur. adv. vult.

Nov. 21.—*MONAHAN, C. J.*, having stated the facts and pleadings, delivered the judgment of the court.—To support the first of these pleas it has been argued that this warrant appeared to be an ordinary search-warrant; that if a felony is committed, and

supposing the magistrate has reasonable grounds for believing that the stolen goods are in the custody of a certain person, it is his duty to issue a search-warrant, with a direction to bring the stolen property and the person in whose possession found; and if this information contained a statement that a felony had been committed, or that from which it might fairly be inferred that a felony had been committed, no subsequent facts are wanted to justify what was done. But the word made use of in this information is "neglected." It is not stated that Leonard refused to restore the gun; it is not stated that the gun was stolen, nor is anything stated from which that might be inferred. It is not stated that the gun had been pawned without the knowledge or consent of the owner, from which there might be inferred facts which would give the magistrate jurisdiction. We were referred by the defendant's counsel to the 20 & 21 Vict., c. 54, s. 4, which enacts that "if any person, being a bailee of any property, shall fraudulently take or convert the same to his own use, or the use of any person other than the owner thereof, although he shall not break, bulk, or otherwise determine the bailment, he shall be guilty of larceny." But it is never said that Leonard converted the gun to his own use, i.e., it does not appear on the information: it does appear afterwards. The validity of the warrant cannot depend upon subsequent events. Mr. Ball preferred resting the case upon the Pawnbrokers' Act. The 13th section of the 26 Geo. 3, c. 43, was passed "for the better enabling all persons to recover their goods and chattels," and requires a statement on oath that the goods were unlawfully taken, and that there was just cause to suspect they were knowingly and unlawfully taken to pawn. Does the information set out in this pleading contain these requisites? There must be an unlawful taking alleged;—there is none here. Next it must appear that the property was pawned: that does not appear. Next, that the pawnbroker had knowingly taken them to pawn: *a fortiori* that does not appear. And grant that all these things were in it, where is the authority under this Act to arrest the pawnbroker at all? Unsuccessful as was the attempt to find a felonious charge, the endeavour to bring the case within the Pawnbrokers' Act is more forlorn. It only remains to be seen whether, upon this state of things, an action of trespass can be maintained against the magistrates. This question depends upon the construction of the Justices of the Peace Protection Act, 12 Vic., c. 16, the first section of which provides that every action to be brought against a justice for any act done within his jurisdiction, or with respect to a matter within his jurisdiction, shall be on the case as for a *tort*. No criminal offence is alleged in this information, and we have to determine what jurisdiction the magistrate had to arrest. *Lawrenson v. Hill* is a much stronger case than the present. In it the written information did not contain a charge of felony, but there was parol evidence which showed grounds for concluding a charge of felony. The Court of Exchequer held that since the written information did not contain a charge of felony, the magistrates either had no jurisdiction, or exceeded their jurisdiction. *A multo fortiori*, must we so hold in this. We cannot distinguish this case from *Lawrenson v. Hill*. I

confess that irrespectively of that case I entertain no doubt that if a magistrate, though acting *bona fide*, issue a warrant to arrest a man upon an information which contains no charge of felony, he exceeds his jurisdiction. We are bound by *Lawrenson v. Hill*; but into the cases there cited I shall not myself enter, because independently of that case I feel no doubt. The demurrer to the first defence must therefore be allowed. The second defence involves a question of greater difficulty. It states that it was afterwards ordered in the same matter that the plaintiff should enter into a recognizance to appear on the next day for holding the Petty Sessions, and that the plaintiff having appeared, an order was made in said matter that the gun should be restored and that said orders and warrant have not been quashed or reversed. This plea depends upon a clause in the second section of the Justices' Protection Act, and it affords an answer to the present action. It is averred as a matter of fact, though I for one do not think much of the averment, that the order was made in the same matter. If it appeared otherwise, I should not consider myself bound by the statement in the plea. I do not think this section contemplated a case as where A. B. is plaintiff, and C. D. defendant, where there be technicalities to be adhered to. The warrant is founded on the information, and it is—Search C. D., and bring the gun here. We think this was a warrant to bring C. D. before the magistrate. For what purpose? To be dealt with according to law, i.e., if a felony had been committed to send him to gaol, or to order the gun to be restored; because there is no doubt that though the magistrate had not jurisdiction to arrest, he could not have ordered the gun to be restored without first summoning the pawnbroker to show cause against his doing so. We think (however informal the complaint) that the order was an order made in the same matter. Very possibly the framer of this Act of Parliament did not contemplate such a warrant as was issued here, but the case of an ordinary warrant, where there is an option to issue a warrant to arrest or to issue a summons. We think in result and consequence that when the gun was found in this man's possession, this warrant became a warrant to secure his personal attendance. The demurrer to the second defence is overruled, and there being one good answer to the action, there must be

Judgment for the Defendant.

Court of Bankruptcy & Insolvency.

[Reported by John Levey, Esq., Barrister-at-law]

[BEFORE LYNCH, J.]

RE WILLIAM M'KEAN.—Dec. 1862.

Lien in respect of an alleged right existing by virtue of a course of dealing—Goods sent on consignment, for which bills are discounted before they are accepted by the consignees on whom they are drawn.

Where a bank discounts the drafts of a trader upon a consignee to whom he consigns goods to be sold on commission before the bills are accepted by the consignee, who ultimately refuses to accept them at

all, although the goods have been subsequently sold, the bank that discounted the bills has no lien on the goods or claim on the produce of them when sold, either by way of lien, or by virtue of any right existing in respect of the course of dealing which previously existed.

Deed of mortgage executed on the eve of bankruptcy in pursuance of a previous arrangement to do so.

Although a deed of assignment by way of mortgage may be executed by a trader in insolvent circumstances, and upon the eve of bankruptcy, yet when it was executed in pursuance of a previous arrangement to do so, and that at the time of such agreement or arrangement the party advancing the money acted bona fide, and that on the day the deed was actually executed, the mortgagee had no knowledge of any circumstances existing to render the conveyance anything but a simple fulfilment of the previous agreement, such assignment will not be deemed an act of bankruptcy, but will be valid against the assignees.

Voluntary preference procured by contrivance, and the suggestion of another party when the trader is insolvent, and where a creditor by such contrivance gets a third party to endorse bills to secure his debt.

Although a preference to a creditor be not the voluntary act of a trader, but given by the contrivance and at the suggestion of another, for the purpose of getting a security for his own debt, and he, for this purpose, induces the trader to mortgage certain property for the debt due to such creditor, and that the mortgagee will besides endorse certain bills to secure the debt of the party having recourse to this contrivance, such a dealing will be deemed a fraud upon the bankrupt laws, and done for the purpose of defeating their operation; and such deed will be inoperative against the assignees; and the party thus induced to endorse the bills will have a good defence to any action brought for the recovery of them.

THE bankrupt had been a flax spinner and linen manufacturer at Keady, in the County of Armagh. The case came before the court upon three charges and discharges, but all connected with each other, and forming portions of the dealings and transactions of the bankrupt. The first charge was on the part of the Bank of Ireland. The second was a charge by Mrs. Margaret M'Kean on foot of a mortgage executed to her by the bankrupt in pursuance of an arrangement to do so. The third was the charge of James M'Kean, administrator, with the will annexed of Mrs. Elizabeth M'Kean, whereby he claimed to be entitled to the property of the bankrupt conveyed to the testator on the 2nd of June, 1862.

Kernan, Q.C., (with him P. Martin,) was for the Bank of Ireland, and also for the administrator of Elizabeth M'Kean, and for Margaret M'Kean. They cited *Chase v. Gobble*, (2 M. & G. 930); *Belcher v. Prittie* (10 Bing. 416); *Straham v. Barton* (11 Exch. 647); *Brown v. Kempston* (19 L.J., N.S., C.P. 169); *Johnson v. Fesseymer* (25 Beav. 88, 3 De Gex. & Jones, 13); *Hutton v. Crutwell* (1 Ellis & Blackburn, 16.)

Heron, Q.C., was for the assignees. He cited *Lindley on Partnership*, 907, and cases there collected; *Re Carroll* (7 Ir. Jur.) *Ex parte Zwilchenbart* (3 Mon. D. & D. 671.)

The facts appear in the able and elaborate judgment of Judge Lynch.

JUDGE LYNCH.—In this case I have to deal with three parties who have filed charges affecting the bankrupt's estate. The first is that of the Bank of Ireland, who claim a lien on the produce of certain flax sold by Messrs. Armstead and Co., to the extent of bills discounted by the bank which were drawn by the bankrupt, and discounted by them, on account of the flax, at the time of its shipment, but which were refused acceptance by Armstead & Co. Amongst other matters of discharge, the assignees insist that the Bank of Ireland has no lien in respect of this dealing, and, in my opinion, they can have no specific claim against the produce of this flax, so as to entitle them to be paid the amount of these unaccepted bills. The claim of the bank is only stated in their proof, and is certainly in a very untechnical form before the court, stating first a lien against the specific goods, and then stating merely the conversion of these goods into cash, and claiming against the proceeds. No objection, however, as to form arose until the case was at argument; the assignees thought that I should not listen to an objection by the bank to the form of their own claims, but I felt bound to hear the case on the evidence before me, and to dispose of it. I would have allowed the bank to state their claims in any form they considered beneficial to themselves, if asked at a reasonable time to do so; but I cannot allow parties to lie by until the case is at argument, and then object to the manner in which their own claim is brought forward. If they lose any advantage in the Appellate Court, or elsewhere, it is their own fault. On behalf of the bank, this claim is not put before me on any precise or definite grounds. It is not claimed exactly as a lien on the goods, but as a right existing by virtue of a course of dealing between them and the bankrupt, whereby it is said a right existed to have the goods applied specifically to discharge this bill, or at all events that these goods were intended to discharge it. I must add that the Bank of Ireland does not claim any special title arising out of the letter of the 4th of June, or insist on that document as of any effect, other than as evidence of the pre-existing dealings between the parties. Now, the dealings between the parties, as disclosed in the evidence, in my judgment are as follows:—The bankrupt consigned goods to the Messrs. Armstead, and in due course of trade used to draw on them against the consignments forwarded, Messrs. Armstead & Co. accepting the drafts on them, of course on the faith of the consignments of which they were advised. The Bank of Ireland knew of this dealing, in fact it was the ordinary custom of trade, and they discounted for the bankrupt the drafts so drawn by him before they were accepted by the consignees. In this particular case the draft was obtained unaccepted, the Messrs. Armstead and Co. not having been satisfied that goods of sufficient value had been forwarded. I certainly do not see in such a dealing in the ordinary course of trade, any foundation for the right now

claimed, no authority in favour of it having been cited to me, and no principle has been shown to me on which it could be said to rest—in truth it would be of the greatest injury to trade, were it to be held that a draft for probable value against a consignment stood as specifically charging that particular consignment with the liability to satisfy that particular draft—no semblance of such a proposition exists in any case to which I have been referred. I see nothing at all in the case to bring it within any class distinct from the ordinary dealings on consignments, drawing for the probable value, and in respect of which it is not insisted before me that any such specific right arises. It appears to me on the whole of this case, there is nothing in it but the ordinary course of dealing, which admittedly does not give the right claimed. Therefore, I rule that the Bank of Ireland has no specific title to the produce of the consignments as claimed by them, and I give the assignees their costs against them. The second branch of this case arises on the charge of Mrs. Margaret M'Kean, on foot of a mortgage executed to her on the 2nd of June, 1862, by the bankrupt. It is insisted that this was a fraudulent preference, and that it was a part of a series of transactions on that day, which taken together amounted to an act of bankruptcy. I will have occasion, in giving judgment on the subsequent charge, to go into detail of the transactions, and express my opinion and findings upon them; but on this charge I put the case on a ground disconnected from them, and on a ground peculiar to itself. I find on the evidence that Mrs. Margaret M'Kean *bona fide* advanced to the bankrupt the sum of £1,400, on the faith of getting the mortgage of the 2nd of June, and further secured the bank in the advance of £600, on the faith of getting the same mortgage, and further actually getting an equitable title to the benefit of the mortgage by deposit of the title deeds, then vested in the bank, to cover this £600. I find that the mortgage of the 2nd of June to Mrs. Margaret M'Kean was a *bona fide* transaction, carrying out the previous agreement on the faith of which she advanced her money, and that she had no knowledge of any of the circumstances existing on that day to render the conveyance to her as other than a simple fulfilment of the existing contract. I further find on the evidence that the title deeds of this property were in the hands of Mrs. M. M'Kean's solicitor, for the purpose of completing her title and preparing the necessary deed; that the deed was completed before the 2nd of June, and the original deeds held for her by her solicitor, and, therefore, in my opinion, the execution of the deed of the 2nd of June by the bankrupt was *bona fide* done in performance of his previous contract, merely giving a legal completion to the act already equitably executed. I may add here that this lady's advances have actually gone into the estate to make up the assets for the general creditors, and expressly on the faith of this security. On these findings by me on the facts, I still hold the opinion already intimated by me in the course of the argument, that this lady's charge must be allowed, declaring at the same time, with the consent of the bank, that they must exonerate from their proof the £600 guaranteed by her, she admitting here, by her counsel and solicitor, that the bank has a first charge mort-

gaged to her for the £600 guaranteed by her, and for which the bank had a prior equitable mortgage, by deposit of the title deed, and I give her the costs of her charge to be added to her demand on foot of the mortgage. Of course an enquiry must be directed to find what were fixtures in this case, and what were chattels belonging now to the assignees. I may take it, I presume that all not legally fixtures as between mortgagor and mortgagee, belong now to the assignees.

I now come to the third branch of the case which arises on the charge of James M'Kean, as administrator with the will annexed of Elizabeth M'Kean, whereby he claims to be entitled to the interest in the property of the bankrupt conveyed to Elizabeth M'Kean by the deed of mortgage, bearing date the 2nd of June, 1862. The discharges of the assignees insist that this deed appears upon the evidence to be a fraudulent deed within the bankrupt law, that it amounts to a fraudulent preference, and that it was an act of bankruptcy. The questions thus raised by the discharges are principally matters of fact to be arrived at by me as a juror weighing the evidence and deducing the actual inferences therefrom, subject to this, of course, that I rightly expound the law which should be given as a direction by the judge, who would preside at the trial of the case if it went before the jury. Therefore, in a case of this importance (for the amount of property in controversy, as well as the nature of the case itself, makes it important) it is, I think, the fairest course for me to state my findings on the facts in evidence, and then to state the legal principles which I apply to these findings, in order that those entitled to canvass my judgment, may see, if dissatisfied therewith, whether it is from my findings upon the facts, or from my interpretation of the law, they dissent. The facts existing material to the consideration of the questions raised, and put in issue by this discharge, are as follow:—The bankrupt was extensively in trade at Keady, in the North of Ireland; and before the 2nd of June, 1862, he dealt largely with the Bank of Ireland, at their branch at Armagh; he discounted with them, he had with them an established credit, and his trade operations at that time were dependent on the continuance of that credit with the bank. Some days before the 2nd of June, the Bank of Ireland, through their agent, Mr. Johnston, intimated to the bankrupt that his credit should be curtailed. The bankrupt was then looking for some assistance from Mrs. Elizabeth M'Kean, who represented the house of M'Kean, Evans, & Co. This appears to have had reference to a money advance sought for by him, and not to have been the dealing induced by the deed of the 2nd of June, for the transaction evidenced by that deed had its inception and completion on the 2nd day of June, the day of the date of the deed. On the 2nd of June, early on that day this state of facts was plainly disclosed between the parties. The state of the bankrupt's affairs was canvassed between himself and Mr. Johnston; his liabilities and his assets were ascertained, and the result was arrived at that he had not ten shillings in the pound to pay his creditors. Failure was then inevitable, unless the bank continued to him a credit to enable him to carry on trade, or unless he got resources from his mother

—these two resources were the only possible means of his rescue from stoppage or bankruptcy. Before 3 o'clock on the 2nd of June, it was known to all the parties that his mother would not further involve herself by any money advance to him for his trade, and in my mind Mr. Johnston then knew that his stoppage was inevitable; however, a man under such circumstances often hopes against hope, and indulges in dreams not likely to be realised; but, judging of this matter by sensible and plain considerations, the bankrupt had then before him admittedly this state of facts—the possessing assets not enough to pay ten shillings in the pound, his continuance in trade dependent on the bank credit, and the fact that the bank had absolutely put an end to that credit, the case was then quite clear that he was insolvent, and must stop payment, unless we can see in the acts afterwards done, some rational foundation for a hope or belief that bankruptcy could be warded off. The only remaining hope was a continued credit with the bank; but had he the slightest foundation for such a hope? In my judgment he had not. Without, then, at all believing that the bankrupt is capable of wilfully misrepresenting any facts, I think he indulged in undue anticipations as to favourable results for the future, I now come to the transaction of the 2nd of June, to state what I find it to be on the evidence. Mr. Johnston knew the bankrupt was then insolvent, and must stop payment. The bankrupt knew he was insolvent, and knew that he could not carry on trade without the bank accommodation, which was then refused; and in such state of circumstances, Mr. Johnston suggested that certain protective acts should be done by him, chiefly with the view to cover the very large advances made by the bank to the bankrupt. In fact on that occasion the bankrupt put himself into the hands of the bank to enable them to work out the object proposed by Mr. Johnston. Mr. Johnston had at this time full knowledge of all the affairs of the bankrupt; he knew of his dealings with Mrs. Margaret M'Kean, and her advances to him, and the treaty of a mortgage with her; he knew that his mother, Mrs. Elizabeth M'Kean, had endorsed his drafts to the bank to a sum of about £800, in which he then was indebted to her. He knew that she had absolutely refused to incur any further responsibility for him, and knowing thus all his affairs, and acting for him, Mr. Johnston, in this last stage of the bankrupt's affairs before bankruptcy, devised a plan whereby he might get security for a large sum (over £1100), the amount of certain acceptances of the bankrupt all then current and in his hands, and none of which would fall due for some considerable time. To work out this end he judged it the best security to get Mrs. Elizabeth M'Kean to indorse the bills, then current paper in his hand, already discounted by the bank for the bankrupt. Now the first step taken by Mr. Johnston that day was a fair and honourable one on his part. Knowing, as he did, the *bona fide* nature of the dealing with Mrs. Margaret M'Kean, and knowing that the mortgage security prepared for her to be then in the hands of her attorney, Mr. M'Kinstry, and that her advances were made on the faith of such promised mortgage. His first act to prepare the way for the further pro-

ceedings intended, was to send for Mr. M'Kinstry, and to get the deed to Mrs. Margaret M'Kean executed, and accordingly it was executed, and it is now in evidence formal and regular in every respect, and all its recitals true and according to the facts; but in my judgment this very act has a deep significance respecting the known consequence of the further proceedings, and shews that Mr. Johnston only thought it justice to secure Mrs. Margaret M'Kean before he carried out the further act that would imperil his security. After this was done the next proceedings are, that Johnston proceeds out to Keady, accompanied by Mr. M'Kinstry, who brings with him, a blank parchment, large enough for any deed that might be required. The bankrupt and his brother had gone out before, and an arrangement was come to—not the arrangement falsely recited in the deed, but an arrangement that Mrs. Elizabeth M'Kean should indorse the current bills in the hands of the bank, and that the bankrupt should then convey to her his property, in mortgage to cover this their assumed liability, and further to secure the future accruing liability on the bills already endorsed by her, and already discounted by the bank for the bankrupt; and further to secure her in the amount which, on private dealing between them, the bankrupt was then indebted to her. This was the whole arrangement, plainly and manifestly of no use to the bankrupt towards carrying on his trade. Mr. Johnston all through acted fairly and openly; he held out no false hopes whatever, he devised the course to be pursued and carried out, and the necessary result came very soon to be exhibited in the stoppage of the trade of the bankrupt, and the petition in this court. The deed of the 2nd June now relied on in support of this charge is now the written evidence of that arrangement. I am sorry to have it to say that it gives very false evidence, and comes before me with such a continued showing of a thing out of course and usage—hastily devised and hastily carried out—a deed charging so large a sum upon property of considerable value, is not ordinarily prepared from mere memory as this was, and in the form this is; and also it contains a recital of the arrangement then made, materially and plainly false, giving a false view of the nature of the arrangement, and introducing the element of a present advance of a considerable sum to the trader, which, if true, would have been the means of enabling him yet to continue in trade. I do not say that the falsehood of the recital *per se* invalidates the deed; but when motives and reasons for conduct come in, it is in my judgment a strong fact to see, that the parties to the transaction in a solemn instrument, like a deed, judge it prudent to present the transaction in a manner opposite to its reality, and different from the truth. Having thus stated the facts found by me on the evidence, the question arises, is this a *bona fide* transaction, to be upheld against the general creditors of the bankrupt, or is it subject to impeachment in bankruptcy as a fraudulent preference, or a substantial conveyance of all the bankrupt's property to secure the bank. Now, certainly, the machinery suggested by Mr. Johnston introduces an element in this case ingeniously contrived to put out of view the application of the ordinary rules applicable to such cases. As far

as Mrs. Elizabeth M'Kean is concerned, any security given to her for her debt was plainly the voluntary act of the bankrupt; and if the deed to her was simply security to her for her debt, it would be an act of bankruptcy. He was plainly insolvent, and it would be a perfectly voluntary act on his part. But then arises the consideration of the request by Johnston, and the endorsement of the bills by her on the occasion. I do not find, nor have I been referred to any case at all in point. Of course the general doctrine is clear enough—to be a fraudulent preference the grantor must be in a state of insolvency—and it must be voluntary—the act of the bankrupt was not produced by pressure or demand by the creditor; and if Johnston demanded a security for himself on the bankrupt's property that day, and obtained it, then the case would arise in an ordinary form; but Johnston, for some reason, did not seek this, but sought to get, out of course and usage, the indorsement of a solvent party to bills current, and already discounted by the bank, suggesting the counter securing of her out of the bankrupt's property. This was never made as a demand by Johnston—it was not put forward by him as a claim that he had any right to make. In my judgment, it was merely suggested as a thing to be done in the arrangement of the assets of the trader, out of kindness to these particular parties; that is, Johnston's plain intention was then and there to arrange the affairs of the bankrupt, so that he might get the bankrupt to apportion from the general assets sufficient to enable him to pay off his mother's debts, and get the bank secured in the amount of £1,100. It belonged to the very act contemplated by Johnston that he should be the moving party to the bankrupt giving to his mother a fraudulent preference over the other creditors. Accordingly on that day, and in a few hours, he apportions out the estate, satisfying Mrs. Margaret M'Kean's claim by getting her deed executed, satisfying Mrs. Elizabeth M'Kean's claim by getting her secured and adding thereto a counter security for her securing his debt. Does not this transaction offend against every principle of the bankrupt law? The bank required no security on the bankrupt's property, they made no claim for security for bills already discounted and then current; and it imports into the case an element not existing in the transaction to bring forward any such claim or demand. Mr. Johnston on that occasion was not a creditor in respect of these bills demanding a security to the bank; he was a private adviser regulating the affairs of the bankrupt, and making an arrangement which would secure to him an advantage in respect of these bills, and which arrangement stood to be carried out as the merely voluntary act of the bankrupt. In truth, I think this transaction had the very effect of a virtual assignment of the bankrupt's whole property to answer this demand of the bank. I think Mr. Johnston dealt with the whole property of a man about to become bankrupt, and regulated it so as to get out of it what he considered a safe security for the bank. Perhaps this does not technically make out a conveyance of the whole property of the bankrupt, perhaps it does not either technically make out a fraudulent preference in respect to the bank security, but substantially it appears to me to offend

against the principle involved in both these classes of cases, leaving questions to be submitted to a jury on the avoidance of acts done in fraud of the law of bankruptcy. The law applicable to avoiding transactions of this nature is to be found in a great variety of cases, in which it is necessarily always stated with reference to the particular facts of each case. First as to a conveyance of all a man's property to secure a bygone debt, it is generally held to be an act of bankruptcy, as being plainly in contravention of that principle of equality upon which the bankrupt laws are founded, and as necessarily tending to defeat and delay creditors; but many modifications of facts arise in the numerous cases considered by the courts namely, where colorable exceptions of property occur, and partial advances are made. On both of these matters, cases, some of conflict, and some of exception and limitation exist; but in this immense accumulation of cases, a simple and leading principle is mainly considered in all—namely, was the act done necessarily calculated to defeat or delay creditors? Did it amount to a stoppage of the usual trade of the party? Did it fraudulently place his assets under the control of particular, or selected creditors, and in fraud of the equity of general creditors intended by the bankrupt code. If these things are deduced by the facts or found by a jury, I think no conflict in the cases arises as to the law to be applied. *Bell v. Simpson*, (2 Hurl. & Nor. 410), is a strong case, going a great way to uphold liberal views in favour of dealings of this kind. In that case, Chief Baron Pollock says, "If a sale of the bulk of a trader's property is absolute and *bona fide*, and there is no intention on the part of the buyer to commit a fraud upon the bankrupt or his creditors. If there is no fraudulent preference or fraudulent sale or delivery, but the matter is perfectly honest and not intended to contravene the bankrupt laws, (which are questions not of law but of fact) the sale is not an act of bankruptcy." *Young v. Ward*, (8 Ex. 234), is also a leading case upon the favorable construction of such deeds. Baron Parke, in that case says, "Acts of bankruptcy arising upon fraudulent assignments are confined to acts of a fraudulent nature under the statute of Elizabeth with an immediate object to defeat creditors—to such as are fraudulent under the Bankrupt Acts, being made with the object of preventing an equal distribution of the bankrupt's effects under his bankruptcy which he knows must occur—and lastly to these where there is a transfer of property, which must necessarily in its results be known to the bankrupt to lead to the delay and disappointment of his creditors, with the exception of that particular individual to whom the transfer is made. Such a transfer is an act of bankruptcy upon the principle, that every man is supposed to intend that which will be the necessary result of his own acts." Take then these principles and apply them to the facts I have stated as deduced by me from the evidence, and does not this action violate every one of them?—bankruptcy was a known inevitable fact—the settlement was made designedly to protect particular creditors, and to pay them in full, thereby defeating the rights of general creditors—it was done to contravene the bankrupt laws—it led to the stopping of trade and anticipated the consequences

thereof by giving a fraudulent preference to Elizabeth M'Kean as well as indirectly to the bank. It avowedly on the eve of bankruptcy, and to prevent its equitable operation, applied the available assets within reach of the parties, to satisfy favoured creditors. The real act, intended, was kept concealed with a view to secure the bank out of the assets. The solemn deed attesting that transaction was falsified, and a fictitious consideration inserted therein. I cannot help condemning this part of the transaction in the strongest terms. The uncertainty of testimony, the difficulty of getting reliable parol evidence about matters in controversy, is a great hindrance to the administration of justice, but solemn deeds having a high sanction in courts, the weight of such testimony ought to be considerable; but it introduces a new element of uncertainty indeed, when a solemn instrument is resorted to, to record a transaction that is not true, and I must add that I will always look with grave suspicion on any act done where the parties were afraid to state the facts honestly and truly. It was argued in this case that the deed was not the voluntary act of the bankrupt, but was done by him under pressure, or on the demand of Mr. Johnston, so as to take the case out of the rule of its being a voluntary preference; but Johnston never acted for Mrs. Elizabeth M'Kean in the transaction—what he wanted was to get her security for the bills, and he did not regard the circumstances, that the inducement held out to her was to give her the bankrupt's assets to pay her bygone debts, he was in fact to give her a fraudulent preference, not in order thereby to benefit the trader in any respect. I cannot hold that if any stranger suggests, to a trader, a fraudulent preference of a particular creditor, that thereby the act of the bankrupt becomes not his voluntary act within the statute. The Bank of Ireland is virtually the real party here—their claim is through and by virtue of an act done with the direct purpose of contravening the bankrupt law, and as far as any real question could arise respecting this transaction, it only arises by the contrivance of Mr. Johnston in complicity with the bankrupt, which made Mrs. Elizabeth M'Kean the party who carried out the fraud which was only intended to get her debt secured by her son on the eve of his bankruptcy. She had no real part in devising the proceedings which made the whole thing an indirect dealing to secure the bank. In my judgment, if this charge were allowed, it would sanction the principle, that any creditor of a trader, when bankruptcy became inevitable, was at liberty to anticipate the action of the law, (which levels claims and establishes equality) by getting a preference for himself at the expense of the other creditors, he adopting as the basis of the arrangement, suggested such further frauds upon the principle of the law as would make the arrangement profitable to the trader, and actually through his desire to work out these frauds, inducing him to yield to ingenious complicity of the acts devised for his adoption. In my judgment this whole dealing was an act in fraud of the bankrupt laws, and done for the purpose of defeating their operation; and consequently that the deed is inoperative to give title now against the general creditors. Certainly it would be a great hardship on the chargeant, if this deed could

be avoided, whilst at the same time he remained liable on the indorsements to the bank made by Mrs. E. M'Kean, but in my opinion such an effect could not follow, for if I am right in my judgment, it seems to me quite plain that the chargeant has a good defence to any action to be brought in these bills, virtually on any such action on a plea of no consideration, the very same question must arise as I have had to decide in this case. I therefore in this case rule against the charge, and declare that there is no lien on the property in respect to this mortgage; but I do not give costs against the chargeant. Mrs. E. M'Kean yielded to the suggestion made to her, under circumstances easily to be extenuated in any view of her act, if not actually to be excused, considering her position at the time; and if my judgment has the effect of securing for the creditors the property thus attempted to be taken from them, I feel myself justified in not giving the costs of this enquiry into the circumstances of these transactions, but the assignees are of course to have their costs out of the estate. I make an order for a sale on foot of Mr. M'Kean's mortgage, but delaying it for a sufficient time to enable an appeal to be brought, if the parties should be so advised.

Attorney for the Bank—Mr. Darling.
 " for the M'Kean—Mr. Larkin.
 " for the Assignees—Mr. McClelland.

Court of Appeal in Chancery.

[Reported by Edmund T. Bewley, Esq., Barrister-at-law.]

[BEFORE THE LORD CHANCELLOR AND THE LORD JUSTICE OF APPEAL.]

IN RE CLEGG'S ESTATE—Nov. 18, 25, 1862.

Construction of will—Changing words.

J. B. by his will devised the lands of X., held under a lease of lives renewable for ever, to M. C. for life, with remainder to J. C.; but "if J. C. should happen to die before he attains the age of twenty-one years or married," then over. Held, that J. C., on attaining the age of twenty-one years, was absolutely entitled; and that the gift over could only take effect if J. C. died under the age of twenty-one years, unmarried.

JONATHAN BALDWIN, of Maryborough, in the Queen's County, was at the time of his death seized of the lands of Castleflemm, Monomendragh or Shinderry, being part of Castleflemm, and the moiety of Leigaragh, situate in the barony of Upper Ossory, in the Queen's County, under a lease for three lives renewable for ever, bearing date the 25th of May, 1742. By his will, duly made and dated 23rd December, 1804, Jonathan Baldwin bequeathed to his wife, Francis Baldwin, the sum of one shilling and one penny sterling, she having already a jointure of £60 a year settled on her marriage, and the will then continued in the following words:—"I give and bequeath unto my granddaughter, Frances Clegg, the sum of £300 sterling, to be paid her by my executors hereinafter men-

ioned out of all my landed property, at the rate of £100 per year, payable half-yearly, the first payment to be made in six months after death of wife, interest free; but in case my said granddaughter shall happen to die *before she shall attain the age of twenty-one years, or married*, then my will and desire is that said sum of £300 shall be paid to such other children of my daughter, Mary Clegg, wife of Benjamin Clegg, share and share alike, at the rate of £100 per year as aforesaid. I give and bequeath unto my said daughter, Mary Clegg, wife of the above-mentioned Benjamin Clegg, all my right, title, and interest of and to all my freehold, landed, and chattel property of what kind and nature soever, which I shall die seized and possessed of, to have, receive, and take the rents, issues, and profits thereof respectively, for and during her natural life; and after her decease I will, devise, and bequeath unto my grandson, John Clegg, son of my said daughter, Mary Clegg, the interest in my said freehold, landed, and chattel property as aforesaid, to have, receive, and take the rents, issues, and profits thereof respectively, for and during the continuance of the respective leases thereof; but in case my said grandson, John Clegg, should happen to die *before he attains the age of 21 years, or married*, then my will is, that my said freehold, landed, and chattel property aforesaid shall be divided, share and share alike, between my said daughter Mary Clegg's children, in like manner as my said grandson, John Clegg, was to have the same in case he lived. And in case all my grandchildren by my said daughter, Mary Clegg, shall die before they attain the age of twenty-one years, or married, as aforesaid, then my will is that my said freehold, landed, and chattel property as aforesaid shall go to and be divided, share and share alike, amongst the children now living of my brother, James Baldwin, of Summer-hill, and John Baldwin deceased, for and during the continuance of the respective leases thereof as aforesaid, and to their heirs." This was followed by a bequest for the maintenance and education of the testator's grandson, John Clegg, until he attained the age of twenty-one years. Jonathan Baldwin died on the 1st Jan. 1805, leaving him surviving, Mary Clegg, his only child, and four grandchildren, namely—John Clegg (the eldest), Jonathan Clegg, Robert Clegg, and Frances Clegg. By a deed of mortgage bearing date the 6th of November, 1837, and made between Mary Clegg and John Clegg of the one part, and Richard Evans of the other, Mary Clegg and John Clegg demised the lands before mentioned to Richard Evans for 1000 years as security for the re-payment of a sum of £1000 with interest thereon at £6 per cent. In or as of Hilary Term, 1842, Richard Evans obtained a judgment in the Court of Queen's Bench against John Clegg for the penal sum of £1000, conditioned for the payment of £500. On the 31st of December, 1854, Mary Clegg died. John Clegg attained the age of twenty-one years in the year 1822, but up to the time of the present suit had not been married; and by an inquisition, bearing date the 2nd day of August, 1855, he had been found a lunatic from the month of October, 1851. The appellant, Isabella Evans, widow of Richard Evans before mentioned, and his executrix, on the 17th of September, 1861, presented a petition in the Land

Estates Court, praying that the lands comprised in the lease of the 25th of May, 1742, or a competent part of them, might be sold for the purpose of discharging the incumbrances thereon; and by an order of the said Court, dated the 4th of February, 1862, it was ordered that these lands should be sold. The appellant having lodged in the court an abstract of the title of John Clegg to the said lands, the Hon. Judge Dobbs made a ruling thereon, dated the 10th of April, 1862, to the following effect, viz.,—"That the order for sale should be amended by directing a sale of the estate of John Clegg in the lands, being an estate in *quasi* fee, subject to an executory devise over on said John Clegg dying unmarried." On the 25th of April, 1862, the petitioner served notice of an application to the Hon. Judge Dobbs that the *quasi* fee of the lands mentioned in the order for sale in the said matter, should be sold notwithstanding his ruling on the abstract of title. This application was heard before Judge Dobbs on the 25th of May, 1862, and stood over for judgment until the 17th of July, 1862, when it was declared, by an order of the last-mentioned date, that John Clegg took an estate in *quasi* fee in the lands sought to be sold, subject to an executory devise over in case he died either before he attained the age of twenty-one years or married; and that as he was still unmarried, his estate was liable to be defeated by the executory devise taking effect on his dying unmarried. From this order Isabella Evans now appealed.

Serjeant Sullivan (with him *Palles*), for the appellant.—The whole case resolves itself into the construction to be put upon that passage in the will of Jonathan Baldwin, whereby a limitation over was made to the other children of Mary Clegg "in case John Clegg should happen to die before he attains the age of twenty one, or married." As the sentence stands at present it admits of no strictly grammatical rendering, and therefore the Court is called on to assign to it such meaning as will best agree with the intentions of the testator to be collected from the rest of the instrument. No similar case is to be found in the books, and therefore but little assistance can be derived from any reported decisions on the construction of wills. The passage quoted appears to be equivalent to this:—that if John Clegg should either attain the age of twenty-one or marry, his estate in the lands should become absolute, and that consequently the remainder over was only to take effect on his failing to fulfil both of these conditions. Thus the language of the testator might be considered to be this,—“if he should die before he attains the age of twenty-one years or marriage.” And its meaning was virtually the same as “if he should die before attaining the age of twenty-one years, unmarried.” The result of Judge Dobbs' judgment would be, that if John Clegg married under age, and died before attaining twenty-one years, leaving issue, the gift over would take effect, and the issue would be deprived of all interest in the lands, manifestly contrary to the testator's wishes and intentions. If the devise had been worded,—“if he shall die before he reaches Paris or Rome,” it would hardly be argued that the estate would not become absolute on his reaching either of the two cities. And so in the present case the remainder over is to take

effect if he dies before the happening of one or other of two events, that is to say, before being twenty-one or marrying. As to changing "or" into "and," though there appears to be no necessity for it here, the court will do so if the intentions of the testator can be best carried out by so doing—*Grant v. Dyer* (2 Dow. 87).

F. Walshe, Q.C., (with him *Foley*) for the respondents, the representatives of John Clegg's brothers and sisters.—The object of the testator was to prevent early and improvident marriages in the family, and therefore the true construction of the words in dispute is that "if John Clegg dies before he attains the age of twenty-one, or if he dies before he is married, the limitation over will take effect." There are two classes of cases in which courts have changed "or" to "and." In the first, the principle appears to be that where the testator has evidenced an intention to benefit the issue of a legatee, or devisee, or some other object claiming derivatively through such legatee or devisee, the Court will make this change if necessary to prevent the testator's intentions from being defeated—(1 Jarm. 472); *Soule v. Gerrard* (Cro. Eliz. 525); s.c. nom. *Sowell v. Garret* (Moore, 422, pl. 590); *Morrall v. Sutton* (1 Phill. 551). But this rule is by no means invariable—*Woodward v. Glasbrook* (2 Vern. 388); *Mortimer v. Hartley* (6 Exch. 47 and S. C. 3 De G. & Sm. 316). The second class of cases in which "or" will be read as "and," comprises those in which a literal adherence to the words of the will would deprive the legatee of what was previously given him on the happening of either of two events, unless both events should happen—*Grant v. Dyer* (2 Dow. 87); but when a prior gift does not exist, this ground for changing fails—*Hawksworth v. Hawksworth* (27 Beav. 1); *O'Mahony v. Burdett* (10 Ir. Ch. 14); *Doed. Usher v. Jessop* (12 East. 288). The present case is not referable to either of the classes mentioned.

Foley, for the same parties.—The grammatical error is not in "married" but in "attains," which should be "attained." "If he should happen to die before he attained the age of twenty-one years, or married," would then be a perfectly intelligible expression. The bequest to the children is to take effect on the happening of one or other of two events, viz.,—John Clegg's dying without attaining twenty-one, and his dying without marrying. The events are these;—and not as has been maintained on the other side—his attaining the age of twenty-one, and his marriage—*Grey v. Pearson* (6 H. of L. Ca. 61); *Weddell v. Mundy* (6 Ves. 341).

J. E. Walshe, Q.C., for the committee of the lunatic.—Two important principles are directly applicable to the present case. In the first place the Court will not give different meanings to the same words occurring in different parts of the same instrument; and secondly, estates already vested will not be divested by ambiguous terms. There is but one event contemplated in the devise to John Clegg, namely, his death; but this is described as a death to happen on one or other of two events—a death before one or other of the two epochs—before his being adult or his marriage. "Before" may be taken as equivalent to "not having." The sentence will then run—"If he should die not

having attained the age of twenty-one, or married." The testator contemplated that John Clegg should have an absolute estate on attaining the age of twenty-one; for in the limitation after the devise to him, the testator says that his other grandchildren are to have the estate in like manner as John Clegg was to have the same "if he lived," i.e., if he reached the age of twenty-one years. A limitation over in case A. died without marrying Mary or Jane, would surely not take effect if A. married either of the ladies. As to changing or supplying words, *vide Abbott v. Middleton* (21 Beav. 143; 7 H. of L. Ca. 68).

Cur. adv. vult.

Nov. 25.—THE LORD CHANCELLOR.—In this case an order has been made by Judge Dobbs, declaring that under the will of Jonathan Baldwin, John Clegg took an estate in *quasi* fee in the lands of Castlefemin, Monomendragh, and Leigaragh, subject to an executory devise over on his dying either under the age of twenty-one years, or unmarried; and that inasmuch as he is still unmarried, his estate is liable to be defeated by the remainder over taking effect. An appeal has been brought against this order; and it was contended on behalf of the respondents, that in accordance with the true construction of the will, John Clegg's estate in the lands could only become absolute on his attaining the age of twenty-one years and marrying; or, in other words, that both of these events should happen, to prevent the limitation over from taking effect. Now, in order to come to a right conclusion as to the true meaning of the devise, it is necessary to consider the language of the will, and the effect of giving it the construction sought for by the respondents. First, then, the testator devises all his landed property to Mary Clegg for life, and on her death, the absolute estate in this is given to John Clegg "for and during the continuance of the respective leases;" and upon this devise, John Clegg would take an absolute vested estate, with remainder over on a certain contingency. If, then, we adopt the construction of the respondents, in the first place this vested remainder would, properly speaking, never vest at any time during the life of John Clegg, if he should continue unmarried; and the second effect would be, that although this property was given absolutely, his issue would not take if he died under the age of twenty-one leaving issue. Thus this estate, which the testator probably wished to continue in his family, might in a short time fall into the hands of strangers, to the exclusion of his own lineal descendants. Now, these two results are the very results which, in the cases cited, influenced the courts in changing the words of a will, and led them frequently to read "or" as "and," in order that they might prevent the intentions of a testator from being frustrated. The principle involved in these cases is one which has governed all the decisions from the days of Queen Elizabeth to the present time, and has always been the rule and guiding principle of this court. It is expressly laid down in the judgment of the Lord Chancellor in a recent case in the House of Lords—*Grey v. Pearson* (6 H. of L. Ca. 79).—"The cases which by way of analogy were mainly relied on as authorities, were cases of which there are a great many in the books,

beginning with one reported in the reign of Queen Elizabeth, and found in Croke's Reports. I say beginning then, though I am not clear that there may not have been prior cases; but beginning then, the same doctrine is carried down through a variety of cases, and was ultimately approved and sanctioned by your Lordships' House in a well-known case in the early part of this century, that of *Fairfield v. Morgan* (2 Bos. & P. N. R. 38). That was a writ of error from Ireland. In that case the doctrine was enunciated and approved, that where a testator devises an estate so as to give the control of the fee-simple to his son or to any other person, for instance to A. B., but if he dies under the age of twenty-one years, or without issue, then over, in that case "or" must have meant "and;" and though it is improperly used, must be taken to have been used conjunctively, and not disjunctively, because it never could have been the testator's intention in giving an estate to a person and his heirs, to give it away from that person's issue if he should happen to die under twenty-one, leaving issue. . . . And to depart from that long established rule, and to adopt a stricter rule of construction would probably cause more evil than it would remedy." It is suggested by Mr. Jarman (1 Jar. 473) that this rule admits of considerable extension, and is applicable whenever the gift over is to arise in the event of the preceding devisee or legatee dying under prescribed circumstances, or leaving an object who might take a benefit derivatively through the devisee or legatee, if his interest remained undivested, and to whom therefore it is probable the testator intended indirectly a benefit. As an instance of this class of cases he cites *Weddell v. Mundy* (6 Ves. 341), where the gift over was "on death under twenty-one or without leaving a husband;" a case in which Sir Wm. Grant, M.R., held that "or" was to be read "and," in accordance with the doctrine in question. Now, in the present case the words are not "under twenty-one or without issue," as in the rule laid down in *Grey v. Pearson*, but they are words which appear to me exactly equivalent to "under twenty-one years or unmarried." Though it is doubtful how far the principle *Weddell v. Mundy* might be applicable to any benefit the wife might derive through her husband in the present instance, yet we must come to the conclusion that in using the word "married" the testator refers to the results consequent on that marriage, and intends to make such a provision for the children, as we should have naturally presumed had the word "issue" been employed. To prevent therefore the consequences that I have before alluded to, and in obedience to the established principle that estates are not to be divested unless by plain, unmistakable language, I think we must adopt the construction so often given in other cases; we must hold that "or" is to be read "and," and regard the estate of John Clegg as now absolute. I have considered the case as if the devise to John Clegg stood alone; but when I observe the same language occurring in the preceding devise to Frances Clegg, where any other construction could clearly never have been intended, my opinion on the construction of the words is greatly strengthened. Under these circumstances I think the order of the Court below must be reversed.

THE LORD JUSTICE OF APPEAL.—I concur in thinking that the order below must be reversed. With regard to the changing of "or" into "and," as long as language exists it will be used carelessly and inaccurately, and cases will arise in which each of these words will be used to express the meaning of the other. The meaning therefore must depend on the intention of the testator; and in the present case I think it may be fairly inferred that the testator intended that John Clegg should have an absolute estate either on his marriage or on attaining twenty-one. It was reasonable that he should be made absolute owner on his marriage, in order that he might be able to make some provision for his family. The case of *Weddell v. Mundy*, already referred to, seems to me substantially the same as the present one. In both, to construe "or" literally would divest the estate and be a cause of manifest hardship. Suppose the present case had been one in which there was a direct devise to John Clegg "if he attained the age of twenty-one years, or married," the estate would have, beyond all doubt, become absolute on the happening of either event. The intention in the present case is plainly the same, and therefore on these grounds, shortly stated, I express my entire concurrence in the able judgment of the Lord Chancellor.

Order below reversed.

Rolls Court.

[Reported by Arthur Houston, Esq., Barrister-at-law.]

IN RE THE TRUSTS OF THE WILL OF ROBERT ROUNDELL GUINNESS, DECEASED, AND THE COURT OF CHANCERY (IRELAND) REGULATION ACT, 1850, s. 11.—Nov. 28, 1862.

Will—Construction—Liability of Executors—Special Case.

In a will, the word "legacies" held to apply to a gift of the residue, even when such residue included real property.

Executors not relieved from consequences of a breach of trust by presenting a petition under the 11th section of the Act.

A Special Case should be brought forward in the form of a statement of the facts, followed by a series of interrogatories, signed by a counsel on both sides.

THIS was a cause petition, by way of Special Case, filed by the executors of the will of Robert Roundell Guinness, applying for the assistance of the court in construing its terms. The question in debate was, whether the word "legacy" included the shares of the residue as well as the specific bequests. The material parts of the will were as follows:—"I give, devise, and bequeath to my dear wife, Mary Ann Guinness, for and during the term of her natural life, my two dwelling-houses, lands, and premises, at Stillorgan, together with the use of my furniture, books, house-linen, &c., for the term of her natural life, and from and after her decease I direct that all said properties so bequeathed to her for her life shall form

part of the residue of my property, and, &c. I give and bequeath to my daughter Mary Ferguson the sum of £5 sterling, having already provided for her on her marriage. I give and bequeath to my daughters Susan, &c. and my son Robert, each the sum of £1,800 sterling. I give and bequeath to my son Richard S. Guinness the sum of £500 sterling, and to my son Henry Guinness the sum of £1,000 sterling; and as to all the rest, residue, and remainder of my property, I give, devise, and bequeath the same, after payment of all my just debts and funeral and testamentary expenses, and the several legacies bequeathed by this my will, to be equally divided between all my said sons and daughters equally, share and share alike, and hereby direct that the interest of the legacies hereby given to such of my children as shall not be of age at the time of my decease, shall be paid to my said wife, to be applied by her for and towards their maintenance and education. I hereby nominate and appoint my said wife Mary Ann Guinness, and my son Henry Guinness, executors of this," &c. There were also two further provisions giving £250 each to the executors for their trouble, "in addition to the legacies hereinbefore provided for them," and declaring "that the legacies hereby given to my said wife are in addition to the provision made for her by her marriage settlement, and to be in lieu of all claim for dower," &c. During the minority of the only son of the testator who was under age at the time of the testator's death, the interest of the share of the residue accruing to him was allowed to accumulate for his benefit, and paid over to him on attaining his majority. Mrs. Guinness, however, finding her income straitened by the withdrawal of the sum allowed for his maintenance, now applied for an order of the court declaring that the interest on the shares of the residue to which her minor daughters were entitled, should be payable to her for their maintenance and education, according to the true interpretation of the clause of the will relating to the subject.

The Solicitor-General (Lawson) for the executrix, contended that the word "legacy" should be held to apply to the share of the residue, as well as to the specific pecuniary bequests, the only difference between the two being that the latter were ascertained, and the former unascertained, in amount: legacy duty is payable on both. It was remarkable that the clause relating to the payment of the interest came after the residuary clause. The testator evidently employed the term "legacy" in a wide sense, for he speaks of the legacies left to his wife in such a manner as to include the real as well as the personal estate bequeathed to her. The word "legacy," though primarily applicable to a bequest of personal property, had been held to apply to a devise and realty.—*Hardacre v. Nash* (1 Jarman, 707); *Doe d. Stopford v. Stopford* (5 East., 501) *Hope v. Taylor* (1 Burr., 268). In a case somewhat analogous to this—*Doe d. Gibson v. Gell* (2 B. & C., 680)—it was decided that the word "part" meant not only a half part of the testator's books bequeathed to Mary Gibson, but her entire share in testator's property under the will.

Warren, Q.C., on behalf of the minors, while conceding that legacy might include a gift of a share of the residue, contended that the testator had explained

it to mean specific bequests; for the residue was to be taken after payment of debts, expenses, and legacies, thus clearly distinguishing the latter from the residue. It followed then, on the plain principles of construction, that the term legacies in the clause immediately succeeding, which directed the payment of interest, should be taken to mean specific bequests.

Foot followed on the same side.

Darley, Q.C., for the executrix, contended that the expressions relied upon by counsel on the opposite side, as distinguishing legacies from residuary bequests, were merely words directing the mode of ascertaining the residue. Further, there was no trust for accumulation; and towards the close of the will there was a legacy to his son Henry in addition to the legacies thereinbefore given him, which must be taken to mean not only the specific bequests, but the share of the residue.—*Saumarez v. Saumarez* (4 My. & C., 331); *Tichfield v. Horncastle* (2 Jur., 610); *Heath v. Weston* (3 De G. M. & G., 601).

Feb. 2 1863.—His Honor gave judgment. In the progress of his review of the facts he observed that it had transpired that the executors had invested the amount bequeathed to the minors in some securities bearing 5 per cent. interest, and different from those authorised by the court. They were to understand that the filing of this petition did not in the least exonerate them from the consequences of this breach of trust; and before the court would make any order, the sum must be invested in Government New Three per Cent. Stock, and transferred to the credit of this cause. The question in the case turned on the construction of the word "legacy," namely, whether it was intended by that term to include the bequests of the real estate. The leading authorities for the extension of the signification, were *Hardacre v. Nash* and *Hope v. Taylor* (*ut supra*). In the latter, Lord Mansfield held that "the word 'legacies' did extend to lands as well as to monies." The other judges, regarding the context, concurred in this view. It was remarkable that a residuary legatee was within the Stamp Act. As it would be manifestly for the minors' advantage, he would, so soon as the sum was transferred to the credit of the cause, make an order directing the interest to be paid over to Mrs. Guinness for their benefit. On the form in which this case was brought forward, he remarked that it was quite irregular. It was not a special case within the Act. A special case was something analogous to a special verdict. The proper mode was to state the facts clearly, and to put to the court the several questions on which information is sought. The counsel on both sides should sign the queries, which amounted to an admission of the facts. This was the case in England: the next special case which came before him he would refuse to hear, unless it was brought forward in the proper mode. The forms were to be found in Mr. Tripp's work on Chancery Forms.*

* *Tripp's Chancery Forms*, p. 145.—*Special Case*.

"In Chancery.

Lord Chancellor

Vice-Chancellor

Between X. Y. &c.

Plaintiffs;

and

T. U. &c.

Defendants.

The special case agreed on by the above-named parties, pursuant to the statute passed in the session of Parliament

Exchequer Chamber.

[Reported by H. J. Wrixon, Esq., Barrister-at-Law.]

[BEFORE LEFROY, C.J., PIGOT, C.B., O'BRIEN, J.,
HUGHES, B., HAYES, J., DEASY, B.]

FITZGERALD v. FITZGERALD.—Nov. 13, 1862.

Construction of will—Implication of cross-remainders.

The following devise.—"I leave all my right, title, interest, and estate in Coney Island unto my two sons, J.E.F. and C.F., for and during the term of their natural lives, a moiety to each for and during the term of their natural lives, and from and after either of their decease I devise said island unto the first, second, third, and to all and every other the son and sons of my said sons one moiety of said island to the son and sons of my said son, J.E.F., lawfully begotten, and the other moiety to my said son, C.F., for and during the term of his natural life: and from and after his decease I devise the same to the first, second, third, and to all and every other the son and sons of my said son, C.F., lawfully begotten, and in default of such issue I devise said island to my seventh son, the Rev. H. F., for and during his natural life." Held—confirming the judgment of Monahan, C.J.,* in the Common Pleas, that on the death of C.F., without issue, a cross-remainder as regards his moiety was to be implied in favour of J.E.F. and his sons.

THIS case came before the court by way of error from the Court of Common Pleas. In an action for ejectment brought by Sir John Forster Fitzgerald against the Rev. Henry Fitzgerald respecting one moiety of Coney Island, in the county of Clare, it was agreed between the parties to submit a special case for the opinion of the court. The case submitted to the Common Pleas set out that the late Edward Fitzgerald, of Killibeg, in the county of Kildare, was, at the time of making his will, seised in fee of the lands of Coney Island, being the lands a moiety of which is sought to be recovered in this action; and that by his will, dated 1812, he made a devise in the follow-

holden in the thirteenth and fourteenth years of the reign of her present Majesty, intituled "An Act to diminish the Delay and Expense of Proceedings in the High Court of Chancery in England."

1. By an indenture dated, &c. (set forth the deeds and facts succinctly, with reference to which the opinion of the court is required.)

2. The plaintiffs submit, &c.

3. The defendants contend, &c.

4. Under the circumstances aforesaid, it has been determined by the plaintiffs and defendants to concur, and they do respectively concur, in the statement of facts herein contained for the opinion of this Honorable Court thereon, under the provisions of the above-mentioned Act.

The parties, therefore, pray the opinion of this Honorable Court,

Whether, &c.

A. B. [counsel's name] for the plaintiffs.

C. D. [counsel's name] for the defendants."

It is unnecessary to observe that the above form will require to be modified, in order to adapt it to the case of an application under the Irish statute.

*Christian, J., concurred in the judgment of the Chief Justice, but for different reasons.

ing terms:—"And the island called Coney Island I leave and bequeath all my right, title, interest, and estate therein unto my two sons, John Forster Fitzgerald and Charles Fitzgerald, for and during the term of their natural lives, a moiety to each for and during the term of their natural lives. And from and after either of their decease I devise the said island to the first, second, third, and to all and every other the son and sons of one moiety of the said island to the son and sons of my said son, John Forster Fitzgerald, lawfully begotten, and the other moiety to my said son, Charles Fitzgerald, for and during the term of his natural life; and from and after his decease I devise the same to the first, second, third, and to all and every other the son and sons of my said son Charles Fitzgerald, lawfully begotten severally and successively, and in remainder, one after another, and to the several and respective heirs, male, of the body and bodies of every such son and sons, the elder of such son and sons and their heirs always to take before the younger. And in default of such issue I devise the said island to my seventh son, the Rev. Henry Fitzgerald, for and during his natural life; and from and after his decease without issue, male, lawfully begotten, I devise the said island to my daughter, by my present wife, Dorothea Anne Fitzgerald, and her heirs." That in 1814 the testator died, and John Forster Fitzgerald, the present plaintiff, and Charles Fitzgerald, entered into possession of Coney Island, and continued so till Charles Fitzgerald died in the year 1859, without issue. That the present defendant, the Rev. Henry Fitzgerald, mentioned in the will, is now in possession of the moiety of Coney Island in the will devised to Charles Fitzgerald. The question submitted to the court was—"Whether upon the death of the said Charles Fitzgerald, without issue, the plaintiff became entitled to the possession of the moiety devised to the said Charles Fitzgerald?" The following devise was relied on for purposes of illustration during the argument:—"And as and for concerning the lands of Rossclave, I give and devise one moiety of said lands, and all my estate and title therein, unto my sixth son by my present wife, Crofton Fitzgerald, for and during his natural life; and after his decease I devise the same to the first, second, and third sons of my said son Crofton, and I give and devise the other moiety of said lands of Rossclave to my seventh son, Henry Fitzgerald, and to his sons lawfully begotten; and for default of such issue of both or either of my sons, Crofton or Henry, I devise the same to my daughter by my present wife, &c. And I do hereby authorize each of my said sons, Crofton and Henry, when they shall be in possession of said lands to charge their respective moieties thereof."

R. W. Warren, Q.C., (with him Franks) for the plaintiff in error.

J. T. Ball, Q.C., (with him Jellett) for the defendant in error.

The following cases were cited in the course of the argument:—*Gilbert v. Witty* (Cro. J., 655); *Comber v. Hill* (2 Strange, 968); *Rabbah v. Squire* (4 De Gex & Jones, 406); *Pery v. White* (Cowper, 777);

* The Court of Common Pleas decided in favour of the plaintiff below. The case will be found reported, 7 Ir. Jur. N.S. 104.

Ashley v. Ashley (6 Simon, 359); *Wright v. Holford* (Cowper, 31); *Doe v. Jenkins* (5 Bing., 476); *Vanderplank v. King* (3 Hare, 1); *Horne v. Barton* (19 Ves. Jun., 400); *Phipard v. Mansfield* (Cowp., 797); *Marryat v. Townley* (1 Ves. Sen., 104); *Holms v. Maynell* (2 Shower, 135); *Watson v. Foxon* (2 East., 36); *Atherton v. Pye* (4 Term., 710).
Cur. adv. vult.

HILARY TERM.

Jan. 28, 1863.—LEFROY, C. J.—The question which comes before the court on the construction of this will is, whether upon the death of Charles Fitzgerald without issue, the plaintiff here, Henry Fitzgerald, became entitled to the possession of a moiety in Coney Island. (Here his Lordship recited the facts of the case, and the different clauses of the will.) It is important to notice the fulness of the bequest—"I leave and bequeath all my right, title, interest, and estate therein." The effect of this bequest is to give to the two sons of the testator, John and Charles, respectively, estates for their life in the moieties of the island, with remainders to their first and other sons in ordinary course, and from and after their decease without issue male, to his son, the Rev. H. Fitzgerald. So that by no means could Henry Fitzgerald be entitled but upon the default of issue male from both the first-mentioned sons. The result in point of law was not only to give estates tail in the moieties to the two sons, John and Charles, but, according to established authorities, to give them cross remainders in tail, so that the issue male of either, if the other died, would unquestionably be entitled to an estate in tail by the doctrine of cross remainders. But Henry Fitzgerald insists that he can take a life estate in Charles's share, Charles having died without issue, while on the other hand it is contended that by the implication of cross remainders between the life estates given to John and Charles, the life interest of either, on his death without issue, accrues to the other. It appears to us all that there is on the face of this will that which amply suffices to bring it within the authority of *Vanderplank v. King*, and that in enforcing the well-known doctrine of *cy pres*, we are far from making a will for the testator; we are only effecting in a legal manner what he wanted to do, but has, by the terms of his will, done with imperfect legal effect. In doing so we follow the ancient rule of law, that in a will the particular must give way to the general intentment. I think that the Vice-Chancellor in *Vanderplank v. King* fully shows that what he decided in that case was nothing more than an exemplification of the doctrine of *cy pres*, and the effect of his decision was simply to make a will effectual, which would not have been effectual in the form in which it was made, as its dispositions, if literally followed, contravene the principles of the law. According to the wish of the testator here, as expressed in the very first sentence of his will, and evinced by his ultimate disposal of the fee to his daughter, Dorothea Anne, we must dispose of every part of his "right, title, interest," &c., and this will be done most effectually by the implication of cross remainders. The decision at which we have all arrived stands on the basis of authority, not for the first time now established. Judge

Ashurst, in *Phipart v. Mansfield*, (Cowp. 797,) says that the doctrine of cross remainders is one to be encouraged as calculated to give effect to the intention of testators who often made wills *inops consilii*. The implication of cross remainders in this case is moreover between two persons only—no others are concerned; and our judgment affirming that of the court below rests on authority, and effectuates the manifest intention of the testator. The appeal is, therefore, dismissed with costs.

Court of Queen's Bench.

[Reported by William Woodlock, Esq., Barrister-at-law.]

CROWN SIDE.

[CORAM HAYES AND FITZGERALD, JJ.]

THE QUEEN, AT THE PROSECUTION OF CHARLES LANYON, v. THE MAYOR OF BELFAST.—Nov. 20, 21, 24.

Burgess roll—Rating—Successive occupation—Statute 3 & 4 Vict. c. 108.

Previous to May, 1862, A. occupied a tenement in Belfast, valued at £114, for which he was rated as occupier under the rate made on the 25th June, 1861. On the 1st May, 1862, he left part of the tenement, retaining the other part, which, in fact, was a separate tenement. On the 25th April, 1862, the valuation within the union was finally revised; and by the revised valuation the original valuation of A.'s old tenement was altered and divided into two, the value of one being £90, and that of the other, the part retained by A. after May, 1862, being £30. A. served a notice on the guardians claiming to be put on the rate of 1861, in respect of the new tenement. This the guardians refused to do. On the 25th June, 1862, another rate was struck in which A. was duly rated as occupier of the new tenement. Held, that A. was not entitled to appear on the list of burgesses for the year following the 31st August, 1862, either under s. 30 or s. 53 of the Municipal Corporations Act, s. 3 & 4 Vict. c. 108.

THIS was a motion to make absolute a conditional order directing that a mandamus should issue, directed to William Ewart, alderman, acting as mayor for the occasion, and to the mayor for the time being of the borough of Belfast, commanding them, or one of them, to insert the name of Charles Lanyon as a Burgess on the Burgess-roll of and for the St. George's ward of the borough of Belfast. The facts of the case appeared from the affidavit of Mr. Charles Lanyon, mayor of the borough of Belfast, which stated that for several years preceding the 1st May last he was in possession and occupation of a dwelling house situate at No. 14 Wellington-place, in the borough of Belfast; and that at the side and rear of the said dwelling-house there were situate certain buildings used as offices which were entered by a separate door from Upper Queen-street, which offices were used and

occupied by the deponent and his partners, William Henry Lynn and John Lanyon, who carried on business there as architects and engineers. That on the rate struck by the Guardians of the Poor Law Union of Belfast on the 25th June, 1861, the deponent was rated as occupier of the entire of said premises described as "house and offices No. 14 Wellington-place," and of the annual value of £114, and was enrolled as a burgess in respect thereof in the burgess-list for the present year. That on the 1st December last he was elected to serve as mayor of the borough for one year from the 1st January in the present year. That on the 1st May last he ceased to reside in or occupy the dwelling-house No. 14 Wellington-place, and went to reside at a place called the Abbey, four miles from Belfast; but that he and his partners continued still to occupy and carry on business in the offices in Upper Queen-street, which were, at the date of the application, and had been since the 1st May last, separate and detached from the dwelling-house, which deponent had sub-let to James Strong, Esq., M.D., as his tenant, from the 1st May last. That on the 23rd April last the valuation made by the Commissioners of Valuations, which had been finally completed and in force for several months within the union, was duly revised pursuant to the st. 15 & 16 Vict. c. 63; and by this revised valuation, which was finally completed on the said 25th April, the original valuation of the house, offices, &c. 14 Wellington-place, was altered and divided into two separate valuations, viz., the dwelling-house No. 14 Wellington-place, occupied by Dr. Strong at the annual value of £90, and the offices occupied by the deponent and his partners at the annual value of £30. That this revised valuation was signed by the assistant of the commissioners of valuations on the 25th April last. That on the 24th June last deponent caused a notice to be served upon the guardians of the union of said poor-law valuation, claiming to be rated jointly with his partners in respect of a counting-house, No. 2 Upper Queen-street, in the said borough and union, being the said offices which were then separated from Wellington-place; and at the time of the service of said notice he caused a tender to be made of any rates then payable in respect thereof. That the guardians did not comply with said notice, or insert his name in the rate of the 25th June, 1861, in respect of the counting house in Upper Queen-street. That on the 25th June last another rate was struck by the guardians, which was based upon the revised valuation, signed on the 25th April; and in the said rate he and his partners were rated as occupiers of the Queen-street premises. That he was returned by the town clerk in the list of persons appearing entitled to be enrolled as burgesses for the ensuing year; but an objection had been duly served by one John O'Hanlon to the retention of his name on the burgess-roll. That deponent duly served a claim to be enrolled as a burgess in respect of the successive occupation of the dwelling-house No. 14 Wellington-place, and of the offices No. 2 Upper Queen-street. That at the revision of the list of burgesses he declined to sit or preside at the hearing of the objection and claim, being advised that he could not legally act as judge in his own cause; and accord-

ingly at the quarterly meeting of the town council of the borough held on the 1st November, William Ewart, Esq., one of the aldermen of the borough, was duly elected to act in his place so far as the hearing of the said objection and claim was concerned. That Mr. Ewart and the assessors proceeded to hear the said objection and claim; and that the objection was allowed and deponent's claim rejected; and consequently that his name had been struck out of the burgess-list for the present year, and did not now appear thereon. The following is a copy of the claim served on the 24th June by Mr. Lanyon on the guardians, claiming to be put upon the rate of June, 1861:—

UNION OF BELFAST.—Pursuant to the Act of 13 & 14 Vict. chap. 19, I, Charles Lanyon, being occupier, jointly with two other persons, of a certain tenement hereinafter described, which tenement is rated under the Act for the more effectual relief of the poor in Ireland, at a net annual value of £30 or upwards, and is situate in the borough of Belfast, electoral division of Belfast, in which there was a rate made for the relief of the destitute poor on the 25th day of June, 1861, last, from which rate my name has been omitted as such occupier of such premises, do hereby give notice to you, the guardians of the Belfast Union, that I claim to be rated in respect of such premises, that is to say, as joint occupiers of a counting-house situate at No. 2 Upper Queen-street, in the said borough and union. Dated 3rd day of May, 1862.

Jointly with John Lanyon, } CHAS. LANTON.
Wm. H. Lyons, }

Whiteside, Q.C. (with him *M'Donogh, Q.C.*, and *Harrison*), for the motion.—The words of s. 30 of the Municipal Corporation Act, 3 & 4 Vict. c. 108, give Mr. Lanyon a right to be rated as a successive occupant. The guardians having the revised valuation of April, 25, 1862, had that before them to which they ought to have had regard. Such a valuation as is described in ss. 21, 24, 27, 32, of the Valuation Act, 1852, 15 & 16 Vict. c. 63, was in existence on the 25th April. It will be said that that valuation could only be looked to for future rates; but the whole scope of the statute shews that that is not so. Then there being on the 31st August, 1862, a separate and distinct valuation of the Queen-street premises, the right of Mr. Lanyon is clear to be rated as a successive occupant of those premises and of the premises of which they had previously formed part; and if he is such an occupier he has a clear right, under s. 33 of the statute 3 & 4 Vict. c. 108, to serve a notice claiming to be rated; and having done so he has a right to insist upon being placed upon the roll of burgesses. *In re Quinn* (3 Cr. & Dix. 285) will be cited on the other side, but it is distinguishable. *Re Peter M'Donnell* (11 Ir. C. C. p. 1); *Wauchob v. Reynolds* (1 Ir. C. L. Rep. 142) does not apply here. *The King v. Hall* (1st B. & Cr. 123). The court ought to prefer such a construction of the statutes as will extend the franchise, and is not to confine itself to a mere literal interpretation—*The King v. The Inhabitants of Everdon* (9 East. 101); *Eyston v. Studd* (2 Plowd. 465).

Sullivan, Serjeant, and *Barry, Q.C.* (with them *E. Richards*), *contra*.—There must be a personal

rating in reference to the premises under s. 30 of the Municipal Corporation Act. Section 33 gives no right to a person to call on the guardians to rate premises. It assumes that there are premises rated to a certain amount, and that a person has not been rated for them; and it gives to the person not personally rated in respect of them a right to be personally rated; but it does not give any right to call on the guardians to assess a value on the premises. If the 33rd section had the meaning ascribed to it, the rating of every union in the country might be upset every moment. There was not here a tenement rated when the notice of claim was served. Mr. Lanyon must continually occupy, and if before the year is out he parts with the occupation of any part of his premises his qualification ceases. Successive occupation means successive occupation of premises rated to a certain amount, to be ascertained in the mode stated in s. 30. The question is concluded by authority even if the language of the statute was not clear enough of itself—*Waucho v. Reynolds* (1 Ir. C. L. Rep. at p. 153). The fact of there being a revised valuation makes no difference, for that is a matter to which the guardians cannot look for thirty days—s. 32 of the General Valuation Act, st. 15 & 16 Vict. c. 63. The argument on the other side comes to this,—that if a man has a house in respect of which he is rated, and in the middle of the year builds a new house, he can abandon the occupation of the house in existence as a rated tenement and claim to be rated in respect of the house which for the greater part of the year had no existence. The words of the 30th section of the Municipal Corporations Act, pointing out the way in which the value of premises is to be ascertained, cannot be struck out—*Müller v. Salomans* (7 Ex. at p. 559) is an authority as to the reading of statutes. *Gilman v. Crowley* (7 Ir. C. L. Rep. 557) is a remarkable instance of the stringency with which statutes are construed. See also *Gray v. Pearson* (6 H. of L. 61), and *Brandling v. Barrington* (6 B. & Cr. 467). The 33rd section merely provides that where the premises are such as are described in s. 30, but the occupier is not a person such as is there described; he can, nevertheless, get his name put upon the roll. The guardians are asked to do that which they have no power to do, namely, to destroy the existing rate and split up the premises into two. If they had such a power the landlord would be rendered liable for the rating of both sets of premises. The argument is, that because these Queen-street premises were rated at £30 in 1862, they were therefore of necessity of that value in 1861—*The Queen v. Savage* (3 Ir. C. L. Rep. 480); *The Queen v. Ruxton* (3 Ir. C. L. Rep. 478); *Nightingale v. Marshall* (2 B. & Cr. 313); *Re Quinn* (3 Cr. & Dix. 285); *Phibbs v. Kearns* (11 Ir. C. L. Rep. 294).

M'Donogh, Q.C., in reply.—There is no such thing as rating lands or premises. The occupiers are rated not the premises. Thus premises belonging to the Crown are not rateable; but the moment they are occupied beneficially by any other person that person is rated. It is on the one hand assumed that the words of the statute are against us, and on the other admitted that its intention is with us. The policy and intention of the Act are plain,—that you must be an inhabitant, of full age, and occupy pre-

mises of the value indicated; you must have done so for twelve months preceding the 31st August; but I deny that the rating and the occupation must be contemporaneous in point of time. We never were out of possession of premises of sufficient value. There is nothing in the Act to show that each part of the premises must be rated for every moment of the twelve months; and to hold that such is its effect would be introducing a new provision into it. We had been on the 31st August in possession for twelve months of two sets of premises; and we produce the rating of June, 1862, to prove that our new tenement was of full value—*Alexander v. Flood* (5 Ir. C. L. Rep. 43) is a strong authority to show that it is sufficient if the value is shown to exist at the end of the twelve months. [*Fitzgerald, J.*—The statute on which that case turned is so different from the statutes now before us that the authority can scarcely be held to apply here]. We had a right to require the guardians to put us on the rate, and private persons are not to suffer because public officers will not do their duty—*Quin v. Aldwell* (Batty's Rep. 339).

Cur. adv. vult.

Nov. 24.—*HAYES, J.*, stated the facts of the case, and proceed to say that upon this state of facts it had been argued by Mr. Lanyon's counsel that upon the true construction of section 30 of the Municipal Corporations Act, and without taking into consideration section 33 of the same statute, his name ought to have been retained on the list of burgesses. The court was of opinion that no such right existed. Under section 30 of the statute, the party was obliged to shew not merely that he was in occupation of premises of a certain yearly value, but also that the premises, whether the same, or different premises in succession, were, during the whole period of his occupation, rated to the relief of the poor, and that to an amount not less than £10 per year, as evidenced by the rate-book. Passing over the period during which Mr. Lanyon was in occupation of the two sets of premises, there was no evidence that, from the 1st May to the time of striking the rate, he occupied premises rated to the value of £10 a year, and the court held that to be a fatal defect. The rate of the 25th June, 1862, was evidence of the value then, but not of the value at any antecedent period. But then, it had been argued secondly by counsel that all doubt was removed when the 33rd section and the different Valuation Acts were called in aid. The 33rd section of the Municipal Corporations Act enacted "that in every borough it shall be lawful for any person occupying any house, warehouse, counting-house, or shop, to claim to be rated to the relief of the poor in respect of such premises respectively, whether the landlord shall or shall not be liable to be rated to the relief of the poor in respect thereof; and upon such occupier so claiming and actually paying or tendering to the collector thereof, or to the person or persons entitled to receive the same, the full amount of the last-made rate then payable in respect of such premises, the guardians or other persons charged with making any rate for the relief of the destitute poor which shall or ought to include such premises, are hereby required to put the name of such occupier

upon the rate for the time being; and in case any such guardians or other persons shall neglect or refuse so to do, such occupier shall nevertheless, for the purposes of this Act, be deemed to have been rated to the relief of the poor in respect of such premises from the period at which the rate shall have been made in respect of which he shall have so claimed to be rated as aforesaid." The section so far imposed a duty on the guardians, and enacted that a certain consequence should follow if that duty were neglected, and all this with the view of securing to the party a remedy for the omission of his name from the current rate. The question arose whether it was the duty of the guardians to comply with the request made by Mr. Lanyon to put him upon the rate. If it was not, it could not be said that the service by him of his claim was to have the effect mentioned in the Act. On the one side it was said that the guardians ought to have put Mr. Lanyon's name on the rate, while on the other side this was denied. The court was of opinion that no such duty arose upon the guardians. When the statute spoke of tendering the amount of the last-made rate, it assumed that those very premises in respect of which the amount was tendered were rated, and not those premises combined with others, and that thus the statutable evidence of value was applied. But nothing of the kind existed here. It was impossible to ascertain from the rate of 1861 the value of the Queen-street premises; but it is said that the value could have been ascertained by the admitted valuation. But the answer was too full. First, no authority was given to the guardians to refer to the valuation for such a purpose. It was to be in force for future rates only, and nothing was sought to be done here with respect to future rates. It was not intended by Mr. Lanyon that a tax should be imposed upon him, but only that it should be shewn that he had been liable to the rate, and had discharged it; but secondly, the statute only directed the guardians to put the party applying upon the rate for the time being, while the claim served sought for much more, namely, to have the Queen-street premises segregated from the others, and to have a value put upon them, so that if the request had been complied with, there would have been a falsification of the rate-book. In conformity with the views of two members of the court in *Wauchope v. Reynolds*, the court now hold that there was no authority in the guardians to make any alteration in the rate-book, saving the putting on the name of a party claimant when it has been omitted. For these reasons his Lordship was of opinion that the mandamus ought not to issue.

FITZGERALD, J.—I have arrived at the same conclusion, and for pretty nearly the same reasons, although it would have been gratifying to me if I could have arrived at a different conclusion, inasmuch as if I could have adopted the argument of the applicant on the 30th section, it would have had the effect of enlarging the basis of the municipal franchise. However, I have found it impossible, without doing violence to the words of the Act, and adding provisions to it, to arrive at any other conclusion than that at which my brother Hayes has arrived. In fact I may say that from the moment I heard the case fully opened by Mr. Whiteside, I entertained no doubt upon

it, and as the decision of the revising barrister was treated with some derision, I think it right to say that in my opinion that decision was arrived at not alone on true principles of construction, but that it is fortified by principle and precedent, and that no other decision would have been sound. I had intended to have given my own reasons at large, but my brother Hayes has put the case so clearly that I do not find it necessary to go at any length into the case. I have never heard it doubted that, on the true construction of s. 30, some of the elements required to entitle a person to be enrolled as a burgess, were occupation for twelve months prior to the 31st August in each year, of premises of the value of £10; that the Act requires in addition rating by names; that the rating and value are to be ascertained by the rate-book; and that it must appear from it that the premises were, during the whole of the twelve months, of the rated value of £10. It is not possible to arrive at the construction contended for on the part of the applicant, without doing violence to the words of the Act. The case attempted to be made by the claimant, is one of successive occupation. As has been pointed out, he did, up to the 1st May, 1862, really occupy premises of the requisite value—that is, from the 31st August, 1861, to the 1st May, 1862—when he parted with the occupation of a portion of them; and the question is, whether his successive occupation, first of the entire, and afterwards of the part which he retained, entitled him to the municipal franchise. On the 1st May, 1862, he became, with two others, joint occupier of a detached part of the premises, the entire of which, up to that, he had occupied. That detached part was a separate tenement, and if it had been then on the rate-book, and appeared to be of sufficient value, the claimant would have made out his title by successive occupation, but he failed, inasmuch as the tenement had not been on the rate-book prior to May, 1862, and there were no means of ascertaining its value. I agree that the General Valuation Act has no real bearing on the present issue; the General Valuation Act was merely to be looked to as the foundation of any new rate that was to be made. As such, the guardians were bound to adopt it, but it had no retrospective operation. The second tenement became of adequate value by being included in the rate for 1862. It was argued that the true construction of the 30th section was, that if, upon the rate made anterior to the period of revision, the tenement appeared then to be of the full value, it gave the title to the franchise provided that there was an occupation for twelve months. In reference to that argument, I said I would have been glad to adopt it if it was consistent with the words of the 30th section. But however, though I was willing to adopt the argument if I could, it appears to me that the Legislature has not said so in the Municipal Act, and has in fact said the contrary. The uniformly received construction has been, that for the purposes of the municipal franchise, a rating of the tenement to the extent of £10 must have existed during the whole period of twelve months. When the Legislature intended something different, it expressed it, and we find in the Registration Act, 13 & 14 Vict., c. 69, when it intended that such should be the basis of the franchise,

that it said so in express terms, and instead of, as in the Municipal Act, following the provisions of the English Act, in the 13 & 14 Vict., c. 69, the franchise is in the first section stated to be given to occupiers "rated under the last rate for the time being." So that the Legislature has there departed from the Municipal Act, and has done so in terms so express that one must be surprised how it was possible for any question to have arisen in the case of *Alexander v. Flood*, as the Act is so plain. If we refer to the statute 6 & 7 Vict., c. 93, it will be found, on referring to the 12th and 13th sections, that all the Legislature requires when providing for the qualification of voters at meetings convened under the statute 9 Geo. 4, c. 89, is a rating of the voter "by the last rate made in the union wherein he shall dwell," in respect of lands, &c., of the net annual value of £5 or upwards. In fact, the 30th section of the Municipal Corporation Act is in exact accordance with the previous Municipal Act in England, that is, the 5 & 6 Wm. 4, c. 76, and section 9, which, though the period given is different, provides that the occupier shall have been rated during the whole time of his occupation, and all the rates paid before the 31st August, and our Municipal Act follows in terms what was done in the English Act, with the difference that the period of occupation and of rating is different. It was then contended that s. 33 supplied the defect, if any, in the party's title under the 30th section; that though it was proved that the tenement in Queen-street was not rated separately for the whole twelve months, yet that Mr. Lanyon's claim to be rated under s. 33 supplied the deficiency and gave him the title. The notice of claim served was brought before us. I confess I entertain a doubt whether it would have been sufficient as a claim to be rated within the meaning of s. 33. In fact the error on the part of Mr. Lanyon was this; he took up the 110th section of the Registration of Voters Act, which provides for the case of a man's name being omitted though his tenement is valued and rated, and he served a notice on the guardians seeking to have his name put upon the rate, and accordingly Mr. Lanyon's notice states—(His Lordship here read the claim stated *ante*). That form of notice is not applicable to the 33rd section. That section has already received a construction in *Wauchob v. Reynolds*. It is true that the opinion expressed there is that of two members of the court only; but Perrin, J., had placed his judgment on such a ground that it was unnecessary for him to express any opinion on the section, while it was necessary for the other judges to dispose of the foundation laid on the 33rd section. I must say that I concur with Blackburn, C. J., and Crampton, J. It has been since that time the received construction of the section, that it is the duty of the guardians under it not to make a new rate or a supplemental rate, or alter figures in the rate so as to disturb the whole rate. It does not authorize them to do that, but only in case of the omission of the name of a party, or the insertion of an untrue name, it authorizes them on the claim of the party, and his shewing the *bona fides* of the claim by paying the rates, either to insert the name in the blank left, or to substitute the true name for the one entered, or, in case of successive occupation, to insert the name of the occupier. That would not

have availed in Mr. Lanyon's case, as there was no omission, no error in it. There was nothing for which the guardians could substitute his name; the guardians had no duty to perform. That construction has been put on it by the 27th section of the 6 & 7 Vict., c. 93, providing for cases of misnomer or misdescription; and again by section 110 of the Registration of Electors Act, under which, in fact, Mr. Lanyon's notice was given, the provisions of which are these. It authorizes any person the occupant of property rated for the relief of the poor to a certain value, whose name shall have been omitted from the rate, to present a claim to have his name on the rate, and on payment of the sum due, the guardians shall insert his name on the rate, and they have no further authority. On these grounds I agree with the judgment of my brother Hayes, and have arrived at the same conclusion as he. In reference to *Quinn's Case*, if I rightly understood that case to be based on this ground, that you can only ascertain whether the tenement is of the proper rated value by reference to the valuation in force, I must say the decision was most correct.

Order discharged with costs.

Court of Common Pleas.

[Reported by J. Field Johnston, Esq., Barrister-at-Law.]

ENGLISH v. DUNNE.—Nov. 15, 17, 1862,

The law of arrest for debt—Construction of 11 & 12 Vic. c. 28, s. 1.

It is competent to a plaintiff who has obtained a civil bill decree for a sum exceeding ten pounds to arrest the defendant, notwithstanding that the latter may by a payment on account have reduced the amount of the debt to a sum not exceeding ten pounds. A civil bill decree was obtained against a defendant for £31 3s. 6d., there being that sum due at the time, and delivered to the sheriff with instructions not to execute it until further orders. By a succession of instalments the amount was reduced to £7 3s. 6d. when the sheriff was directed to arrest the defendant. In an action by the defendant against the plaintiff for an illegal arrest, the judge ruled that the writ was not virtually delivered until the sheriff was directed to arrest the defendant. Held—that this construction was wrong; and it being impossible to draw a distinction between the writs of the superior and inferior courts under 11 & 12 Vic. c. 28, s. 1, and the civil bill decree being in its earlier portion a judgment, and in its latter part an execution, that the writ must be taken to have been "issued" whenever the decree was signed by the Chairman, and that the arrest was justifiable.

THE 1st count of the summons and plaint complained that, before the committing of the grievances hereinafter mentioned, to wit, at a quarter sessions of the peace held before the chairman of the King's County, at Tullamore, in the said county, in the month of April, 1861, the defendant, Jeremiah Dunne, then

being one of the registered public officers of the National Bank of Ireland, as such public officer obtained a civil bill decree from the said chairman, whereby it was ordered and decreed that the said Jeremiah Dunne, as such public officer, do recover from the said Robert English the sum of £30 debt, together with £1 3s. 6d. costs, making together the sum of £31 3s. 6d.; and that the several sheriffs of the respective counties in Ireland were thereby commanded, notwithstanding any liberty in their bailiwicks, to enter the same and take in execution the body of the said Robert English to satisfy the said debt and costs. That after the obtaining of the said civil bill decree as aforesaid by the said Jeremiah Dunne, as such public officer of the National Bank of Ireland, and before the committing of the grievances hereinafter mentioned, the said plaintiff paid to the said National Bank of Ireland, and the said bank accepted from the now plaintiff, divers sums of money, amounting in the whole to the sum of £24, on account of and in part discharge of the said sum of £31 3s. 6d. And that thereupon, and at the time of the committing of the grievances hereinafter mentioned, the sum of £7 3s. 6d., and no more, being the residue of said sum of £31 3s. 6d. after such payments as aforesaid, remained due and payable to the said National Bank on foot of said civil bill decree. That the said Jeremiah Dunne, as such public officer as aforesaid, afterwards, to wit, on the 10th day of March, 1862, although well-knowing the premises, and that the said sum of £7 3s. 6d., and no more, was due to the said National Bank of Ireland on foot of said civil bill decree for debt and costs maliciously, and without any reasonable or probable cause whatever, caused and procured the said civil bill to be delivered to the sheriff of the King's County, and maliciously, and without any reasonable or probable cause, caused and procured the said sheriff to arrest and take the plaintiff by his body upon the said civil bill decree, to satisfy the said National Bank of Ireland, the said sum of £30 debt, and £1 3s. 6d. costs, so pretended to be due on foot thereof as aforesaid, although the said sum of £7 3s. 6d., and no more, for debt and costs, was due on foot of said civil bill decree. And that thereupon, to wit, on the said 10th day of March, 1862, he, the said plaintiff was taken and imprisoned by virtue of said civil bill decree, and lodged accordingly in the gaol at Tullamore aforesaid, and there kept and detained for a long time, to wit, for the space of twenty-four hours. That at the time of such arrest and imprisonment of the plaintiff as aforesaid the sum of £7 3s. 6d., and no more, was due to the said National Bank of Ireland on foot of said civil bill decree for debt and costs; and that after the said arrest, and during the said imprisonment, and long before his discharge, as hereinafter mentioned, he was able and willing to pay the said sum of £7 3s. 6d.; and that afterwards he was discharged from such arrest and imprisonment, and satisfied the said decree by payment of said sum of £7 3s. 6d., and no more. And that by reason of the premises he was not only prevented from attending to his affairs and business as clerk of the petty sessions, and also as clerk of the town commissioners of said town of Tullamore, and injured in his credit and character, but also by means of the premises he was put to and incurred great

costs and expenses in and about procuring his liberation and release from such arrest and imprisonment, and in and about his maintenance during his said imprisonment, to the plaintiff's damage of £500. There was also a count in trespass for assault and imprisonment. The defendant pleaded that at the time the said Jeremiah Dunne, as such public officer, caused and procured the civil bill decree in the first count of the summons and plaint mentioned, to be delivered to the sheriff of the King's County, as in said count alleged, a sum exceeding £10 for debt was due upon said decree, the costs by said decree recovered having been previously paid by said defendant. And that the said defendant did not (save by the said delivery of the said civil bill decree to the said sheriff) cause or procure the said sheriff to arrest or take the plaintiff as in said plaint alleged. A second defence traversed malice in the defendant. The issues joined on these defences were—1. Whether at the time of the delivery to the sheriff of the King's County of the civil bill decree in the first count of the summons and plaint mentioned, a sum exceeding £10 for debt was due upon said decree? 2. Whether the doing of all or any of the acts in the first count of the summons and plaint mentioned was malicious, and without reasonable or probable cause? At the trial before Monahan, C. J., the plaintiff proved that on the 27th of March, 1861, the defendant obtained a civil bill decree against him for £31 3s. 6d. That after the decree was obtained the defendant agreed to accept the amount by instalments of £3 a month, several of which the plaintiff paid, and made default in the remainder, the result of which was that in March, 1862, only £7 3s. 6d. remained due for debt and costs. That he was arrested on the 10th of March by the sub-sheriff, and remained in custody in the county gaol till the next day, when he was discharged on payment of the sum of £7 3s. 6d., which was admitted to be the sum due. The governor of the gaol proved that the decree under which he received the plaintiff in execution purported to be a decree for £31 3s. 6d.; and that he got no directions to discharge on payment of a less sum, but did on the following day discharge him by direction of the sub-sheriff; and the sub-sheriff proved that the decree was lodged with him shortly after its date, but with directions not to execute it till he got special directions to do so; that on the 10th of March, 1862, he was desired to execute it, but did not get any precise directions as to the sum he was to arrest for; that he did arrest the plaintiff on that day and discharged him the day following, by directions of the plaintiff's attorney. The Chief Justice was of opinion that malice had nothing to do with the case; but to obviate the necessity of a new trial in any result, left the question to the jury, who negatived malice in the defendant and the officers of the bank. He then ruled that the decree was not virtually delivered for execution till the 10th of March, 1862, when only £7 3s. 6d. was due on foot thereof. And conceiving that the question really in dispute between the parties was whether under the 11 & 12 Vic. c. 28, the plaintiff in the civil bill decree was justified in delivering it for execution when only £7 3s. 6d. was due on foot thereof, he left the question of damages to the jury, and by consent of the parties reserved liberty for the

defendant to apply to have the verdict entered for him if, under the 11 & 12 Vic., c. 28, he was justified in having the plaintiff arrested. And it was agreed that the court should have power to amend the pleadings, so as to raise the question of the construction of that Act for the determination of the court. The defendant's counsel on the 5th Nov. accordingly obtained a conditional order, against which

J. T. Ball, Q.C. (with him *F. L. Dames*) for the plaintiff, showed cause. To arrest a man for a greater sum than is due is a personal loss and personal inconvenience, and therefore a ground of action. At the foot of the civil bill decree is the warrant, signed by the sheriff. [*Monahan, C.J.*—In this instance the sheriff himself arrested, and so no warrant was necessary; but after the arrest he wrote something at the foot of the decree.] The Act upon the construction of which this question depends is the 11 & 12 Vic. c. 28, the first section of which runs thus:—"Whereas it is expedient to limit the present power of arrest for debts, damages, demands, or costs under process issuing from courts of law or equity, or inferior courts, in Ireland: be it enacted, that from and after the day of the commencement of this Act no writ of *capias ad satisfaciendum* or other writ, process, or warrant to arrest the body of any defendant in any action or suit shall be issued in Ireland, founded on a judgment, decree, or order of any of the superior courts of law, or of any inferior courts in Ireland, when the sum due or to be paid by or under such judgment, decree, or order, exclusive of the costs, if any, thereby recovered or ordered to be paid shall not exceed the sum of ten pounds." The embarrassment is caused by the expression "issued." In the analogous English section the 7 & 8 Vic. c. 96, s. 57, the expression is "wherein the sum recovered shall not exceed," &c. [*Monahan, C.J.*—Remotely that applies in this way; that if at the time of issuing the debt is due, it may be argued the arrest is legal.] The Irish Act contemplates proceedings after the recovery; it speaks of "the sum due or to be paid." The English Act does not contemplate any such procedure as the money being allowed to remain due. It does not contemplate payments by instalments, whereas the Irish Act does contemplate that such payments after recovery may fetter the plaintiff. It would be a narrow construction to hold that issuing meant a technical act, and it would put parties under a civil bill decree in a worse position than defendants against whom judgments are recovered in the superior courts if arrest were legal, as long as the total amount of the debt was not paid. By issuing under this Act was not meant an abortive silent procedure—a dormant process, as it must be if the decree is kept in the pocket of the plaintiff and not given to the sheriff. [*Monahan, C.J.*—The question is this,—can a distinction be taken between this and the case of the superior courts? and, first, would a judgment recovered in the superior courts authorize the arrest under the circumstances of this case?] The prominent object of the Legislature was to take away the right to arrest when the debt had been reduced by payments; and is it not a narrow construction to hold that they stopped short in the way contended for? The policy of the English Act is to give no credit

after judgment recovered; the policy of the Irish Act is the reverse. Rigidly interpreted, "issue" may be taken to mean "issue" from the court, but in this case it may be held to mean "issue to the sheriff." [*Christian, J.*—There is a difficulty in saying that the civil bill decree is a writ, process, or warrant under the first section.] In that case we are not within the Act at all. [*Christian, J.*—In the superior courts the case is clear enough, because the judgment and execution are two different things; but in the inferior court there seems to be no writ, process, or warrant other than the civil bill decree itself.] There are no authorities but English ones to affect this case of *English v. Dunne*, which is the first Irish case; but though I admit them to be hostile I insist on this, that the policy of the two Acts is different. [*Monahan, C.J.*—Is not the plain meaning of issuing issuing from the court? Was it intended that the decree should not be delivered to the sheriff? If an ordinary writ of execution against goods be delivered to the sheriff with directions not to execute it, and another execution be delivered without any such restriction, the second creditor is held to have precedence.] To hold that issuing involves connexion with the sheriff would embrace every case, would meet every mischief. [*Keogh, J.*—Is the decree *in toto* delivered or an abstract of it? *Christian, J.*—The Act directs the assistant-barrister to sign the decree; and I take it that is the decree which he signs. Might not the requirements of the statute be complied with as follows:—by treating the portion of the decree declaring the sum recovered as the judgment and the operating part as the execution? And the issuing would mean when the decree was put in process of being carried out.]

Battersby, Q.C., and *C. Palles*, in support of the order.—The words of the statute must not be added to or expanded. We come to justify under a legitimate execution, and express words alone can take away our right. The words in the English and Irish sections are different, but the Legislature had in both the same object, viz., that a certain sum recovered should be the minimum giving the power to arrest. The state of facts at the time of the money being recovered is the material thing. The question to be decided is, what is the issuing of the execution? The issuing of a writ has always been understood to be the suing out of it, the getting the sanction of the court to it. There are no such words as "executing the execution." The second section of the 11 & 12 Vic., c. 28, makes use of both expressions, "issued" and "executed," and enacts that in case any such writ, process, or warrant, to arrest the person, shall have issued before the commencement of the Act, when the sum thereby due, or to be recovered and paid, shall not exceed the sum of ten pounds, and such writ, &c., shall not have been executed before the commencement of the Act, it shall not be executed afterwards. To make this arrest illegal, the first section ought to have stated that the writ should not be executed if only ten pounds were due at the time of the arrest. So in *Ewart v. Jones* (14 M. & W., 774), which decided that trespass would not lie against a creditor who had sued out a writ of *ca. sa.* upon a judgment regularly obtained by him against the debtor, after

the debtor's discharge under the Insolvent Debtors' Act, 3 & 4 Vict., c. 107. Parke, B., says, at page 787—"All that the 81st section enacts is, that if any person is arrested after he has been declared entitled to the benefit of this Act, it shall be lawful for any judge of the court from which the process issues, to release him from custody. The 82nd section enacts that no *capias ad satisfaciendum* shall issue against the party so discharged under the Act. Now, I take these words to mean that a plaintiff who has a suit against the insolvent *ought not* to issue a *ca. sa.*; not that, if issued, it shall be absolutely void." This goes to the extent of holding that the original process preserves the creditor, unless words in a statute have taken away his right. [*Monahan, C.J.*—In the case of the Superior Courts, the sum due must be marked on the execution. Suppose a judgment recovered for £100, and no over marking, could the writ be marked for £9, and the party arrested on it? Or do you suppose that a person could be arrested on a judgment upon which there was only £8 due? You make the amount recovered, not the amount due at the time of issuing the writ, the test of the power to arrest.] [*Christian, J.*—Your argument is, that the English and Irish statutes are the same, notwithstanding the difference in their words. The question comes back to this—is the writ issued before the restraint is taken off from the sheriff? The sheriff has nothing to do with the issuing of the writ; his business is with its execution; and, by the second section, he cannot, under certain circumstances, execute it, which clearly distinguishes the two sections.

F. L. Dames, in reply, cited *Lessee of Shulldham v. Boles* (2 Ir. Com. Law Rep., 140); *Johnson v. Harris* (15 C. B., 357); and referred to an unreported case of *Nolan v. Delany*, which had been tried before *Monahan, C. J.*, in August, 1853. The second and third sections of the 11 & 12 Vict., c. 28, throw light upon the first. In the second, which provides for the case where the writ has been issued, but not executed before the Act was passed, it is forbidden to be executed "when the sum thereby due, or to be recovered and paid, shall not exceed," &c. What do the words, "or to be recovered and paid," mean? As in *Johnson v. Harris*, Maule, J., referring to the English section, says, "I think that, in favor of the liberty of the subject, we ought to give the words of the Act a large and liberal construction, so as to effectuate the intention of its framers;" so I say these words, "or to be recovered and paid," intimate, in favor of the liberty of the subject, a protection to the debtor. [*Monahan, C. J.*—These words might be put in relevant to the custom of marking the execution for a smaller sum than was recovered by the judgment.] I admit that issuing may, and does, mean issuing out of the court; but I submit that this is not its only meaning; and I ask for as liberal a construction of the first, as of the second and third sections—for as liberal a construction where the case comes within the mischief of the Act after it has been passed, as where it did so before it was enacted.

Cur. adv. vult.

Nov. 21.—*MONAHAN, C. J.*, having stated the preliminary facts, and the substance of the civil bill de-

cree, proceeded to deliver the judgment of the court.—It appeared at the trial before me that directions were given to the sheriff not to execute the decree without further orders, and so it remained for several months. An arrangement was entered into to hold over, provided the present plaintiff would pay instalments by the month, and this he did for some time, until he was prevented by a domestic affliction. There remained £13 due, when by a fresh effort he succeeded in reducing the amount to £7 3s. 6d. It is now admitted that on the Saturday previous to the arrest there was only that sum due. On the morning of the 10th of March the plaintiff was arrested, the official of the Bank, who was immediately active in procuring the arrest, believing that there was £13 due. The plaintiff had not ready either that or the smaller sum, and on the next day was discharged, it having been ascertained that only £7 3s. 6d. was due. So that the facts are these, that the decree was delivered to the sheriff when £31 was due, and when directions to arrest were given, only £7 3s. 6d. was due. Upon this state of facts, is the defendant liable in an action for illegal arrest? The issues were settled before me, and there was some informality in them. By consent of the parties, the only question really argued at the trial was, whether, under the 11 & 12 Vict., c. 28, there had been an illegal arrest. By consent, also, I got the jury to assess the damages. I did not think malice had anything to do with the case, which turned upon the construction of the 11 & 12 Vict., c. 28. The first section, after stating that it is expedient to limit the present power of arrest, enacts "that from and after the day of the commencement of this Act, no writ of *ca. sa.*, or other writ, process, or warrant, to arrest the body of any defendant in any action or suit, shall be issued in Ireland, founded on a judgment, decree, or order, of any of the Superior Courts of Law, or of any Inferior Courts in Ireland, when the sum due or to be paid by or under such judgment, decree, or order, exclusive of the costs, if any, thereby recovered or ordered to be paid, shall not exceed the sum of ten pounds." I thought at the trial the writ was not virtually delivered until the sheriff was given directions to execute it. What is the meaning of these words, "shall be issued," when the sum due, or to be paid shall not exceed £10? It occurs to us that looking at this section, it is impossible to give a different construction to the different writs. No one can doubt when a *ca. sa.* issues; it is when sued out from the officer of the court. So it was rightly held in *Lessee of Shulldham v. Boles* (2 Ir. Com. L. R., 140). What is the distinction between that and the case of an inferior court? We can make no distinction. This decree is a judgment in the earlier portion of it, and in the latter part an execution. Both must be delivered to the sheriff. He need not, however, himself arrest the party, but he may if he likes. He may issue a warrant at the instance of the plaintiff. But here no warrant was issued, and none was necessary. It is true the sheriff signed a committal after the arrest to be the gaoler's authority for detaining his prisoner. We think it is impossible, having regard to the intention of the Legislature, to do else than inquire what was due when the decree was issued, i.e., when the decree was signed

by the Barrister. The circumstance of giving time to the debtor does not interfere with this. We think the arrest in this case was justifiable, and that my decision at Nisi Prius was erroneous. In trying a former case, I thought that the change of sheriff necessitated a return to the court to get the writ re-issued, but that is not so. If a year elapse, and it be necessary to renew the decree, then there is a fresh issuing of the process.

Let the order be made absolute to enter the verdict for the defendant; but as the pleadings are useless, let them be amended so as to raise the proper question. In the event of the parties not agreeing, let a summons be issued for that purpose; and as the confusion upon the pleadings arose as much from the defendant's fault as the plaintiff's, let each party abide his own costs.

Rule accordingly.

NOTE.—The following is the form of Civil Bill Decree referred to in the argument:—

It is therefore ordered and decreed by the court that the plaintiff do recover from the defendant the said sum, together with costs; and the several sheriffs of the respective counties of Ireland are hereby commanded, notwithstanding any liberty within their bailiwicks, to enter the same, and take in execution the body of the defendant, to satisfy the said debt and costs.

Dated
Signed

I authorize and empower _____, or either of them, and their assistants, special bailiffs, at the plaintiff's peril, to execute the above decree. Given under my hand and seal this _____
Sheriff.

TAYLOR v. CLARKE.—Nov. 18, 20, 1862.

Retainer—Absence of counsel from the trial—Absence of counsel from the country in which the trial is had.

A plaintiff and defendant were equally desirous of securing the services in a trial of a particular counsel, who was then attending his duties in Parliament. The latter left a retainer at the counsel's house, and the former subsequently communicated with him by post and by telegraph. The counsel disappointed both parties, and arrived on the night of the day on which the trial had concluded. Held, that an application by the defendant that the taxing master should be directed to review his taxation, and disallow a fee of £10 10s. given by the plaintiff, who was the successful party in the action, to the counsel, but which application did not make a case of want of bona fides, either in the plaintiff or the counsel, should be refused.

The court will not entertain a question arising upon the practice of retainer, but will leave it to be decided by the counsel retained, or by the members of the Bar generally.

Henry Devitt (with him Serjeant Armstrong) for the defendant, applied that the taxing officer might be directed to review his taxation of the costs in this case, which was an action brought by one medical man

against another, and tried before Monahan, C. J., on the 24th of June, 1862, and which resulted in a verdict, with damages of £100, for the plaintiff. The affidavit of the defendant's solicitor stated that he had called two or three times at the residence of Mr. Whiteside, and saw there a person who appeared to be his housekeeper, and who said that he was expected home, and that she would take any messages for him. That he prepared a docket to retain Mr. Whiteside's services, and left £2 2s. with the housekeeper, who, on the night preceding the day on which the case came on for trial, stated that he was expected home, in consequence of which the defendant's briefs were not given to another counsel. That it appeared the plaintiff's solicitor sent a telegram to London, where Mr. Whiteside then was, requiring to know if he was retained by the defendant, and if not, requesting him to consider the telegram a retainer for the plaintiff, and this was followed by a brief in course of post. That in point of fact Mr. Whiteside did not arrive in Dublin until after the trial was over, subsequently to which he returned the £2 2s. to the deponent, stating that he had accepted a brief on the opposite side; that a fee of £10 10s. had been given with this brief which the taxing officer allowed to the plaintiff. The proper number of counsel to be instructed upon a trial is two—Ferguson's Common Law Procedure Act, Schedule of Fees, pp. 297, 298. It is not denied that this was a proper case for three counsel, but this schedule of fees will, under the present circumstances, be an indication of the intention of the Legislature. [*Monahan, C. J.*—There is no allegation that the plaintiff was at all aware, when he sent the brief to Mr. Whiteside, of what the defendant had done.] No; but the facts show a suspicion on his attorney's part of what had happened. The plaintiff pretermitted making an inquiry, which would have enabled Mr. Whiteside to answer. Mr. Whiteside was duly retained for the defendant. This case may be distinguished from *Baylis v. Groud* (2 Mylne & Keen, 316), in which *Cholmondeley v. Clinton* (19 Vesey, 261), was cited. Questions of retainer, where they do not affect the counsel, are, for collateral matters, entertained by the court.—*Lucas v. Peacock* (8 Beav. 1). [*Monahan, C. J.*—Your argument, if it amount to anything, must be, that if Mr. Whiteside had, on the whole, accepted the plaintiff's retainer improperly, we might notice it. The question comes to this, whether, if we cannot interfere on the ground of Mr. Whiteside's being retained by your client, the circumstance of his being out of the country, and not being here at the trial, constitutes a reason]. Upon the point of the counsel being out of the country, there is no authority either here or in England. [*Christian, J.*—If a counsel is in a place from which it is improbable that he will return, and parties choose to speculate on his coming back, and if he does not come, it seems to be a question if a fee, given under such circumstances, ought to be taxed against the opposite party.] Those who have the honour and ultimate profit of seats in Parliament, ought to sustain the loss of briefs posted to them to Parliament, and retainers sent by telegram. If the course which was here followed be sanctioned, it will become a practice to send out two briefs, one to the counsel practising at the

Bar, and the other to the counsel recreating himself on the Continent.

Joshua Clarke, Q.C., contra.—There are two grounds laid for this motion, one that Mr. Whiteside ought to have accepted the defendant's retainer; the other that he was not present at the trial. As to the first, it has been a question if one retainer was given to a counsel in the Hall of the Four Courts, and another in the same cause sent to his house,—or if one was oral, and the other written, which he would be bound to act upon. That question arose in the O'Connell case with reference to Mr. Napier, and was brought before a committee of members of the Bar and solicitors, and it was decided that the retainer which came first to the counsel personally was the one binding [*Monahan, C.J.*—That which came first to his personal knowledge.] As to the second ground, the telegram was sent on Saturday, the 21st June. Mr. Whiteside received it in the course of that Saturday, and replied that he could not be back till the following Tuesday. He did arrive on the Tuesday night. The case had concluded on the Tuesday, owing to a number of other cases being struck out, the parties in them not being ready. It might have been necessary to send this brief to Cork, and can it make any difference that it had to cross the sea?

Serjeant Armstrong in reply.—Some rule ought to be laid down. I would suggest that in case of a counsel being absent, an attorney should not be at liberty to communicate with him without first ascertaining either from the opposite attorney, or by inquiry at the counsel's house, if he had been retained on the opposite side. [*Monahan, C.J.*—It would be easy to write by post to the counsel in London to tell him that a retainer had been left at his house.] I have known the retainer left at the house to be the binding retainer in the case of another retainer being given in court.

MONAHAN, C.J.—We think there is no ground for this application. It is for the counsel himself, or the other members of the Bar, to determine whose retainer Mr. Whiteside was bound in this instance to keep and act upon. Does the circumstance, then, of Mr. Whiteside having been absent from the trial make any difference? If the case were made that the brief and retainer were not given by the plaintiff *bona fide*, we might entertain the application. But in this instance, from an intimation which I gave at the after-sittings, it was clear that there could not have been a trial before the 21st June. Mr. Whiteside replied that he would be home in time for Wednesday, and the parties were under the impression that the trial would not come on till the Wednesday. The question is reduced to this, if the brief and fee are *bona fide* given and accepted, will the circumstance that the counsel was not able to be there, disentitle his client to tax the costs of them? Who is injured? The client who retained the counsel, and he alone. We could not interfere unless we were prepared to say that no fee should be allowed when the counsel was not in attendance. A different rule holds both in this country and in England, and the present application has not been pushed to the extent of asking for such a principle to be laid down.

Application refused.

CAREY v. WALSH.—Nov. 20, 1862.

Ejectment—New trial motion—Surprise—Responsibility of client for the mala fides of his attorney.

*In the course of the trial of an ejectment brought to recover a tract of land of very trifling value, it was proposed by the plaintiff's counsel, and acceded to by the defendant's counsel, that the issue between the parties should be tested by the ascertainment of a particular matter of fact deposed to by the plaintiff, and it was further agreed that the written reply to a written interrogatory addressed to the official of a bank in a neighbouring town should be conclusive of the question between them. The clerk of the plaintiff's solicitor, who had been conducting the trial throughout on the part of his master's client became the bearer of this missive, and brought back an answer in writing which was of ambiguous import; but the writer, by a verbal communication made contemporaneously with the delivery of the answer, explained to the clerk that its meaning was what would in fact have proved unfavourable to the plaintiff. The clerk made no mention of this communication, and the jury found a verdict for the plaintiff, subsequently to which the defendant discovered the fact of the verbal explanation. At a still later period it was ascertained by the plaintiff's attorney that the verbal explanation by the bank official was itself a mistake, and that the merits, so far as they could be tested by the proposed method, were entirely with his client. Held, that a conditional order for a new trial on the grounds of surprise, newly-discovered evidence and suppression of evidence should be discharged (*Monahan, C.J., dissentiente*).*

And, per Christian, J., that the conduct of the attorney in not submitting the oral communication for the consideration of the court, was blameworthy.

And, per Ball and Keogh, JJ., that to make absolute the order for a new trial would be punishing one person for the fault of another.

And, per Keogh, J., that there was no duty in the attorney or his clerk to communicate the explanation.

And, per Monahan, C.J., that the clerk, under such circumstances, could not be separated from the attorney, nor the attorney from his client; that it was the imperative duty of the attorney to have submitted the explanation for the consideration of the court, and that, irrespectively of any merits, a verdict tainted by such a suppressio veri ought not to be allowed to stand.

An ejectment had been brought by the plaintiff to recover from the defendant, the son and devisee of a deceased brother, a moiety of a farm held under a lease made by the Earl of Kingston. At the trial before Keogh, J., at the last Assizes for the County of Limerick, it appeared in evidence that an arrangement had been entered into between the plaintiff and his deceased brother for the purchase for £35 of the lands in question, and a deed was accordingly prepared, in which, in order to avoid an additional stamp-duty, the consideration-money was stated to be £20. The deed, though executed, was in fact never delivered to

the plaintiff, but remained in the hands of a third party until the purchase-money should be paid. Subsequently to this the brother died, and devised by his will the same premises to the defendant. The plaintiff deposed in addition to this, that on the 22nd Feb., 1858, he had exchanged a deposit receipt for £35 in the National Bank of Fermoy, and, in the presence of one Mr. Murrough and his clerks, had paid the amount to his deceased brother. There was some corroboration of the plaintiff's case, it being proved that the defendant had offered to return the £35 on one occasion, and the clerk of the solicitor of the parties stating his recollection of some reference being made to a deposit receipt. The defendant's contention at the trial was, that the alleged transaction at the Bank at Fermoy never took place, and that the £35 was never paid. While the defendant's counsel was addressing the jury to this effect, the plaintiff's counsel interrupted him, and offered to stake the entire of his case upon the question if the plaintiff had £35 standing to his credit in the books of the bank at the time referred to. This offer was accepted, and, to save the inconvenience of making *profert* of all the books of the bank, it was agreed that the manager should be written to, and that the parties should be bound by his written reply. A letter was drawn up, and approved of, and entrusted to the clerk of the plaintiff's solicitor, who, at the trial, had a considerable portion, if not the entire, of the management of the plaintiff's case. The clerk went to Fermoy, and brought back from the manager a written reply of ambiguous import, which ran thus:—"I have searched the books of the bank, and I find the name of Thomas Carey for a sum of £150 lodged on the 18th of May, 1857, and taken away by him in full on the 22nd of February, 1858." The plaintiff contended that this meant that he had drawn out the £150 by little and little, until it was all drawn—the defendant, that its meaning was that it was all drawn in a bulk sum. It was proposed to send another message of inquiry, but to this the judge objected on the score of time, and suggested that the verdict in the ejectment should abide the result of his own personal inquiries when he got to Cork—a suggestion which was at first embraced, but subsequently declined by the plaintiff's junior counsel. The case then went to the jury, and the judge submitted to them both constructions of the document, and conceiving that the truth lay with the plaintiff, charged in his favour, and he obtained a verdict. The defendant's attorney then went to the bank, and ascertained from the manager that the meaning contended for by his client was the true meaning of the answer, and further, that the manager had verbally explained this to the plaintiff's attorney's clerk when he gave him the answer, and the manager subsequently made an affidavit to this effect. Upon these facts, a stay of execution was obtained from the judge by the defendant. The plaintiff's attorney becoming equally active, next ascertained that the manager's answer to the letter sent to him was a mistake from beginning to end, and it was found, on private inspection of the books of the bank, that in October, 1856, the plaintiff had lodged two sums of £111 and £60, and, on the 28th December, had drawn out the entire of these two amounts, and relogged £30, which, with the accru-

ing interest, would make about £35, on the day in question, the 22nd February, 1858. In the meanwhile the defendant obtained a conditional order for a new trial, on the grounds of surprise, newly-discovered evidence, and suppression of evidence, against which

J. T. Ball, Q.C., (with him *H. P. Jellett*) showed cause.—The newly-discovered evidence is, in fact, evidence in the plaintiff's favour. [*Christian, J.*—The defendant will not be prevented from bringing his cross-ejectment.]

C. Barry, Q.C., and *J. S. Greene*, contra.—There never was a more unsatisfactory state of things. Here is a suppression by the attorney's clerk at the trial of a verbal communication made to him by the manager of the bank. Had he acted fairly between the parties, he would have told what was the truth. [*Christian, J.*—He suppressed what was not the truth, as it turns out, and what would have caused a miscarriage at the trial.] It was the truth *ad rem*. The dishonest artifice is a reason for granting a new trial. [*Christian, J.*—Suppose the clerk had made this statement, and that a verdict were obtained for the defendant, would not that verdict be set aside as a matter of course by reason of the newly-discovered evidence? Why should we set aside this verdict because, by a happy accident, the clerk did commit a *suppressio veri*?] [*Keogh, J.*—It is not clear to me that if the clerk, having heard something favourable to the plaintiff, had attempted to give it in evidence, there would not have been strong objections to his doing so, seeing that the parties were bound to let the letter decide the question.] We do not claim a new trial on any technical grounds, but on principle, nor is it material whether the new trial does not last five minutes. The verdict ought not to stand if truth and fairness are to hold place in the conduct of trials. The plaintiff swore to a particular sum, and it was with reference to that particular sum that the letter was drawn up, and conceiving we were dealing with a specific sum of £35, we thought there could be no ambiguity in the answer. The defendant's counsel was interrupted by the plaintiff's offer, and prevented from commenting on the fact that the plaintiff never got possession of the deed during his brother's life. A verdict tainted by this suppression, if allowed to stand, will establish an evil precedent. [*Ball, J.*—Do you go the length of contending that this case ought to be sent to a new trial against the truth, upon an abstract principle?] Yes. [*Ball, J.*—You will find it hard to sustain that proposition.] [*Monahan, C.J.*—Your argument is, that if an attorney bring forward evidence, knowing it to be false, the verdict should be set aside, though there be sufficient evidence, without that false evidence, to sustain it?] Yes. [*Monahan, C.J.*—It is the general rule that in an action of ejectment a new trial will not be granted on the ground of newly-discovered evidence, unless the court is satisfied that this evidence is very likely to lead to a different result, but I do not think this a case of newly-discovered evidence at all, and my impression is, that no merits will support a verdict obtained in the manner alleged by an officer of the court.] The plaintiff's attorney has not made an affidavit. [*Ball, J.*—The clerk was the agent of both parties; was he bound to volunteer the information?] Yes; because

he was the agent of both parties. It had a tendency to diminish the credit of the plaintiff's evidence.

H. P. Jellett in reply.—It is the rule that no verdict will be set aside on the ground of surprise, unless the court be satisfied that such verdict was substantially wrong.—*Tharpe v. Stallwood* (6 Scott's New Reports, 730). The manager of the bank could never have been expected to tell, as a witness, whether several years before a particular sum of £35 had stood to the plaintiff's credit in the books of the bank, and it was understood that the written reply was to be the only test. The statement in that reply was completely untrue. The oral statement was untrue, and if true, was not evidence, and could not have been received. Suppose it had been favorable to the plaintiff's case, would it have been competent to the clerk to make it public? Is he to get up and contradict a counsel when he hears him put a construction on the written reply, simply because the oral statement is unfavourable to the plaintiff, his client? Where is the line to be drawn? The clerk was no party to the letter. The proposition contended for ought to have some authority to sustain it. It is startling to hear that a new trial ought to be granted in order to inflict an exemplary punishment, not upon the attorney or the attorney's clerk, but upon the client, who was no party to the act complained of. What are the grounds for this motion? The further light only confirms this verdict. It shows that if the additional facts had been before the jury, they would not have hesitated for a moment. In the first place there was no duty to disclose this oral statement; in the second place, it was not legal evidence; in the third place, it was not true. [*Christian, J.*—Are you not going too far when you say it was not legal evidence? Suppose a mistake in the letter, could not the writer, a moment after writing it, state he had made it, and correct it with his tongue instead of with his pen? Would this have been illegal?] It would, inasmuch as the parties were bound to receive the written statement. [*Keogh, J.*—From my recollection of the trial, I should say if a parol statement had been proffered, I would not have received it, and upon the ground that the answer was to have been in writing.]

KEOGH, J.—There was evidence given at the trial that the defendant had offered to return the £35, and when examined he was never asked to contradict this. The plaintiff swore he paid the sum in the bank by drawing it out upon a deposit receipt. The clerk who prepared the conveyance stated his recollection of some reference being made to a deposit receipt. The proposition to refer to the manager of the bank came from the plaintiff's counsel. "These poor parties," said he, "are related to each other, and it can be ascertained if this money was or was not paid." It was suggested that the attorneys on both sides should go to Fermoy, when one of them said he would not go there for the whole consideration. It was then agreed, and the understanding, as conveyed to me, was, that a letter should be written to the manager, and that by the written answer to this letter the parties should be bound. A day or two elapsed, and in the interim the most important of the cases came on for trial. The written answer arrived, and on its being produced I saw at a glance that it was of doubtful construc-

tion. It was proposed to send for another, but I thought that this would take too much time, and suggested a course to which the plaintiff's junior counsel objected. I then took the document, and left it to the jury with both the constructions contended for, and I charged strongly in favor of the plaintiff. I thought the truth was with him, and the subsequent facts have shown that it was. It turns out that the evidence of the plaintiff was correct; that a sum corresponding to the sum sworn to was paid out by the bank at the time alleged. I believe the plaintiff would have had a verdict without any reference to the bank. The jury adopted the construction favourable to the plaintiff. And, lastly, subsequent disclosures have confirmed all this. Can this be considered newly-discovered evidence to sustain a motion for a new trial, which, if known at the time, would have gone more strongly to confirm the verdict. It is said the attorney's clerk was guilty of bad faith in not communicating the oral explanation given to him. I understood nothing of any oral statement. If the clerk had tendered a piece of oral testimony favorable to the plaintiff I would have rejected it; and any attempt to give a different version of the letter I would have received with great suspicion. I do not think the clerk was bound to act in this manner; but rightly or wrongly as he may have acted, we do not (with the exception of the Lord Chief Justice) conceive that we ought to punish the client upon this account.

CHRISTIAN, J.—Perhaps the attorney cannot be severed from his client. I think it would have been fairer and more candid to have brought this oral communication before the court (if not, to have put it to the jury), in order to enlighten the court as to the course to be pursued. I do not therefore approve of the course adopted by this clerk; but that is not the present question. Shall we send the parties down to another trial now that we know that the oral statement, if communicated, would have had the effect of subjecting the jury to the influence of what was false, now that we know that the result of the trial is entirely in favor of justice? I do not think that in support of an abstract principle we ought to send these parties down to contend again about this miserable property. But I do not acquit the attorney of blame.

BALL, J.—There may be a doubt upon the strict propriety of what this clerk did; and on the ground of that doubt I abstain from saying anything which might reflect on the attorney. No case has been cited to show that such an application as has been here made was ever granted. It is impossible that a different verdict can now be given which would not be set aside by the court. The thing asked for is devoid of justice and devoid of precedent. It would be punishing one person for the fault—if fault it be—of another.

MONAHAN, C.J.—The subject-matter in dispute being very trifling, this motion, in my opinion, involves a much graver consideration, viz., the duties of the officers of the court, and the consequences of a breach of duty in them. I do not concern myself with the respective addresses of the counsel at the trial; if I could I might perhaps agree with my brother Keogh, that the evidence for the plaintiff preponderated. No

doubt, a verdict had without a reference to the bank could not have been disturbed, for the subsequent facts show that without perfect materials the jury came to a true conclusion. I come to this,—that when the defendant's counsel was commenting on the want of confirmation of the statement that the £35 had been paid, it was proposed to refer to the officer of the bank. The plaintiff's evidence I take to be that he, having a deposit receipt, changed it and paid the amount in the bank. It was this that was capable of easy confirmation. The letter was written in general terms to know whether the plaintiff had any, and what sum, standing to his credit, and when he drew it out. The officer of the bank has made an affidavit, stating that he received the letter, which appeared to be from the attorneys of both parties, and that he wrote a reply. The reply was capable of two constructions; and this affidavit states (what raises the difficulty in my mind) that at the time the manager handed the answer to the person who brought him the letter he explained to him how the accounts stood; and that Thomas Carey, the plaintiff, had no other sum standing to his credit; and that it was all drawn out on the one occasion. I conceive this reply to have been given to the attorney for all intents and purposes, and I take it to mean that the money was all drawn out on the one day. There is nothing to show whether the communication was carried on to the attorney by his clerk, nor do I think it material whether it was or not; but if I might guess as a matter of fact, I should say it was. But from the circumstance of the whole of the case being conducted by the clerk, I think it would be trifling with the duties of an officer of the court not to hold that there was such misconduct here, as his master would be responsible for. I take it the clerk knew what was the meaning of the written reply, and that it was a result to be expected, that there would have been a verdict for the defendant if the communication had been told. The great contest was concerning the meaning of the letter. I do not enter into the question, whether the evidence of the clerk could have been received or not; but I do not doubt that at least my brother Keogh would have postponed the trial until the bank official should have been present to give the evidence properly himself. I agree with my brother Christian in what he has said regarding the attorney, and perhaps go a little further; for I have no doubt that it was the bounden duty of the attorney, if aware of what his clerk knew, to convey the explanation; for I consider the explanation was a part of the written answer. And I think a verdict obtained by such a suppression from the court ought not to stand. This court is not the tribunal to decide what verdict a jury ought to give. The verdict was improperly obtained by this suppression. The client in such a case is bound by what his attorney does. The majority of the court, however, being of a different opinion from that which I have expressed, the result must be to have the verdict stand and the

Rule discharged.

Court of Probate.

[Reported by W. R. Miller, Esq., LL.D., Barrister at Law.]

IN THE GOODS OF JOHN SMITH FLEMING, DECEASED,
INTESTATE.—January 27.

Practice—Limited administration.

Where a sum of £70 or thereabouts, was lying in the hands of the Commissioners of Police, being the balance due to the deceased for his pension as a police magistrate, the court refused to grant administration to a creditor of the deceased's to whom his pension of £500 a year had been assigned as a security for an annuity, and to whom the sum of £38 2s. was due, limited either to the said sum of £70, or to receiving and giving a discharge for £38 2s., part of said sum of £70.

T. Wheeler moved on behalf of the Rev. Wm. McCulloch, for a grant of letters of administration to the goods of the deceased, limited to the sum of £70, in the hands of the Commissioners of Police. It appeared from the affidavit of the applicant that the deceased had been formerly one of the police magistrates of the city of Dublin, under the old corporation, and had, on the change of the system by the Reform Bill, been pensioned. This pension was £500 per annum. In the year 1819 he granted an annuity of £140 2s. 6d. a year to Mr. Sheera for the life of deceased, and charged it on said pension, and assigned it as a security for the payment. In 1853 Sheera assigned to Bargenny McCulloch, who had died, and the present applicant was his representative. There remained at the death of the intestate, which was in April, 1862, a sum of £38 due to the applicant on foot of the said annuity. And there was due to the deceased at his death a sum of £70 or thereabouts, the balance of his said pension, which the Commissioners of Police would pay on the production of letters of administration. [Keatinge, J.—Your debt is less than the fund. How can I give you authority by a limited grant to draw more than is due to you?] We will give security to pay it back, or we will be satisfied with a grant limited to the amount of our debt—*In the Goods of Steudman* (2 Hagg. 59); *Pegg v. Chamberlain* (1 Sw. & Tr. 527).

KEATINGE, J.—You have a clear right to a general grant on citing the proper parties and giving security. If your debt covered the whole fund it would be a different thing; but you are asking for a grant where you would have to settle the account with yourself. As to giving a grant limited to a part of the fund, the authorities cited do not warrant me in doing so; they were cases where part of the assets had been long severed from the rest; but that is not this case. And if I made the order here I should be obliged to do so in every other case, the consequence of which would be that numerous administrations would be out respecting the same assets. It is contrary to the settled practice in the office.

No rule.

RUSSELL v. RUSSELL.—Jan. 29.

Practice—Caveat—20th rule of April, 1861.

The 20th rule of April, 1861, does not apply to cases of persons lodging caveats "in the goods" who are not by interest entitled to do so; and an appearance entered, accompanied by a notice in the terms of that rule and the caveat, will in such cases be set aside with costs.

THE deceased, Sydney Russell, died recently intestate, leaving his widow, Mary Russell, the plaintiff, and one child. A caveat was entered on behalf of James Russell, but the caveat merely said "having an interest." This was warned, and an appearance entered by the said James Russell, described as the natural and lawful brother of the deceased; and a notice at the same time was given, stating that the only object of the appearance was to see that proper security for the share of the child in the assets of the said deceased should be given, and claiming to be heard on petition respecting such matter.

Dr. Miller, for the plaintiff, now moved to set aside the caveat and appearance, and for liberty for the plaintiff to apply in the office for letters of administration of the goods of the said deceased. The defendant had entirely misconceived the meaning and intent of the 20th rule of April, 1861, which is expressly confined to *causes* relating to grants of probates or letters of administration; but here no *cause* existed when the caveat was lodged, nor until an appearance was entered. The rule was intended to apply to cases where parties in a *cause* having an interest desired to confine the evidence to some particular point, and so lessen the expense; but here the defendant had no interest at all, and no right to appear. As to security the registrars have under the rules, full power to require, and always do require, proper security.

The 20th rule is as follows:—"In all cases relating to grants of probate or letters of administration it shall be competent for the defendant on the day upon which an appearance is entered by him, or on his behalf, or on the day upon which he receives from the plaintiff the declaration in the *cause*, or within three days thereafter, to notify to the plaintiff in writing the object for which he has so entered his appearance, and in such notice to set forth that he admits the validity of the will or the intestacy of the deceased, and the relationship claimed by the plaintiff to the deceased, and demand to be heard on petition in respect of some other matter to be therein stated. The plaintiff shall, upon receiving such written notice, unless otherwise ordered by the judge, within eight days, file his act on petition. In case he shall fail to do so, the defendant shall be at liberty to file his act on petition; and the *cause* shall be heard by affidavit unless the judge shall direct otherwise."

Hamill, for the defendant, submitted that the brother had an interest to protect the share of his nephew, the deceased's child, and such was the only object in lodging the caveat.

KEATINGE, J.—The caveat and appearance are quite irregular and must be set aside. The rule referred to was not intended to apply to such cases as this, but to *causes* where the parties were entitled by interest to

appear and desired to make some admission as to the validity of the will or the relationship of the plaintiff, but to object on other grounds to the plaintiff's title. The registrars have full power to require security, and I will therefore dismiss the caveat and appearance, with costs, and give the plaintiff liberty to apply in the registry for letters of administration of the goods of the deceased.

Order accordingly.

DAVIDSON v. WOODS AND WIFE.—Feb. 5.

Legitimacy—Practice as to issues.

Where a question of legitimacy of a person represented as the father of an alleged next of kin is raised by a party alleging himself to be next of kin, the practice is, to raise the question by petition and affidavit, and if either party asks for an issue, to direct an issue on that point to a jury.

THE facts of this case will be found fully reported in the 7th vol. *ante*, pp. 202, 307, as to the way in which it came before the court. The case now came on for hearing before the court itself upon the petition and affidavits in support of it, of the plaintiff, and the answering affidavits of the defendants, and of numerous other persons; the only question now raised being the legitimacy of William Ker, the father of the persons who were, at the former trial, alleged to be and cited as the next of kin of the deceased. Counsel for the defendants had, on several previous occasions, and now also, pressed for an issue to a jury; but his lordship decided on first hearing the case opened by one counsel on each side.

Accordingly, *Dr. Miller* (with him *Dr. Walsh, Q.C.*) for the defendants, stated their case, and opened fully the affidavits relied on, and cited *Queen's Proctor v. Williams* (31 L. J., N.S., Prob. 86), and *Bouverie v. Attorney-General* (ib. 79), as to sending the case to a trial by jury.

Dr. Ball, Q.C. (with him *Hamill*) for the plaintiff, also stated his case, and objected to an issue to a jury, but submitted that certain witnesses might be cross-examined before the court itself.

KEATINGE, J.—In this case I think I must follow the cases cited by the defendant's counsel, decided by Sir C. Cresswell, and in which I quite concur. The affidavits here are very numerous, and in many respects quite contradictory, and I think it is peculiarly a case where the witnesses should be personally seen and examined. No doubt, that could be done without a jury; but if there was an heir-at-law who asked for an issue he has a right to it, or if either party, not being an heir-at-law, ask for it, I am entitled, though not bound, to give it; but if I refuse it, my order may be appealed from, and perhaps the Court of Appeal would, on that ground alone, allow the appeal, considering the case peculiarly fit for a jury. I therefore direct an issue to a special jury of the city of Dublin at the next sittings of the court, the issue to be whether William Ker, the father of the alleged next of kin, was the legitimate son of Anne Colvan, otherwise Gibson, in the petition mentioned.

Order accordingly.

Court of Appeal in Chancery.

[Reported by Edmund T. Bewley, Esq., Barrister-at-Law.]

IN RE THOMAS F. READ AND RICHARD A. READ—Feb. 2, 1863.

Fraudulent preference—Payment by bankrupt under fear of a criminal prosecution.

A trader indorsed to a bank certain bills of exchange drawn by him in fictitious names. Afterwards, seeing that the stoppage of the firm of which he was a partner was inevitable, and fearing that he might be prosecuted for forgery, if the circumstances connected with these bills were allowed to transpire in proceedings in the Court of Bankruptcy, he withdrew the bills from the bank before they had arrived at maturity.

Held, that this payment was a fraudulent preference within the meaning of the Bankrupt Laws, and void as such.

THIS was an appeal brought on behalf of the Hibernian Banking Company against an order of Judge Lynch in the matter of the bankruptcy of Thomas Francis Read and Richard Arthur Read. The bankrupts, Thomas F. Read and Richard A. Read, who were brewers, carrying on their trade in Dublin, had been in the habit, it appeared, of keeping a discount account and an account current with the Hibernian Joint Stock Company as their bankers. Prior to their bankruptcy, in the months of September and October, 1860, the Hibernian Bank in the usual course of business had discounted for the Reads eight bills of exchange for a total amount of £441 5s. 7d., indorsed by them to the bank, and for which cash on account was allowed them by the Company. Subsequently, however, the bills were retired and taken up from the bank before they respectively arrived at maturity, and shortly afterwards on the 20th of December, 1860, Thomas F. Read and Richard A. Read were adjudicated bankrupts by the Court of Bankruptcy and Insolvency. In the course of the proceedings in bankruptcy, it appeared on the evidence of Thomas F. Read, one of the bankrupts, that these bills were forgeries, committed by him, of the names of the parties on the bills other than the names of the bankrupts. He had in reality been insolvent in the months of October and November, 1860, and a meeting of creditors had been held in the latter end of November, 1860, after which he had retired the bills, seeing that the stoppage of the firm was inevitable. On the 16th of August, 1862, the assignees filed a charge, referring to these matters amongst others, and stating that Thomas F. Read, in apprehension of a stoppage, had resolved to pay these bills out of the course of trade before they became due, because they were forgeries; and stating, moreover, that the bills were forgeries of imaginary names; and that no demand for payment of them had been made by the bank. The assignees in conclusion charged that the payment of the bills was a fraudulent preference in contemplation of bankruptcy. On the 6th of November, 1862, the Banking Company filed their discharge to this charge, and submitted to the Court that the payment of the bills by

the bankrupt under the apprehension of and to save himself from a prosecution for forgery, was not a fraudulent preference in contemplation of bankruptcy, nor an act of bankruptcy. The matter of the charge and discharge having come on to be heard on the 18th and 21st of November, 1862, Judge Lynch made an order whereby he declared, "that the said Hibernian Bank is now indebted to the estate in this matter in the sum of £441 5s. 7d. as mentioned in the charge of the said assignees; and that the Hibernian Bank do pay to the official assignee in this matter the said sum of £441 5s. 7d., together with the said assignees' costs in connection with the said charge and discharge when taxed and ascertained."* From this order the Hibernian Bank now appealed.

Brewster, Q.C., (with him *Kernan, Q.C.*, and *Dowse*) in support of the appeal.—*Ex parte De Tastet* (Mont. B. C., 138.) is an express authority that a payment made to a creditor on the eve of bankruptcy under the fear of a criminal prosecution is valid. In fact it is the actuating motive in the bankrupt's mind that is to be looked to, and unless a fraudulent intention to prefer and a contemplation of bankruptcy concur, the act will always be protected. Putting the case even stronger, it may be laid down that if the bankrupt's motive is not *alone* to give preference, the payment will not be disturbed.—*Brown v. Kempton* (19 Law Jour., N.S., C.P., 169)—where *Wilde, C.J.*, directed the jury that if the payment was made under the influence of pressure and importunity, and also with a desire to give preference in the event of bankruptcy, their verdict should be for the creditor. This direction was subsequently affirmed by the Court of Common Pleas. Cases like the present are generally tried by a jury, and if so, it is always left to them to determine what was the motive that led to the payment. The circumstance that the bills were retired before they were due, will not necessarily imply a fraudulent preference, but will merely be a fact to be submitted to the jury as indicative of the bankrupt's motive.—*Strachan v. Barton* (11 Exch., 647); *Van Casteel v. Booker* (2 Exch., 691). In all cases of the kind the payment must be voluntary, and with a view to favour a particular creditor, but here it is admitted beyond all doubt that the payment was due to the fear of a prosecution for forgery, with the object of protecting the bankrupt himself, and not from any intention to defraud his general creditors.—20 & 21 Vict., c. 60, s. 338.

Heron, Q.C., (with him *Palles*) for the assignees, in support of the ruling of Judge Lynch.—It is clear that if the Hibernian Bank had known that these bills were forgeries, they could not legally have received the money in payment, for their primary duty would have been to prosecute the bankrupt for forgery, and their civil remedy would have been suspended until that duty had been discharged—otherwise, it would have been a compounding of felony.—*Broom's Legal Maxims*, 196. In *Ex parte De Tastet*, the marginal note refers only to the first part of the case, and is not borne out at all by the case taken as a whole. On the grounds of public policy such a proposition is not maintainable. In fact until the bank had prosecuted

* *In re F. & R. Read* (7 Ir. Jur. N.S., 401.)

to conviction, no debt existed between them and the bankrupt, and, therefore, the present payment is devoid of all consideration. With regard to the question of fraudulent preference, whenever the payment originates with the debtor, whether there be pressure or no pressure, the act will not be protected. In the words of Lord Mansfield in *Harman v. Fisher* (Cowp., 117), "when the payment is pursuant to no contract, in performance of no obligation, in no course of dealing, and without any call on the part of the creditor," it will be regarded as a fraudulent preference. In the present instance there was no pressure—no demand—the act was perfectly voluntary; and, as Lord Ellenborough says in *Ex parte De Tastet* (Mont., 146), the main question for the jury is, "was the act done voluntarily or importunately?" and if the result be that a creditor is preferred, it is immaterial whether the motive was an intention to prefer or not.—*Marshall v. Lamb* (5 Q. B., 115); *Rust v. Cooper* (Cowp. 629); *Mogg v. Baker* (4 M. & W. 348); *Morgan v. Brundrett* (5 B. & Adolph. 289; 2 Nev. & M., 280); *Dudley and West Bromwich Banking Company v. Spittle* (1 John. & Hem. 14); *Prosser v. Roe* (2 Carr & Pay. 421); *White v. Spettigue* (15 M. & W. 603). *Palles* on the same side.

Kernan, Q.C., in reply.—The motives influencing the bankrupt's conduct and leading to the payment cannot be rejected. If the fact of there being a preference inferred a motive to prefer, why, in all the cases for a century past, has the bankrupt's motive been always left to the jury?—*Fidgeon v. Sharp* (5 Taunt. 539; 1 Marsh. 196); *Thompson v. Freeman* (1 Term. R. 155); *Hartshorn v. Slodden* (2 B. & P., 582; 4 Esp. C. 60); *Cook v. Prichard* (6 Scott N. R., 34; 5 M. & G. 329); *Cook v. Rogers* (7 Bingh. 438); *Crosby v. Crouch* (11 East. 256). The words of the Bankruptcy Act are "fraudulent preference," not "fraudulent payment." It is evident here that there was no intention to prefer the bank, for a selection of the bills is made, and those which are forged are alone paid. When the payment originates with the debtor, there is a presumption, no doubt, that the act was voluntary, but the fact of its originating with the debtor is not the essence of a fraudulent preference. [*Lord Justice of Appeal*.—There may be a double motive—favour to a creditor, and a regard for his own interest.] The sole motive was the apprehension of a criminal prosecution. [*Lord Justice of Appeal*.—There is something like an estoppel here. Can you make felony the premises from which legal rights are to be derived?] [*The Lord Chancellor*.—The case is quite new, and one of enormous difficulty, owing, I may say, to the confusion arising from *Ex parte De Tastet*. We shall accordingly allow the case to stand over, as it is probable that we may wish to have it re-argued on a future day.]

Feb. 6.—The case came on for re-argument.

Brewster, Q.C., for the appellants, reviewed at length the authorities already cited.—Suppose a person who was not a trader learned that some one was in possession of documents that would affect his character or that of some member of his family that was dear to him, and should give £100 to get these papers

out of the power of the other party, the giving up of the documents would be a good consideration for the money, even though it might be morally wrong to make use of them. Next take the case of a trader on the verge of bankruptcy, who goes to a person with whom he has had no dealings already, and pays him a sum of money to obtain possession of some papers that would compromise him. Would not that be a payment for good consideration, and even though bankruptcy was the result, would not the assignees be precluded from recovering the money which was thus *bona fide* paid? Lastly, how could that payment be defeated from the mere fact of the person in possession of the papers being a creditor of the bankrupt?

Heron, Q.C., in reply.—Wherever the payment was in contemplation of bankruptcy, and moved from the bankrupt, the intention to prefer has never been left to the jury.—*Hunt v. Mortimer* (10 B. & C. 44); *Boydell v. M'Michael* (1 Cr. M. & R. 177). [*The Lord Chancellor*.—Suppose a man and his son were in partnership, and the son brings a forged bill to his father, and gets him to indorse it to a bank. If the father subsequently discovers that it was a forgery, and to save his son's reputation and credit withdraws it from the bank, in the event of bankruptcy would the act be a fraudulent preference?] The case is a strong one, but, upon the authorities, it appears that it would be so regarded.—*Pennell v. Heading* (2 F. & F. 744); *Newton v. Chanler* (7 East. 137); *Graham v. Chapman* (12 M. G. & Sc. 103); *Alverson v. Temple* (4 Barr. 2235).

THE LORD CHANCELLOR.—On the whole, I think we must affirm the decision of the Court below. I confess that I was not free from doubt as to the principle involved in the present case, owing in a great measure to the language in some of the judgments in former cases, and to the doubts and difficulties that have in consequence arisen. For this reason, and from the fact of the present being an entirely new case, we considered it right that it should receive as much elucidation and argument as possible, so as to enable us to arrive more readily at a correct conclusion. Upon general principles, then, it appears to me that without overruling *Marshall v. Lamb*, one of the most recent cases on the subject, we could not come to any other decision than that which I have already stated. There is no question under the present circumstances but that the payment was made in contemplation of bankruptcy, and that the effect of it was to give certain of the bankrupt's creditors an undue preference above the others. It is also beyond all doubt that the act originated with the debtor, and was without any pressure, or without any of those other causes which in some instances have been held to countervail the voluntariness of the transaction. That being the case, we must consider whether we are to allow Courts of justice to speculate on the motives present in the bankrupt's own mind, that led him to make this payment—motives which he may represent just as he pleases, and which, from their nature, can never be discovered or ascertained otherwise than by his own evidence. Here he represents that his object in retiring the bills was to avoid a prosecution for forgery; but whether this is an admissible consideration in the case at all, or not, and whe-

ther he can thus defeat the claims of his other creditors, are questions which do not appear to have ever arisen before. Amongst the cases cited, no case is to be found where the mere apprehension of proceedings, either civil or criminal, has been considered a sufficient motive for a payment otherwise voluntary. There is no case where a man making a payment from the fear of the legal consequences of his conduct, or of any act of his, has been held to be within the doctrine contended for by the appellants. The act has never been considered as protected, unless there was either pressure or application on the part of the creditor actually or presumptively overcoming the bankrupt's own will. Sometimes his inclination to prefer may point in the same direction as the pressure (though some doubt has been thrown by Lord Brougham on this question of mixed motives), but there must be pressure or application, and, as I have already remarked, no case is to be met with where the apprehension of consequences alone has been held to take the transaction out of the policy of the bankrupt laws. When, therefore, all the other circumstances concur which would lead us to presume a fraudulent preference, where the act originated with the debtor, and was done in contemplation of bankruptcy, and where it had the effect of preventing the equal distribution of assets, to the prejudice of the general creditors, we must hold that the present case is an instance of fraudulent preference. We were anxious to have the case discussed as fully as possible, on account of the observations that occur in some of the former cases; but I think that in the present case Judge Lynch has rightly excluded the consideration of the bankrupt's motives, and as the payment is consequently brought to what has been always regarded as contrary to the policy of the bankrupt laws, the order of the Court below must be affirmed with costs.

THE LORD JUSTICE OF APPEAL.—I concur in the judgment of the Lord Chancellor substantially on the grounds given by him; and I shall now proceed to state briefly the reasons that have caused me to come to this decision. It is very clear that the transaction in the present case was voluntary, and also in contemplation of bankruptcy. There was no pressure, no demand on the part of the bank, as is plainly evidenced by the fact that the forged bills were taken up before they arrived at maturity. The defence which has been offered for this is, that though they were retired without any solicitation, the payment is not to be considered as a fraudulent preference, inasmuch as it was not any desire to favour the bank, but the fear of a criminal prosecution that was the actuating motive. Now, while the avoidance of a voluntary payment made by a bankrupt on the eve of bankruptcy is an act of the plainest justice, it would subvert the fundamental principles that form the basis of this code of laws, if such a cause should be deemed a justification of an act, which, if it were due to the honourable and conscientious motive of repaying a creditor, could not be upheld. The law deals with the act, and the motive to prefer, and the contemplation of bankruptcy, are left to be inferred from the bankrupt's conduct. But the fears and hopes that form the groundwork of this conduct cannot qualify its effect nor alter the nature of what the law holds to be fraudulent. In the

present case, on his own representation, they show motives of an illegal act which he committed in full contemplation of bankruptcy. In fact, it amounts shortly to this, that the apprehension of a criminal prosecution may co-exist with a fraudulent intention to prefer. The question that the fear of the consequences due to the commission of a crime should be received in a Court of justice as an excuse for an act that would otherwise be indefensible, is one that can never be sustained.

Order below affirmed with costs.

Court of Chancery.

[Reported by Edmund T. Bewley, Esq., Barrister-at-Law.]

IN THE MATTER OF EDWARD MAHONY, A LUNATIC.

Jan. 31, Feb. 2, 9.—1863.

Fines and Recoveries Act—Protector of settlement in lunacy—Construction of 4 & 5 Will. IV. cap. 92, secs. 19 & 31.

Where there is under the same settlement a tenant in tail in possession, and a tenant in tail in remainder, the tenant in tail in possession is protector of the settlement as to the tenant in tail in remainder. And where the tenant in tail in possession is a lunatic, the Lord Chancellor can, as such protector, consent to a disentailing deed by the tenant in tail in remainder.

By an indenture, dated the 7th of April, 1821, the lands of Drumsnave and Castlekirke, situate in the barony of Ross, and county of Galway, were limited to the use of Sir John Blake for life, with remainder to the use of John Brice Blake, son of the said Sir John Blake and Rose Blake, in tail, with remainder to the use of the second and every other son and sons of the said Sir John Blake and Rose Blake in tail, with remainder to the use of the daughters of the said Sir John Blake and Rose Blake as tenants in common in tail, with cross-remainders between them in tail. John Brice Blake entered into possession of the lands, but died intestate, without issue, and without having barred his estate tail. His three sisters, Eliza Blake, otherwise Lady Ventry, Arabella Blake, otherwise Lady O'Donnell, and Jane Blake, who intermarried with the Rev. Denis Mahony, thereupon became entitled each to an undivided third part of the lands before mentioned. The Rev. Denis Mahony and Jane, his wife, had issue four sons, Denis, Edward, Henry, and John; and two daughters, Rose and Margaret. At the time of the present application, the Rev. Denis Mahony and his wife, Jane Mahony, were both deceased; Denis, the eldest son, had died under age and unmarried; Edward, the second son, had by an inquisition been found a lunatic; and Rose Mahony had married Henry Carr Glynn. Lord and Lady Ventry and Lady O'Donnell having entered into an agreement with Benjamin Lee Guinness for a sale of the lands at the price of £3,600, requested the committee of the lunatic, Edward Mahony, to concur on his behalf in the sale. Benjamin Lee Guinness, how-

ever, objected to accept the title offered to him, or to take a conveyance of the one-third of the lands, inasmuch as Edward Mahony had not vested in him the immediate reversion in fee therein; for under the limitations of the deed of the 7th of April, 1821, these lands stood limited in remainder after the death and failure of issue of Edward Mahony, to his brothers successively in tail, with remainder to his sisters as tenants in common in tail, with cross-remainders between the sisters of John Brice Blake as tenants in common in tail. A proposal was then made by Benjamin Lee Guinness to contract for the purchase of this one-third of the lands on the following terms, viz.—that £683 6s. 8d., part of a total sum of £1200, purchase-money, should be invested in government stock and transferred to the credit of this matter, and to a separate account, to be entitled “purchase-money of Drumsnave and Castlekirke;” and that the residue, amounting to £516 13s. 4d., should be retained by Benjamin Lee Guinness during the life of Frances Blake, who had a charge upon the lands, in consideration of his paying her a certain annuity during her life, and that after her death this sum of £516 13s. 4d. should be invested and transferred in the like manner and to the same credit; that this purchase-money should be retained in Court during the lunacy and until a proper conveyance of the fee and inheritance of this one-third of the lands should be executed to Benjamin Lee Guinness, his heirs or assigns, by the lunatic in the event of his recovery, or if not, by such of the persons next in remainder as should be competent to do so. And it was agreed between Benjamin Lee Guinness and Henry Mahony, John Mahony, Henry Carr Glynn, and Rose, his wife, and Margaret Mahony, that with the consent of the Lord Chancellor, as protector of the settlement made by the deed of the 7th of April, 1821, in the place of the lunatic, under the provisions of the 4 & 5 Wm. IV., cap. 92, Henry Mahony, the tenant in tail in remainder, should execute a disentailing deed and bar his estate tail and the remainder over, for the purpose of enabling these estates and the fee and inheritance of them immediately expectant upon the estate tail of the lunatic, to be conveyed and limited absolutely to the use of Benjamin Lee Guinness and his heirs. It was further agreed between the same parties, that if the Lord Chancellor’s sanction to this arrangement should be obtained, the purchase-money should be retained in Court and invested so as ultimately to be paid to such of the brothers and sisters of the lunatic, or their issue, as would have been entitled in remainder to the lands under the settlement of the 7th of April, 1821, and who, after the decease of the lunatic, would have been competent to bar the estate tail and to execute a proper conveyance of the fee-simple if this arrangement had not been entered into. This matter having been referred to Master Brooke, together with other matters connected with the lunatic’s estate, the Master adopted the arrangement already mentioned, and an application was now made on behalf of Katherine Mahony, the committee of the lunatic, and Henry Mahony, his next of kin, that the report of Master Brooke should be confirmed, and that the contract for the sale of the lands to Benjamin Lee Guinness should be carried out.

The Solicitor-General (with him *D. Plunket*). Under the 31st section of the Fines and Recoveries Act (Ireland), 4 & 5 Wm. IV. cap. 92, the Lord Chancellor is appointed protector of the settlement in cases of lunacy. Where there is a tenant in tail in possession, and a tenant in tail in remainder under the same settlement, the tenant in tail in possession is the protector as to the tenant in tail in remainder. In the 19th section of the Act the protector is defined to be the owner of “any estate for years determinable on the dropping of a life or lives, or any greater estate (not being an estate for years) prior to the estate tail;” and under the corresponding section of the English Act (3 & 4 Wm. IV., cap. 72, sec. 22), it has been held that when the tenant in tail in possession is a lunatic, the Lord Chancellor, as protector, will consent to a disentailing deed by the tenant in tail in remainder, when the proceeding is such as the lunatic would probably have consented to if he were sane—*In re Blewitt* (6 De G., M’N. & G. 187; 2 Jur. N. S., 217). By this decision *In re Blewitt* (3 My. & Kee. 250) and *In re Wood* (3 My. & Cr. 266), have been overruled.

THE LORD CHANCELLOR.—I entertain serious doubts as to whether I have the power to act as protector of the settlement in place of the lunatic when the lunatic is tenant in tail in possession. It appears to me that such a case was never contemplated by the Act of Parliament, and that it is only by a straining of the words of the 19th section that it can be brought within it. However, as I have considerable doubts on the matter I shall examine the authorities and the statute, and mention the matter again at the next sitting of the court.

Feb. 2nd.—**THE LORD CHANCELLOR.**—On looking into *In re Blewitt*, I think the authority sufficient to warrant me in acting for the lunatic as protector of the settlement. I wish, however, to investigate the facts of the case more closely, to satisfy myself that this arrangement is beneficial for the parties interested.

Feb. 9th.—**THE LORD CHANCELLOR.**—I have carefully examined the matter, and I see no reason why this application should not be granted. Mr. Guinness, of course, will have a permissive occupation of the lands, and will be entitled to receive the rents.

(PETTY BAG SIDE.)

THE QUEEN v. GIBBINGS.—*Feb. 21, 23.*

Surety to recognizance of tenant—Substitution of service.

The recognizance of a tenant under the Court was put in suit against R. G., one of his sureties, resident out of the jurisdiction, and service of notice of the proceedings was acknowledged in writing on behalf of R. G. by his solicitor in this country. A writ of scire facias having been issued; Semble that the Court had jurisdiction to direct substitution of service of the writ on R. G.’s solicitor.

In June, 1838, Richard C. Smyth, Richard D. Smyth, and Richard Gibbings, entered into a joint and several

recognizance in the sum of £500 in the cause of *Walcott v. Smyth*, as security for the payment by Richard C. Smyth of a certain annual rent to the receiver in this cause. A sum of £1075 6s. 3d. had accrued due, and was at the time of the present application still unpaid. Richard C. Smyth had died insolvent, Richard D. Smyth was destitute of all property, and Richard Gibbings was out of the jurisdiction of the Court. The rents of Richard Gibbings' estate were received by a receiver appointed in the cause of *Purcell v. Gibbings*, and a portion of this estate had been sold in the Landed Estates Court for the payment of debts anterior to this recognizance, the sum of £500 being retained in court to meet this liability. By an order of the Master of the Rolls, bearing date the 13th of January, 1863, made in the cause of *Walcott v. Smyth*, it was ordered that Robert Hunt, the receiver in the cause, should be at liberty to put in suit, for the benefit of the parties to the cause, the recognizance before mentioned as against Richard Gibbings. In pursuance of this order, a writ of *scire facias* was issued against Richard Gibbings, directed to the high sheriff of the county of Cork; and a motion was now made to substitute service of the writ on Edward T. Hughes, who, it was sworn, still acted as solicitor for Richard Gibbings in Ireland.

J. W. Harris in support of the motion.

THE LORD CHANCELLOR.—I cannot find that any practice exists on the petty bag side of this Court of making an order to substitute service under circumstances such as the present. No such jurisdiction has been given by statute and I entertain some doubts as to whether I have any power to make this order. It appears also to be the usual course to serve the sureties with notice before putting the recognizance in suit, and the proceeding is in this respect irregular. In the present case the object will be more readily attained by filing a claim in the Landed Estates Court, where the judges can deal with the fund reserved to meet the recognizance.

Feb. 23.—At the sitting of the Court *Warren, Q.C.*, stated to the Lord Chancellor that Mr. Hughes had acted as solicitor for Richard Gibbings in the Rolls Court in the cause of *Walcott v. Smyth*, on the 13th of January, 1863; and that when the order of that date had been made, he had admitted in writing, as solicitor for Richard Gibbings, the service of the notice of proceedings on foot of the recognizance.

THE LORD CHANCELLOR.—In that case I shall make the order required.

Rolls Court.

[Reported by Arthur Houston, Esq., Barrister-at-law.]

PENNEFATHER v. BOLTON.—*Dec. 6, 1862.*

Reference—Wilful default.

In a petition praying a reference to the Master on the ground of wilful default on the part of a land agent—Held, that the rule which requires some specific case of wilful default to be charged, is sufficiently fulfilled by a reference in the petition to

certain accounts put in evidence, on the face of which such wilful default is apparent.

EDWARD J. BOLTON, the respondent in this case, was land-agent to Major Kingsmill Pennefather, whose widow and administratrix was the petitioner. The petition, which was presented under the Court of Chancery (Ireland) Regulation Act, 1850, prayed an account, which was not resisted, and also charged "that the said Edward J. Bolton was guilty of gross and wilful default in allowing the large amount of arrears to remain uncollected which appears by all the said accounts, and also in omitting to bring forward arrears of rent, and in taking upon himself to remit the arrears; and your petitioner refers to the separate items in the said accounts as evidence of such wilful default." The accounts referred to in the above extract from the petition were three in number, marked A. B. and C., and, on examination exhibited a good deal of negligence and some confusion, as will be seen below.

Brewster, Q.C., for petitioner, stated the case.—Mr. E. J. Bolton, and his father, John Bolton, conjointly succeeded Messrs. Bermingham and Berwick as agents to Major Kingsmill Pennefather, from the 1st of November, 1847. At that date there were no arrears due on the estate; but in the first account furnished by E. J. Bolton, considerable arrears were shewn. Among others, a tenant of the name of James Ryan, who had a lease of the lands of Golden and Knockinglass, at an annual rent of £276, was returned as owing, on the 1st of May, 1850, two years and a half rent, less a sum of £194 received on account. Edward John Bolton represented to Major Pennefather, who was then residing on the Continent, that Ryan was "an excellent and respectable tenant who had expended money on the land, and deserved a temporary abatement." Accordingly, a reduction of 20 per cent was made; nevertheless, the rent was still permitted to fall in arrear, an occurrence which never had taken place before Bolton became agent, nor since he ceased to be so. Bolton urged in reply that Ryan's rent had all along been too high, and quoted a letter received from Major Pennefather dated the 16th of March, 1849, expressing confidence in his management of the estate, and authorising the abatement to Ryan. This letter, however, adds the words, "next year these pressing difficulties will be over," which showed that the reduction was to be temporary only.

The Solicitor-General for the respondent, contended that Edward J. Bolton was not Major Pennefather's agent at all. His father, John Bolton, was the agent, and the son acted only as solicitor in transactions in which he required professional assistance. After the death of his father he acted as agent to Mrs. Short, a mortgagee, who entered into possession in order to prevent a receiver being appointed over the lands for the benefit of the creditors. The policy of the abatement of the rent, and the forgiveness of arrears to Ryan, was proved by the very fact that no arrears had since accrued. Besides, the account marked A. was in the hands of Major Pennefather when he wrote to Edward Bolton on the 7th of February, 1851, again expressing his

entire confidence in his system of management, and satisfaction with his previous conduct as his agent. But lastly, this petition must be dismissed for neglecting to specify a single case of wilful default. *Bond v. M'Watty* (14 Ir. Jur., 315), decided so recently as the 9th of May in the present year, was precisely in point. There the Lord Chancellor refused to grant a reference with a direction as to wilful neglect or default, "as the cause petition should have specified some three or four instances of such neglect or default."

Owen, on the same side, observed that in the case cited by the Solicitor-General the petition stated arrears, stated that they would be lost, that arrears had been allowed to accumulate for 20 years, and were barred by the Statute of Limitations, and that an answering affidavit was filed annexing a schedule shewing the cases in which arrears were due. Yet all these details were held insufficient to render the charge of wilful default specific. He cited *Sleight v. Lawson* (3 Kay & J.) where it was held that a preliminary enquiry (such as that in *Coope v. Carter* (3 De G. M'N. & G., 297), which was short of directing wilful default), in order to ground upon it a new order, and to direct an inquiry as to wilful default at a future stage, could not be granted.

Chatterton, Q. C., and *Twigg*, contra, contended that the allegations of wilful default were sufficiently specific. In addition to the extracts from the petition given already, they cited the 21st paragraph, which was in the following terms, "That the said account C. omits to bring forward a large portion of arrears of rent shewn to be due by account B., and your petitioner believes and charges that a large portion of such arrears have been lost by the wilful default of the said Edward J. Bolton, and that he should be charged with the same." Now, the only case in which any arrears were so neglected to be brought forward in account C., was that of the tenant Ryan, which instance of wilful default was therefore sufficiently particularised. The fact of Edward J. Bolton's being agent for Major Pennefather, was completely established by his signature to receipts for rent.

Cur. adv. vult.

THE MASTER OF THE ROLLS observed that he was placed in great embarrassment by the mode in which the case was brought forward, which rendered it difficult to direct a reference of any kind. This was the difficulty in *Sim v. Sim*, in which he refused to go into the accounts unless some item in which wilful default appeared was stated. The neglecting to bring forward arrears from account B, to account C. was immaterial, as the question was, whether they were properly remitted. If improperly remitted, and, by such neglect, they were lost, then, if the case were made by the petition, the court would direct a reference to the Master, who would come at the justice of the case. As to there being authority to remit, if a reference to the Master was directed on that point, and he found that there was no such authority, would it then be regular to refer it back to the Master to inquire if the arrears could be collected, when no specific case of wilful default was alleged?

January 27, 1863. — HIS HONOR gave judgment in the case, in the course of which he observed that the fact of John E. Bolton's agency was sufficiently established by the receipts for rents being signed by him, and other acts inconsistent with any other hypothesis. The fact of gross negligence and remissness was also fully made out by his delay in furnishing accounts, his mistake in returning of a sum of £5 instead of £55, as appeared by account B., and his neglecting to distinguish the period during which he received the rents for Mrs. Short, from that in which he was acting for the mortgagor. An examination of the accounts also would sufficiently establish a case of wilful default. But the question was, whether the petition made a charge sufficiently specific to entitle the petitioner to a reference on that point. In *Brooke v. Elliott* (6 Ir. Ch. Rep., 310), he decided that a petitioner was not entitled to a direction for wilful default against a land agent, unless some case of such wilful default was specified and established. The Lord Chancellor held the same in *Bond v. M'Watty*; but he (the Master of the Rolls) had come to the conclusion that the present case was not governed by *Bond v. M'Watty*, for here there was a reference in the petition to certain accounts, which were thereby incorporated with the petition, and both read together, sufficiently particularised a case of wilful default. The case of the tenant Ryan was an example of this.

HIS HONOR directed a reference in the following form:—

1. The usual decree to account.
2. To enquire whether any and what portion of the rents shewn by accounts A. B. and C. to have been allowed to go into arrear, and remain still uncollected, were remitted by Major Pennefather, or by his authority, and whether any and what portion were lost by the wilful neglect and default of Edward J. Bolton.

Court of Queen's Bench.

[Reported by William Woodlock, Esq., Barrister-at-law.]

CORAM FITZGERALD, J.

JACOB V. BERNAL.—Nov. 17, 1862.

Security for costs.

A motion for security for costs is too late after defence filed, although the preliminary notice was served before the time for pleading has expired.

THIS was a motion on behalf of the defendant that the plaintiff should be compelled to give security for costs. The plaintiff lived in England. The time for pleading had expired, and the defendant had pleaded, before the service of the notice of motion, but the preliminary notice calling upon the plaintiff to give security had been served before the defence filed.

Daniel, for the defendant, contended that under these circumstances the defendant was not too late in his application.

O'Driscoll contra.

FITZGERALD, J.—The defendant is too late in coming here after having taken a step in the cause, and his motion must be refused.

Motion refused, with costs; a small sum to be named for the costs.

BEFORE THE FULL COURT—(CROWN SIDE)

THE QUEEN AT THE PROSECUTION OF JOHN FARQUHARSON v. THE CHAIRMAN OF QUARTER SESSIONS AND OTHER JUSTICES OF THE PEACE IN AND FOR THE COUNTY OF ANTRIM.—*Jan. 17, 19, 21.*

Appeal—St. 24 & 25 Vict. c. 91, s. 19—Quarter Sessions—Divisions—Towns—Sessions original or adjourned.

The Sessions held at the towns in divisions of counties are all original and distinct Sessions and not merely adjournments; and therefore where a statute directed an appeal to be brought to the next General Quarter Sessions for the county, division, town, or place where the judgment appealed from is delivered, held twenty days next after the delivery of the judgment. Held, that this appeal should be brought to such next Sessions in the very town where the judgment was delivered, and that a party passing over those Sessions and appealing to the next Sessions held in the first town for the division was too late, and that the appeal could not be entertained at those Sessions.

THIS was a motion to make absolute a conditional order for a *mandamus* to issue directed to the chairman of Quarter Sessions and other the justices of the peace in and for the county of Antrim, commanding them to enter or cause to be entered continuances upon the appeal entered by or on behalf of the said John Farquharson against the judgment of dismissal of the justices of the peace at petty sessions held at Belfast on the 12th June, 1862, of the complaint exhibited by the said John Farquharson against one Jas. Cushman for recovery of a certain penalty in and by the said complaint alleged to have been forfeited by the said James Cushman, and that they should hear and determine upon the merits of the matter of said appeal. The facts of the case were as follows:—Mr. Farquharson, an officer of Inland Revenue, proceeded, for the statutable penalty of £100, against one James Cushman for having in his possession a quantity of spirits on which duty had not been paid. The case was heard at the petty sessions of Belfast on the 12th June, 1862, when the complaint was dismissed by the magistrates. Mr. Farquharson then served notices of appeal on the magistrates and on the clerk of the peace for the county of Antrim, and on James Cushman. And the record having been prepared and lodged with the clerk of the peace, the defendant was served with notices for the October sessions of the said county of Antrim, specifying the time and place of hearing of the appeal, and stating that the appeal would be heard at the general quarter sessions of the peace for the county of Antrim at Antrim, in the said county, on the 17th October, 1862. The case having come before the court of quarter sessions at

that date, the chairman refused to hear the appeal for the reasons which follow:—The appeal was brought under st. 24 & 25 Vict. c. 91, s. 19, which enacts that “in case of any information or complaint exhibited by any officer of inland revenue, or of any proceedings at the instance of any officer, head or other constable of the constabulary force in Ireland, under the provisions of the said Illicit Distillation Act, or of any Act passed in the seventeenth and eighteenth years of the reign of her present Majesty, chapter eighty-nine, or of an Act passed in the twentieth and twenty-first years of the reign of her said Majesty, chapter forty, it shall be lawful for any such officer and constable or constable respectively, or for any person against whom any such information, complaint, or proceeding shall have been exhibited or taken, who shall feel aggrieved by the judgment given thereon, to appeal therefrom to the justices at the next general quarter sessions of the peace which shall be holden for the county, shire, division, city, town, or place in which such judgment so appealed against shall have been given next after the expiration of twenty days from the giving of such judgment, upon giving such notices, and upon such terms, conditions, and regulations as are prescribed in cases of appeals by the several Acts passed respectively in the seventh and eighth years of King George the Fourth, chapter fifty-three, the fourth and fifth years of King William the Fourth, chapter fifty-one, and the fourth year of her present Majesty, chapter twenty.” The county of Antrim is divided into two divisions, that of Antrim and that of Ballymena. The sessions towns in the division of Antrim are Antrim and Belfast; those in the division of Ballymena are Ballymena and Ballymoney. The dismissal of the complaint at petty sessions having taken place on the 12th June, 1862, the first general sessions which took place afterwards for the county of Antrim were those held on the 24th June, 1862, at Ballymoney for the division of Ballymena; the next in point of date were those held at Ballymena on the 20th June. Then came a session on the 1st July at Antrim, for the division of Antrim, and then one held at Belfast on the 5th July. The chairman being of opinion that the session holden at each town in a division was a distinct original session, held that the appeal ought to have been to this last-mentioned session at Belfast, that being the “next general quarter sessions holden next after the expiration of twenty days from the giving of such judgment” within the enactment above mentioned, and therefore that the appeal to the sessions held at Antrim on the 17th October was too late. A conditional order for a *mandamus* was then obtained upon the ground that the sessions held at the second town of each division of a county are mere adjournments of the sessions for the division opened at the first town of the division, and therefore that there could not have been any appeal to the sessions held at Belfast on the 5th July, those sessions being only an adjournment of the sessions for the division of Antrim, opened at Antrim on the 1st July, which day was not twenty days after the giving of the judgment appealed against.

M'Donogh, Q.C. (with him Jebb), for the Crown.—The appeal must be either to the first day of the general quarter sessions of the county or to the first

day of the division in which the place is where the judgment was delivered. In either case the justices were wrong. The words "county, shire, division," in sec. 19 of 24 & 25 Vict. c. 91 apply to the case of counties and their divisions. The other words, "city, town, or place," refer to towns which have their own courts. St. 24 & 25 Vict. c. 91 is the first which gives an appeal in the case of a complaint in an illicit distillation case being dismissed. The previous legislation on the subject is to be found in st. 7 & 8 G. IV. c. 53, s. 82; 4 & 5 W. IV., c. 51, s. 23; 4 & 5 Vict. c. 20, s. 30. For quarter sessions purposes nothing is recognised but the county and the division; the town is not recognised. The sessions at the different towns are merely adjournments of the sessions for the division, which commence at the first town in the division. In England the law is, that the whole session is considered only as one day, no matter how many adjournments take place—Dickenson's Quarter Sessions, p. 74; *R. v. Surrey Justices* (1 M. & S. 479); *R. v. Dorset Justices* (15 East, 200). The style of an adjourned session is given in Dickenson, p. 71; *The King v. Justices of Sussex* (7 T. R. 107). In case of the subject an appeal is allowed to the division by st. 4 & 5 Vict. c. 93. Schedule C. of st. 14 & 15 Vict. c. 57 states the jurisdiction in civil bill cases as "county of —, division of —;" but there is no legal subdivision of a division of a county, which would be implied by the decision of the chairman in the present case. Ss. 15, 20, 21, 31, 100, 104, all show that there are no distinct sessions, except for counties and divisions of counties. The cases of *The Queen v. The Justices of Suffolk* (4 D. & L. 629); and *The Queen v. The Justices of Suffolk* 5 D. & L. 558, are in point. [Hayes, J.—Does it not make a difference between those cases and the present one that all these sessions are in Ireland settled by statutory authority. S. 31 of the Civil Bill Act speaks of an adjournment of the sessions held at a town; and from that section it is plain that the sessions held at each town in the division are separate and distinct sessions.] If the case is doubtful the *mandamus* ought to go, in order to have the question fully gone into on the return.

Falkiner, contra.—Admitting the authority of the cases cited so far as England is concerned, the whole subject is regulated by statute in Ireland; and the real question is, whether the effect of the statute 14 & 15 Vict. c. 57 has not been to establish the principle of distinct sessions for each district. St. 36 G. III. c. 25 (Ir.), first establishes the jurisdiction of assistant-barristers to hear civil bills. By that statute the two courts for the hearing of civil bills and of quarter sessions are kept distinct; but by s. 5 it is provided that there shall be eight general sessions of the peace every year in each county. St. 38 G. III. c. 25, Ir., gives further importance to the divisional sessions. The words "quarter sessions" are altogether dropped in the statutes; and instead of quarter sessions, there are eight general sessions of the peace established, none of them being adjournments. Then st. 1 & 2 Vict. c. 62 directs that general sessions shall be held in two divisions of each county four times in the year at the periods mentioned. The provisions respecting service of process in the statutes 36 G. III. c. 25, s.

22, and 6 & 7 Wm. IV. c. 75, s. 3, are important. If the view put forward on the other side is correct all the processes served since the Civil Bill Act, 14 & 15 Vict. c. 57, have been wrong. The six days and the fifteen days mentioned in s. 68 of the Act are always counted with reference to the sessions for the particular town where the process is to be heard. In the same way Form 13 in the schedule to the Act, Rule 18 of the Chairmen of Counties, Rule 11 of the Probate Court District Registries, the 17th of the rules made by the chairmen under the recent Landlord and Tenant Act, ss. 20, 21, 30, and s. 31 of the Civil Bill Act, all go to show that the sessions at the different towns are distinct original sessions and not mere adjournments.

Jebb replied.

Jan. 21.—LEFROY, C.J., stated the facts of the case, and proceeded—This case involves the consideration of a great number of Acts of Parliament. Several cases were referred to, but the fact is, that as to quarter sessions the law in England is different from that in Ireland. In England the quarter sessions are regulated under an old Act of Parliament (36 Edw. 3. c. 12), which enacts that there shall be every three months, and not more, a session, and that session is, therefore, called a quarter session, and they are held at places where they have been held from time immemorial. But in Ireland the case is different. Both the time and place are regulated by the Privy Council, pursuant to Acts of Parliament, which have been made from time to time. We had a very satisfactory and a very full statement of those Acts, and of the several changes made in the law, to us in the very satisfactory and very clear argument on the subject by Mr. Falkiner. The result is this—this is the summary of the matter, and I do not mean to go into more detail—that the Lord Lieutenant is authorised to make divisions of the counties, and districts within those divisions; but he is also authorised to appoint the times as well as the places; and the session for each division is in truth a moiety of the quarter sessions for the whole county. In Ireland there is a quarter sessions for each division into which the county is divided, and, therefore, although this in fact amounts to eight quarter sessions, it is but a quarter sessions for each division, treating each division as a county; but the quarter sessions for that division is the quarter sessions in truth, the moiety of the quarter sessions of the county, and, therefore, perhaps not properly called a quarter sessions. Now the Act of Parliament under which this information was promoted, requires that all appeals, either from a conviction or a dismissal, shall be to the next quarter sessions, which shall take place after the end of twenty days next after the dismissal or conviction. The next session after twenty days in this case was in Belfast, and to that session the appeal should have been brought. It was not so brought, but to a later session. We are, therefore, of opinion that the chairman was right in refusing to entertain it, and we, therefore, shall not order this *mandamus* to issue.

O'BRIEN, J.—I am also of opinion that this conditional order should be discharged. The order made at petty sessions dismissing the complaint, bore date the 12th June. There was a session at Belfast on the

5th of July. The appeal was not brought until October. Mr. M'Donogh argued that it could not be heard at the July sessions for Belfast, because those sessions were only the adjournment of the sessions held at Antrim. Well now, looking at the Act of Parliament which was cited by Mr. Falkiner in the course of his clear argument, the statute 6 & 7 Wm. 4, it is impossible to say that the sessions thereby directed to be held at particular towns were not distinct sessions, and not merely adjournments. The Act of Parliament would have been differently framed if they were to be looked upon as adjournments. The Act might have been so framed as to give the chairman the power of adjourning the sessions to such town. But no such thing is done, and the words of the several sections shew that the sessions at those towns are distinct sessions. Why then should not the appeal here have been heard at Belfast? The object of the Act was, that the appeal should be heard at the first sessions next after twenty days after the decision below. The sessions established by the Irish statute could not properly be called quarter sessions, but the new sessions thus established are of the same character as the old quarter sessions, and they are distinct sessions, not adjournments, and I believe there is no doubt in point of practice that these sessions are dealt with as distinct and original, and that no one considers the sessions at Belfast as a mere adjournment of those at Antrim. This case might have been heard at Belfast, and therefore Mr. Otway was right. Mr. M'Donogh said we ought to put the case in a course of solemn inquiry. Of course that is often a proper course to take in a case of doubt; but the case here is of that nature, that the moment the conditional order would be granted, no one would have an interest in disputing it. The only persons would be the magistrates, who very likely would not care about it, and I cannot see how granting the order would lead to any more satisfactory argument than that which we have had.

HAYES, J.—I agree in the decision of the court. It is important for us to attend to two out of the many statutes which have been cited; and those two are, first, the statute 24 & 25 Vict., c. 91, which gives the appeal, and secondly, the statute 14 & 15 Vict., c. 57, the Civil Bill Act. Other statutes were referred to, and for a very lucid exposition of them we are indebted to Mr. Falkiner. The statute 24 & 25 Vict. says, "that the appeal shall be to the justices at the next general quarter sessions of the peace which shall be holden for the county, shire, division, city, town, or place, in which such judgment so appealed against shall have been given next after the expiration of twenty days from the giving such judgment." &c. Now, as I have said, in my opinion this statute would have been complied with, not only according to its words, but according to its true meaning, by the appeal having been brought to the Belfast sessions. By the Civil Bill Act, ss. 31 and 32, power was given to the Lord Lieutenant to divide counties, and appoint sessions towns in each county, and to declare by authority that sessions shall be held in those towns not more frequently than four times a year. According to the proclamation we learn that Belfast was, in 1854, divided into two divisions, &c. According to the true reading of these two sections of the Act, every session

holden pursuant to the authority is a general original sessions of the peace, and not merely original in the first town of the division, and adjourned in the second. They are then original sessions. Then, are they quarter sessions? Yes, and not only in name, but according to the true intent and purpose for which quarter sessions were instituted. They are so in name, because they are held four times in the year in each town, and they come up to the true meaning of the term, because the reason for the statute of Henry V., by which they were instituted, was, that the whole public might know at all times when the courts were to be holden, and that it was not to be left to the justices only to convene general sessions when they chose, though their right to hold them oftener than at the times pointed out was not interfered with; so that thus the public was secured the general sessions, and at the times mentioned in the statute they knew they might expect to find a tribunal. All these requisites we find in the quarter sessions held in Belfast. It was held by statutable authority; it was an original session; it was a quarter session, the time fixed and the public having warning that at this time the sessions would be held to which all might come for justice; and it is in this view that the 24 Vict. is sedulous to say that the appeal is to be at the next general sessions, that is, the sessions established by statutable authority. Accordingly, not only according to the true literal meaning of the word quarter sessions, but according to the true intent and meaning of the Legislature, all these are satisfied by the sessions held at Belfast, and to them the appeal ought to have been. The Legislature reasonably concluding that there should be no unreasonable delay, the party was bound to go to the next sessions, and he not having done that, his appeal is gone.

FITZGERALD, J.—I have before me a copy of the proclamation under which the County of Antrim was divided into the present divisions. It bears date the 8th of July, 1854, and directs, that from and after the then October sessions, the then existing division should be annulled, "and that in lieu thereof the county should be divided into the two divisions following, for the administration of the criminal and civil business, and doing all other business that may by law be done at the general quarter sessions of the peace, and for hearing and determining civil bills, and for all other purposes whatsoever, that is to say, one of said divisions to be called the district or division of Belfast, and shall consist of the baronies of Upper Antrim, Upper Belfast and Lower Belfast, Upper Toome, Upper Massareene and Lower Massareene, and the town and liberties of Carrickfergus; and that the towns of Belfast, Antrim, and Carrickfergus, shall be the towns for holding sessions in and for said district or division, and that sessions shall be held there respectively as follows—that is, to say, four general sessions of the peace in each and every year in the said town of Belfast, and four general sessions of the peace in each and every year in said town of Antrim, and two general sessions of the peace in each and every year in the said town of Carrickfergus. And the other of said divisions to be called the district or division of Ballymena, and shall consist of the baronies of Cary, Upper Dunluce and Lower Dunluce, Upper Glenarm and Lower Glenarm, Kilconway, Lower Antrim and Lower Toome;

and that the towns of Ballymena and Ballymoney shall be the towns for holding sessions in and for the said last-mentioned district or division, and that sessions shall be holden therein respectively as follows, that is to say, four general sessions of the peace in each and every year in the said town of Ballymena, and two general sessions of the peace in each and every year in the said town of Ballymoney." On the 2nd Aug., 1856, another proclamation was issued directing that henceforth the town of Carrickfergus shall be discontinued as a sessions town for the said County of Antrim. We were told that Antrim was the division, and that the sessions at Belfast were a mere adjournment. It now turns out that Belfast is the first town, and that the division is the division, not of Antrim, but of Belfast. I need only say that I am of opinion that the quarter sessions held at Belfast in this case were the next sessions after twenty days after the judgment, within the meaning of the statute; and they are thus brought exactly within the words of the section speaking of the sessions for the place at which the judgment appealed from was pronounced.

Rule discharged.

Court of Exchequer.

[Reported by H. J. Wrixon, Esq., Barrister-at-Law.]

[MICHAELMAS TERM.]

BOYD v. FITT.

Agent abandoning his office—indirect injury caused thereby to other branches of business in which the principal was engaged—Damages given therefor, whether too remote.

In an action by a principal against his agent in a particular branch for abandoning his agency, the jury having given damages for losses sustained by the principal in collateral branches of his business, by reason of the injury done to his credit by the defendant's abandonment of his agency, the court refused to interfere with the verdict, or to consider the damage too remote.

In this case the defendant obtained, on the 7th Nov. a conditional order for a new trial, on the ground of misdirection, and reception of illegal evidence, or to have the damages reduced from £300 to £110. Cause was now shown against the conditional order. The action was tried by Pigot, C.B., at the sittings after Hilary Term last. The plaintiffs were provision agents and cattle salesmen in Dublin. The defendant had been their agent in Glasgow, and the action was or breach of a written agreement regulating the terms of the agency, dated the 13th December, 1861, which was to have been in force for nine months, and then determinable upon giving three months' notice. The commission was guaranteed to amount to £250 a year, and the agreement contained a stipulation that the defendant should procure the sum of £500, or obtain a cash credit to that extent of a Glasgow bank, and should open a bank account in his own name with this capital, to be used in honouring the cash orders of the plaintiffs, the plaintiffs undertaking not to pass

any cash order on the defendant, without the defendant's having the full amount of such orders "in his hands," either in cash or goods, previous to his being required to pay same. The defendant commenced business in Glasgow as agent to the plaintiffs on the 25th January, 1862. On that day, goods reached him to the amount of £267 4s. 6d. On the 28th, he received £50 in cash, but on the same day an order was presented to him for £400, payable immediately, which he honoured, being thereby in advance to the plaintiffs to the amount of £82 15s. 7d. He subsequently received on the same day goods to the value of £70 4s. 6d., and immediately after, a cash order for £250, which he also honoured, leaving himself, on the evening of the 28th, in advance to the plaintiffs to the amount of £262 11s. 2d. It appeared that one of the plaintiffs, who was then in Glasgow, had offered to procure the money by telegraph, and that the defendant volunteered of his own accord to advance it. On February the 1st, the defendant received £350 in cash, and goods, which had arrived at Greenock per the Vanguard steamer, and were invoiced to him, to the value of £302, as also cattle, which were invoiced at £370, but which were sold afterwards for £308. But those goods and cattle could not arrive in Glasgow before half-past eleven or a quarter before twelve o'clock, at which latter hour the banks closed (the 1st of February being on a Saturday). The defendant, at the same time, received a cash order for £250L, payable immediately. Under those circumstances he became alarmed, and abandoned his office, after drawing the balance remaining in his favour at the bank. He, however, returned on Monday, the 3rd, and remained till Wednesday, the 5th, when the contract between him and the plaintiffs was finally rescinded. In the meantime, the order for 250L, and another order for the same amount, were returned dishonoured. Counsel for the defendant asked for a direction that the plaintiffs ought only to recover nominal damages, grounded on the defendant's absenting himself from his duty, and that he was justified in not meeting the cash order on February the 1st, inasmuch as he had not cash or goods "in his hands," considering his former advances, sufficient to meet that order, as the goods which arrived that morning at Greenock could not be considered to have been "in his hands," it being impossible to have them delivered to him before the closing of the bank. A direction was also asked, to the effect that the items of special damages were too remote, the plaintiffs claiming compensation, first, for the suspension of the Glasgow business; secondly, for the loss of a commission agency in Dublin, in consequence of the injury done to their credit; thirdly, for injury to their other business in Dublin, arising from the same cause. The jury estimated the damages complained of under those several heads at 110L, 70L, and 120L, respectively. Other objections had been taken at the trial, but were not relied on in this argument.

J. T. Ball, Q.C., now appeared for the plaintiffs, to shew cause against the conditional order. The following cases were cited by him against the objection to the damages, on the ground of remoteness:—*Hadley v. Baxendale* (9 Exchequer R., 34); *Smeed v. Ford* (5 Jur., N.S., 291); *Rigby v. Hewitt* (5 Ex., 240);

Greenland v. Chaplin (ibid., 243); *Dunlop v. Higgins* (1 H. of L. Ca., 381). [*Pigot, C.B.*—Failure in business is frequently caused by the default of parties with whom a man is dealing, and one failure often causes a series of others. Shall those parties be liable for all the disastrous consequences of their default?]

J. E. Walsh, contra, (with him *Serjeant Sullivan* and *O'Hagan*.) cited the following cases in support of the objection to the damages on the ground of remoteness:—*Hadley v. Baxendale* (ubi supra); *Wilson v. Lancashire and Yorkshire Railway Company* (9 C. B., N. S., 632); *Gee v. Same* (6. H. & N., 211); *Hoey v. Felton* (11 C. B., N. S., 142); *Priestley v. McClean* (2 Fo. & Fin., 288); *Archer v. Willis* (2 C. & K.); *Story on Agency*, s. 220, (ed. 1827).

Serjeant Sullivan on the same side, referred to *Knight v. Lynch* (5 Law Times, 291), and contended that the authorities cited tend to shew that it is for the court, and not for the jury, to decide whether the damages complained of are the natural result of the wrong done, or not. He relied strongly on *Gee v. The Lancashire and Yorkshire Railway Company* (ubi supra), and on *Story on Agency*, s. 220. He gave up the objection to the first item of damages, but distinguished that item from the second and third, and contended that the indirect damage to the separate and collateral branches of business, in consequence of the injury done to the credit of the plaintiffs by their agent in the first branch of business, cannot be deemed to have been contemplated by the defendant. [*Pigot, C.B.*—The defendant may, in one sense, be considered as the banker of the plaintiffs, and, in that point of view, the case of *Rollin v. Stuart* (14 C. B., 595) is a direct authority to shew that even without averring special injury, the plaintiffs might recover special damages, if the defendant, at the time of dishonouring the cash order, had sufficient assets to meet it. Are the jury then to be at liberty to give substantial damages upon mere conjecture, and are they not to be at liberty to estimate upon the basis of facts to be proved in evidence?]

D. C. Heron, Q.C., in reply, contended that the mere description of the plaintiffs in the agreement was express notice to the defendant of the various branches of business in which his principals were engaged. He referred to *Sedgwick on Damages*, p. 22, and submitted that, the defendant being the banker of the plaintiffs, "special" damage was not the gist of the action, and that the injuries complained of ought rather to be considered as "particular" items coming under the head of general injury.

Cur. adv. vult.

Jan. 31, 1863.—The judgment of the court was delivered by

Pigot, C.B.—The defendant has contended that the plaintiffs ought only to recover nominal damages on the ground that the goods, which arrived at Greenock on the 1st of February, 1862, could not be considered as being in "his (the defendant's) hands," so as to oblige him to meet the cash order for 250*l.*, which he received on that day, and that, therefore, his sole default consisted in his absenting himself from his post till the Monday morning following. I told the jury that if they thought the goods were within the defen-

dant's dominion at the time when the cash order ought to have been honoured, they ought to find that they were "in his hands" for the purposes of this action, and they found accordingly. That point is, therefore, closed. Taking it, therefore, as settled that the defendant was in default, in not meeting the plaintiffs' cash order on the 1st of February, the case of *Rollin v. Stuart* is a direct authority for the plaintiffs, entitling them, as traders, to recover substantial damages for the dishonour of their cash order at a time when the defendant had sufficient assets in his hands to meet it. The defendant has contended that the several items of damage were too remote. His objection to the first item, viz., the injury arising from the suspension of the Glasgow business, was given up in the argument. In my opinion, that objection was properly given up. As to the two other items, viz., the injury to the Dublin business, and the loss of the commission agency, *Hadley v. Baxendale* was relied on. According to that case, the damage must be such as either arises naturally in the ordinary course of things, or such as both parties to the contract might reasonably have expected to result from a breach of it. *Smeed v. Ford* (E. & E., 602), and *Gee v. The Lancashire and Yorkshire Railway Company* (6 H. & N., 211) further illustrate this principle. I left the question to the jury, and it is not desirable to overrule their verdict, as the heads of damage complained of, if they do not come under the first branch of the principle, may well be brought under the second.

Rule discharged,

Court of Probate.

[Reported by W. R. Miller, Esq., LL.D., Barrister-at-Law.]

TERNAN v TERNAN.—13th Jan. 1863.

Practice—Photograph of will.

Where a will lodged in the Registry was impeached as a forgery, the court refused to allow the party propounding it to get a photograph copy of the testator's and witnesses' signatures to it, without an affidavit explaining the circumstances, but on consent made an order that a copy might be taken of the body of it.

Dr. Townsend, for the plaintiff moved that one of the registrars be ordered to attend at a photographers with the original will of James Ternan, the deceased, in order that a photograph might be taken of it. The deceased, who died in Dec. 1860, was supposed to have died intestate, and administration to his goods as of an intestate had been granted to his widow; but afterwards, in April, 1862, the will now alleged was sent in an envelope by post to a person named in it as an executor. Both the witnesses were then dead. The will was dated in Dec. 1860, and the solicitor for the plaintiff alleged that he could by letters and comparison of handwriting prove their signatures; but the body of the will appeared to be in some clerk's handwriting, and it was desired to have copies by photograph of the will to institute inquiries to trace the writer of it, and also to get evidence as to the

testator's handwriting. The testator was a seafaring man, and the object was to save the expense of bringing up numerous persons to inspect the original. The copies, however numerous, must be identical, with no variation, and but one document can either be admitted to proof or condemned—*The Queen v. The United Kingdom Telegraph Company* (3 Fost. & F. Cr. C. 73).

Dr. Ball, Q.C., for the defendant.—We impeach by our plea this document as a forgery, and we object to the motion as affording a facility for the fabrication. A photograph picture does not afford so accurate a means of testing handwriting as the original.

Boston (with Dr. Ball) mentioned Davy v. Pemberton (11 C. B. N. S. 628), where in an action of libel photographs had been allowed to be taken of the document containing the alleged libel, in order to trace the handwriting, the defendant denying that he was the author of the libel.

KEATINGE, J.—In this case there is no affidavit to ground the motion to explain the necessity for it, and I see great difficulty in making such an order unless on consent. Comparison of handwriting is admissible evidence; and what is to prevent a fraudulent person getting a dozen of letters alleged to be genuine, and by them proving the signatures to the will? [Dr. Ball having consented to the order suggested by his lordship, it was ordered that one of the registrars should attend with the original will at a photographer's to permit copies of the body of it (but not the attestation clause, or testator's or witnesses' signatures) to be taken, the defendant undertaking to give a copy to the plaintiff.]

ADAMS v. QUINN.—20th Feb. 1863.

Practice—Sending cases to Assizes.

Where the assets do not by affidavit or otherwise appear to be small, the court will not send the case to the assizes, though all the witnesses and parties reside in the country.

Musgrave moved for the plaintiff, that the case should be sent to Belfast for trial. The plaintiff had alleged a will; the pleas were, undue execution, want of capacity, fraud, and undue influence. The affidavit of the plaintiff in support of the motion relied on the fact of one witness being old and rheumatic, but did not state the age or the ailment more minutely, and of the other intended witnesses being doctors and clergymen near Belfast. The assets are supposed to be about £400—*Benson v. Derrig* (3 Ir. Jur. 350.)

J. A. Phillips, contra.—There are no special circumstances alleged here. The assets are supposed by the defendant to be much more than suggested by the plaintiff; we think they amount to at least £2,500.

KEATINGE, J.—If it was clear that the property was small I would be disposed to send this case to the assizes, as Sir C. Cresswell has done in several similar cases. But here one party says the assets amount to £2,500, and the affidavit of the plaintiff does not state the amount. The general rule is that these cases should be all tried by myself; and if I were to send this case I should send every case where the

testator happened to die in the country, and where his capacity was disputed. His lordship then directed the case to be tried before the court and a common jury of the city of Dublin at the next sittings for Nisi Prius.

ROBINSON v. INCE.

Practice—Duplicate citation.

When a citation which had been served abroad was on its way back rendered by shipwreck of the packet and from the effect of salt water illegible; but the affidavit of service was forthcoming, and also the precipe for the citation, the court ordered a duplicate to issue and to be filed instead of the original in the office.

Dr Gibbon, for the plaintiff, moved that a duplicate citation might be issued and filed instead of the original. It appeared from affidavit that, pursuant to an order of the judge, a citation had issued on the 19th of July last, directed to Robert Ince, the father and sole next of kin, and heir-at-law of the deceased Thomas Ince; and the said citation was transmitted with a copy for service to a Mr. Newman, solicitor at Melbourne, Victoria, to be served on said Richard Ince, at Geelong, Victoria, in Australia. And on the 23rd January last the affidavit of service of said citation was received in Dublin by a Mr. Johnson (correspondent of Newman) in a letter, dated 25th Oct. 1862, and had said been, with the original citation and other documents, transmitted by said Newman from Australia by the mail packet, "Colombo," which vessel was, however, wrecked on her passage. There was also a letter from Newman to the plaintiff's solicitor, advising him of the papers being sent. The packet containing the documents was sent by Johnson to the plaintiffs solicitor, who opened them. The affidavit of service was found damaged, but quite legible; but the original citation being on parchment was, from the effects of salt water, illegible and nearly rotted and dissolved. The precipe for the citation was in the Registry, and fixed the date of the citation as the 19th July; and the entry also appeared, of the proper officer, in his book, of the issuing of the citation. No other citation had issued in the cause.

KEATINGE, J.—Under the circumstances I will order a duplicate citation to issue and to be lodged in the office instead of the original, which is illegible.

NUGENT v. NUGENT.

Practice—Petition—Caveat—Costs of proving will.

In certain cases where the facts are peculiar, a petition is the proper course to adopt in order to have a caveat, appearance, and plea set aside. The costs of proving a will in common form are always paid out of the residue, and should not be charged on a legatee.

H. Devitt, for the plaintiff, moved the prayer of the petition, which was that the caveat, appearance, and plea of the defendant be set aside, with costs, and that

the plaintiff might be at liberty to prove in common form the will of the 17th of March, 1862, of the deceased. The petition stated that the deceased died on the 17th March, 1862, on which day the will relied on by the plaintiff was made and executed, which gave a legacy of £100 to the defendant. A sum of £91 was paid to the defendant by the plaintiff, the executor in that will, on the 30th May, 1862, the deductions being for legacy duty, and also £4 for part of the expenses of proving the will. Afterwards the defendant lodged a caveat, which was warned, and an appearance was filed by the defendant as a *legatee under the will of the deceased*. On the 24th Dec. 1862, the declaration was filed alleging the will of the 17th March, 1862, to which the defendant pleaded undue execution, incapacity, and undue influence; and also that the deceased made another will, dated on the 25th March, 1862, which revoked the former. [That was eight days after the deceased had died.] But the plea did not state any interest of the defendant.

KEATINGE, J., called on the other side.

J. Hamilton, for the defendant.—We do not object to the caveat appearance and plea being set aside, but we do object to the costs of this petition, as the plaintiff should have come in by motion and affidavit, and the petition was quite unnecessary (Miller's Prob. Prac. 62).

KEATINGE, J.—That is the correct practice in ordinary cases; but this is an exceptional case, where I think a petition was the proper course. If a motion only had been made the defendant would perhaps have applied to amend the appearance by giving the date of the later will relied on. The plaintiff must give credit, however, for the deduction of £4 made as part of the costs of proving the will, as that is always borne by the residuary legatee. The caveat, appearance and plea must be set aside, with costs, and the plaintiff be at liberty to prove in common form.

Order accordingly.

NOTE.—See *Inkson v. Jeeves* (11 W. R. 350) where Sir C. Cresswell refused to order an amendment of pleas by setting forth how the defendants derived their interest, *after the plaintiff had declared*. The proper objection would be to the appearance, and the filing the declaration was a waiver of the defect. The same, perhaps, might have been said in the principal case.

Landed Estates Court.

[Reported by R. H. V. Archer, Esq., and H. Fawcett, Esq.
Barrister-at-Law.]

[BEFORE JUDGE LONGFIELD.]

IN THE MATTER OF THE ESTATE OF JOHN RORKE, OWNER;
EX PARTE MARIA ISABELLA LLOYD, PETITIONER.

A lease, duly registered, postponed to two mortgages prior in date to the lease, but subsequently registered, the mortgagor and lessor being the same person, and the lessee having employed the lessor as his solicitor.

J. R., the owner of the estate, who was also a solicitor, executed a mortgage on the 20th March, 1856, to M. S. to secure the repayment of £4,000, which

was registered on the 3rd April, 1859. J. R. executed another mortgage on the 1st of February, 1859, to A. B. to secure £3,000, and this mortgage was registered on the 23rd March, 1859. And on the 7th March, 1859, J. R. executed a lease of the lands to P. M. for thirty years, at a rent of £845, P. M. paying one year's rent in advance, and a fine of £1500. The lease was registered on the 16th of March, 1859, and was drawn and registered by J. R., the lessor, for which P. M. paid the costs out of pocket. P. M. alleged a custom for the landlord's solicitor to prepare the tenant's lease, and denied that he retained or employed J. R. as his solicitor. Held, that J. R., the lessor, having drawn and registered the lease, was the solicitor for P. M., the lessee; and therefore that P. M. had notice, through J. R., his solicitor, of the prior unregistered mortgages executed by J. R., and accordingly that he was not entitled to priority over the mortgagees by reason of his lease being first on the registry.

THIS case came before the court on the motion of Mary Stein, Margaret Reid, Teresa Ennis, and Anthony Browne, mortgagees, who sought that the lands of Tyrrellstown, forming part of the lands ordered to be sold in this matter might be set up for sale discharged of a certain lease dated the 7th day of March, 1859. The motion was opposed by Patrick Maher, the lessee in the said lease. It appeared that by a certain mortgage dated the 20th of March, 1856, the owner in this matter granted the lands of Tyrrellstown (with others) to Mary Stein, Margaret Reid, and Teresa Ennis, to secure the repayment of a sum of £4,000, with interest thereon, at the rate of £5 per cent. per annum. This mortgage was registered on the 3rd of April, 1859. By one other mortgage, dated the 1st day of February, 1859, the owner granted the said lands of Tyrrellstown (with others) to Anthony Brown, to secure the repayment of a sum of £3,000, with interest thereon at the rate of £5 per cent. per annum. This mortgage was registered on the 23rd of March, 1859. And by an indenture of lease dated the 7th of March, 1859, the owner, John Rorke, demised the lands of Tyrrellstown to Patrick Maher for a term of thirty years, at a rent of £845 per annum, the lessee at the same time paying one year's rent in advance, together with a fine of £1,500. This lease was registered on the 16th of March, 1859. It appears also that the owner, John Rorke, was a solicitor; and it was alleged by an affidavit filed in support of the motion that on the occasion of the granting of the lease of the 7th of March, 1859, John Rorke acted as solicitor for the lessee, Patrick Maher. On the other hand Maher, in his affidavit, alleged that he never employed John Rorke, as his solicitor at law or in equity, or as his professional adviser; but that, acting upon what he understood to be the custom of the country, he allowed his landlord to prepare the lease, and merely paid him the expense out of pocket incurred in respect of the lease. On these facts the mortgagees contended that their mortgages were in point of law entitled to priority over Maher's lease, notwithstanding the prior registry of the lease, inasmuch as the lease was prepared by Rorke, the mort-

gagor, and accordingly that the lessee was affected with constructive notice of the mortgages executed by the lessor prior to the lease.

Mr. Flanagan, Q.C., for the mortgagees, contended, firstly, that Maher was bound by constructive notice of the mortgages, by reason of employing the lessor as his solicitor, he being in fact the mortgagor in the deeds of the 20th of March, 1856, and the 1st of February, 1859, and that he could not now rely on the prior registration of his lease; and secondly, that the court was bound to assume that Rorke was the solicitor for the lessee, he having in fact prepared the lease, and having been paid the expenses incident thereto by Maher, notwithstanding the allegation in Maher's affidavit that he never retained Rorke as his solicitor. In support of these views he relied on the following cases:—*Majoribanks v. Hovenden* (6 Ir. Eq. R. 238); *Kennedy v. Greene* (3 Myl. & K. 699); *Atkins v. Delmege* (12 Ir. Eq. Rep. 1); *Twycross v. Moore* (13 Ir. Eq. R. 240); *Tucker v. Henzill* (4 Ir. Ch. R. 513); *Smith's Landlord and Tenant*, 162; 1 Furlong's *Landlord and Tenant*, 379.

Serjeant Sullivan on behalf of the tenant, Maher.—It appears from the affidavit filed in support of the motion that the mortgagees entered into a stipulation with the owner that they would not register their mortgage, but took John Rorke's promise that he would not do any act to impair their security. This was a fraud under the statute of Elizabeth—*Perry-herrick v. Atwood* (2 De G. & Jo. 21). There is no evidence that the lease is at an undervalue, except that a fine was paid; and there is positive evidence that the lands are set at the full value. Rorke did not act as solicitor for Maher in the transaction, and Maher only paid him the costs out of pocket for preparing his lease—*Burke v. Smith* (9 Ir. Eq. R. 137). Mr. Rorke was committing a fraud in suppressing by agreement a deed from the Registry, and is not to be presumed to disclose it—*Perry v. Hall* (2 De G., F. & Jo., 38); *Espine v. Pemberton* (3 De G. & Jo. 547, and 4th Drury, 533); *Sugden's Vendors and Purchasers*, 757, and vide 768; *Hewitt v. Loosemore* (9 Hare, 449). The doctrine contended for here by the mortgagees is a mistaken view of the ground on which notice to the attorney is notice to the client—*In re Burmester* (9 Ir. Ch. 41).

Sir Colman O'Loughlen, on the same side.—A party taking under a subsequent conveyance can only be affected with notice of pre-existing incumbrances, a knowledge of which could or would have been acquired if he had employed an independent solicitor. He cannot be fixed with notice of that which the solicitor had in his own mind and fraudulently suppressed. The later decisions overrule the previous ones as to constructive notice. The following cases were cited in support of the argument:—*Kennedy v. Greene* (supra); *Sheldon v. Cox* (Ambl. 624); *Traill v. Ellis* (16 Beav. 350); *Atterbury v. Wallis* (8 De G. M. & G. 454); *Ware v. Egmont* (4 De G. M. & G. 474); *Perry v. Hall* (2 De G. F. & Jo. 33); *Majoribanks v. Hovenden* (supra); *Bernard v. Drought* (1 Mol. 39).

Mr. Flanagan, Q.C., in reply.—The allegation as to the agreement not to register only applies to one of the mortgages. If the English and Irish cases differ,

the Court ought to follow the Irish cases. The case of *Majoribanks v. Hovenden* was recognized as good law in the case of *In re Burmester* (supra). There were no costs paid to the solicitor in the case of *Hewitt v. Loosemore*. Robert Loosemore was the solicitor and tenant, and prepared the deed of assignment at his own cost. In the case of *Espine v. Pemberton* the Irish cases were not cited; and there was no evidence that the mortgagor acted as solicitor for the mortgagee.

JUDGE LONGFIELD, in delivering judgment, said,—This is an application by certain creditors to sell the estate, discharged of a certain lease, to Patrick Maher. The creditors, Mary Stein and her partners, claim under a mortgage made to them by the owner, John Rorke, for the sum of £4,000. Patrick Maher claims under a lease made by the owner for the term of 30 years, at the rent of £845. For this lease he paid, between advance of rent and a fine, the sum of £2,345. The mortgage is dated the 20th March, 1856, and was registered on the 3rd of April, 1859. The lease is dated the 7th of March, 1859, and was registered on the 16th of March, 1859. If this case were one of first impression unaffected by any previous decisions of courts of equity, my judgment would be very brief, and would be given without hesitation, that Patrick Maher claiming under a deed which was earlier on the registry than that of his opponents, has an Act of Parliament clearly in his favor, and that nothing has occurred to make it inequitable in him to claim and enjoy the advantage given to him by the Registry Acts. But a number of cases have been cited which have settled or confused the law upon the subject and make it necessary for me to consider some further facts in the case. John Rorke, the owner, was himself an attorney. He drew and registered the lease under which Patrick Maher claims; and it is contended that as Maher employed no other attorney in the transaction, Rorke must be deemed to have been his attorney in the transaction; and that therefore Maher must be considered as affected by that notice or knowledge which Rorke undoubtedly had of his own prior unregistered mortgages, and therefore cannot claim the protection of the Registry Act, which was intended only to protect purchasers against prior secret deeds of which they had no notice. Many cases have been cited to prove or disprove the different steps in this argument which, therefore, I must notice in some detail. At a very early period it was decided on the construction of the Middlesex Registry Act that a party who, when he got his own deed, had notice of a prior unregistered deed, could not in equity avail himself of the Registry Act to obtain priority over that deed. Those decisions have always been treated as applicable also to the Irish Registry Act. It is unfortunately too late to dispute them, and this disposes of one step in the argument. The next step is, that notice to the attorney must be deemed equivalent to notice to his client, otherwise many obvious equities might be extinguished, as purchasers would escape being fixed personally with any knowledge of such equities by committing the conduct of the transaction altogether to their attorneys. The good policy and the justice of this rule are plain; but the reason on which the rule is founded seems to me to require

that notice to the agent to bind his principal should be such notice as he acquired or might acquire in the course of that transaction. This was at one time supposed to be the law, but a second reason was found for this limitation, viz., that previously acquired notice might have passed away from the mind of the attorney before the particular transaction commenced, which made it material. Then, as if this was the only reason for limiting the rule to notice acquired in the course of the transaction, this limitation was qualified by an exception to this effect, namely, unless the recent origin or notice of the prior equity or other special circumstances show conclusively that at the time of the second transaction the attorney must have had the former one present to his mind; and then the general rule affected the second purchaser with notice of all unregistered deeds in all cases where his attorney was himself the vendor or mortgagor, and in most cases where the same attorney acted for mortgagor and mortgagee, vendor and vendee. This rule laid down in *Sheldon v. Cox* (Ambl. 624) made it unsafe for any person to purchase or take a mortgage from his own attorney. It would not occur to an unprofessional man to employ any other attorney upon such occasions. Indeed, he could hardly give a reason for doing so that would not be an insult to his usual confidential agent. Let him mince the matter as he likes, his reason would come to this,—"I do not employ you on this occasion, because the state of the law is this, that if you are a knave, the law would give me no protection against your prior unregistered deeds." The reason would be absurd as well as insulting; for if the client thought him likely to be a knave, he ought not to continue to employ him in his other affairs. Accordingly, in compliance with a rule, which has no reason in policy or justice to support it, and in plain contradiction to an Act of Parliament, there are many cases in which honest purchasers have been deprived of what they bought, on the presumption that they had knowledge of acts which they could not by any possibility have even suspected. These are generally admitted by the court to be hard cases. I doubt the right of any court of justice to decide so as to make a hard case against a person who has the clear provision of an Act of Parliament in his favor. It is sometimes said that hard cases make bad law. I am sure that the converse of this proposition is much more obvious, and that bad law makes hard cases. By their fruits shall ye know them, and hard cases are the fruits by which you may know bad rules of law. This law of constructive notice was supposed to have at least the advantage of certainty, as there was very little conflict of authorities until the well-known case of *Kennedy v. Greene* (3 Myl. & K., 699). In this case an attorney mortgaged a property which he had acquired by a gross fraud practised on the plaintiff. He himself drew the mortgage for the defendant, the mortgagee; but the mortgagee was not on that account fixed with notice of the fraud by which the attorney acquired the property; for it is not to be supposed that the attorney would have informed the mortgagee that he had been guilty of such a fraud. This introduced a new subject of inquiry into such cases, viz., Did the attorney communicate such knowledge to his client? The

materiality of this inquiry is admitted in *Hewitt v. Loosemore* (9 Hare, 449), where the plaintiff had a prior equitable incumbrance by the deposit of a lease, and the defendant, who had a legal mortgage, had employed the mortgagor as his solicitor in the transaction; but this was held not to affect the defendant with the consequences of notice, because the plaintiff's evidence shewed that the knowledge which the solicitor possessed was not communicated. This case decided, as in *Kennedy v. Greene*, that the communications of knowledge to the client by the solicitor was a material circumstance; but unfortunately, instead of trying that question as one depending on evidence and probability, it made it depend on a kind of estoppel, binding the client without evidence, and even contrary to evidence, except in the two cases—first, where, as in *Kennedy v. Greene*, the prior equity resulted from an antecedent fraud committed by the solicitor; or, secondly, as in *Hewitt v. Loosemore*, where the evidence produced by the party relying upon the previous equity, shows that knowledge of it was not communicated to the opposite party. This view of the law appears to have been adopted by the present Lord Chancellor in *Tucker v. Henzell*. However, the law on this point has been again disturbed by the case of *Espine v. Pemberton* (3 De G. & Jo. 547). This case contradicts two opinions expressed by the court in *Kennedy v. Greene*. Lord Chelmsford distinctly states: that the notice which affects the principal through a solicitor, does not depend upon whether it is communicated to him or not; and he also decided, that although the mortgagor, who was a solicitor, drew the mortgage deed, and the mortgagee employed no other solicitor, this did not constitute the mortgagor the solicitor of the mortgagee in the transaction. He says, "I think there ought to be some consent on the part of the mortgagee to constitute this relation between them;" and he adds, on the circumstance of no other solicitor having been employed by the mortgagee—"But he may not desire to have any solicitor, considering himself equal to his own protection." Now this supposition is exactly the case made and sworn to in the case of *Kennedy v. Greene*, and yet it did not prevent Lord Brougham from deciding that the mortgagor was the solicitor of the mortgagee. If we compare *Espine v. Pemberton* with *Hewitt v. Loosemore*, we perceive that although the judgments were in favour of parties similarly circumstanced, they rested upon grounds altogether different. I have hitherto referred only to the English decisions, which are not altogether consistent with each other. The decisions on the Irish statutes are more uniform. In those cases, *Sheldon v. Cox* (Ambl., 624,) is uniformly recognized as law. In that case Lord Northington decided that a mortgagee with a registered mortgage, in obtaining which he employed the mortgagor as his solicitor, was thereby affected with notice of a prior unregistered mortgage executed by the same mortgagor. Lord Northington deciding that notice to the solicitor was constructive notice to the principal, says, that a party would avoid notice in every case by employing an agent. This reason seems to apply only to notice in the same transaction; but the decision was founded on notice not obtained by the solicitor in that transaction. This law is fully recognized by Lord

St. Leonards, in *Majoribanks v. Hovenden* (6 Ir. Eq. R., 238), where he says, "It is quite clear that if a man employed a solicitor who is also owner of the property, he is as much bound by the knowledge of that solicitor, as if he had employed one who had no interest whatever in it." In that case he postponed a registered mortgage to a prior unregistered deed, because it was drawn by the mortgagor himself, and there was no evidence that the mortgagee employed any other solicitor in the transaction. But the later case of *Tucker v. Henzill* (4 Ir. Chan. R., 513), (decided by the present Lord Chancellor) is stronger still, and no distinction favourable to the tenant can be shewn between it and the case now before the court, although there the defeated party had some additional equities. In that case one Martin Tucker, being entitled to the estate for his life, with remainder in tail to his eldest son, entered into a family arrangement with William Tucker, then supposed to be his eldest son, and by a deed dated the 1st of May, 1832, and duly registered, a jointure of £100 a-year was provided for Mrs. Tucker, the plaintiff, who was the wife of Martin, and the mother of William; and the estate, subject to the jointure, was settled on Martin for life, remainder to William in fee. Martin died shortly afterwards. William, by settlement dated the 12th March, 1833, which was not registered, settled a jointure of £200 a year on his wife, who, after her husband's death, married again, and was the defendant, Mrs. Henzill. Shortly after William's marriage, Thomas Tucker, a younger brother of William, and a son also of the plaintiff, claimed the estate, alleging that he was the eldest legitimate son of Martin Tucker. This claim, which, if proved, would have destroyed both jointures, was compromised. Thomas got a portion of the estate free from incumbrances, and confirmed the title of William to the rest. This was effected by a deed dated the 13th of February, 1835, which was duly registered. Mrs. Tucker released her jointure of £100 a year, which extended over the whole property, and in lieu thereof William granted her a rentcharge of the same amount on the portion granted to him. Mrs. Tucker employed no solicitor, and of course took no part in the negotiations, but she executed the deed at the request of her two sons, William and Thomas, who assured her that her position would remain just as it had been. This jointure was postponed to Mrs. Henzill's jointure, because the deed was drawn by a firm in which William Tucker, who was a solicitor, was a partner; and she was bound, therefore, by the knowledge which her son possessed of the jointure, which, by the unregistered deed, he had previously settled on his wife. It is obvious that in that case Mrs. Tucker had some strong circumstances of natural equity in her favour. If Thomas succeeded, both she and Mrs. Henzill would have lost their jointures, and Mrs. Henzill's husband would have lost the estate. The deed of compromise was equally for the benefit of them all; Mrs. Tucker gained nothing, and got no increased charge on the estate; whereas Mrs. Henzill was claiming under the deed, and against it. She was claiming the benefit of the release, and yet impeaching the annuity, which was the only consideration given for that release. But the only material point for the court now to consider,

is, whether Mr. Maher's rights in this case are stronger than Mrs. Tucker's were in that. It is said that he is a tenant, and that the claims of tenants are entitled to peculiarly favourable consideration from this court; but it is rightly answered that this favour is to be shown only to ordinary tenants at rack-rent. The creditor who leaves his debtor in possession and management of the estate is supposed to entrust him with the power of making ordinary leases. But this rule was never extended to the case of a tenant who paid a fine for his lease, and in this case Mr. Maher, having paid between £2,000 and £3,000, must be looked upon as an ordinary purchaser, bound to look to his vendor's title. It is next contended that Rorke is not to be considered as Mr. Maher's attorney, because it is the custom for the landlord's attorney to draw the lease. Admitting such to be the custom, I do not see how it is material. In the first place Rorke not only drew the lease, but he also registered it, a duty certainly belonging to the tenant's attorney. In the next place Mr. Maher, as a purchaser, although the lessor drew the lease, might have submitted it to his own attorney to see that the proper clauses and covenants were introduced for his own protection. He trusted Mr. Rorke, as his attorney, to do this. Compare the case in this respect with *Tucker v. Henzill*. In that case undoubtedly it was not the part of Mrs. Tucker's solicitor to prepare the deed. All that in any case could have been expected was, that her attorney should peruse the deed, and approve of it, as carrying out what was promised to her; but because she had not an attorney to do this, she was considered as if she had employed the attorney who prepared the deed; although she probably had not the most remote idea that she had employed any attorney whatever in the transaction. Lord Chelmsford calls the notice with which a party is affected through his attorney, an imputed notice: it is a happily selected epithet, and we may extend its application in such cases as *Majoribanks v. Hovenden* and *Tucker v. Henzill* by saying, that there was imputed notice through an imputed attorney, and say that Mrs. Tucker was fixed with imputed notice of what in fact she did not know, by means of an imputed attorney, whom in fact she did not employ. But in this case Mr. Maher did employ and pay Mr. Rorke. On the whole, therefore, I cannot distinguish this case from *Tucker v. Henzill*, which, although a hard case, is recognized as an authority, and is certainly not contrary to any distinct consistent current of English cases. It is my duty to follow the decisions of the Court of Chancery, although I should be exceedingly well pleased if my decision were reviewed and reversed by a higher tribunal, and the law reduced to a just and consistent state, by declaring that a party shall only be affected through his attorney by such knowledge as the attorney, with reasonable diligence, might acquire in the course of the same transaction *plus* such knowledge as he shall be proved to have actually communicated to his client. I must, therefore, rule to sell discharged of the lease to Mr. Maher, with liberty for him to apply for compensation at the settling of the schedule, if there should be any funds remaining after payment of prior incumbrances: but I shall give no costs as his is a very hard case, and I think that justice and the Registry Act are in

his favour. His land ought to be sold last, in order that he might know the state of the funds.

Court of Bankruptcy & Insolvency.

[Reported by John Levey, Esq., Barrister-at-law.]

[BEFORE LYNCH, J.]

RE GUSTAVUS WILSON, EX PARTE THE PROVINCIAL BANK.—Feb. 1863.

Reducing proof—Putting a stay upon a portion of the dividend to which certain creditors are entitled.

A bank are creditors upon a bankrupt's estate for a considerable amount, and hold the acceptances of the bankrupt for the entire debt, which entitles them to prove for the full amount. Those bills were drawn by J. P. and accepted by the bankrupt, who, as collateral security, gave J. P. a mortgage on certain leasehold property. J. P., joined by the bankrupt, assigned this mortgage to J. G., who discounted the bills in question for J. P., who subsequently gets the bills discounted by the Provincial Bank. J. G. makes the mortgage available to the extent of £387. Held, that this sum must be deducted from the proof made by the Bank; or that if they insist on their right to retain the entire amount of their proof, then that they should allow the assignees to proceed in their name against J. P. on foot of the bills in question.

THE bankrupt, Gustavus Wilson, was a linen-draper in extensive business in Dublin, and having business transactions with the house of John Porter, of Belfast, he accepted bills drawn on him by Porter to the amount of £1027; and as collateral security gave Porter a mortgage on certain real estate then in his possession. Porter got the bills discounted by Mr. James Gray, of the firm of Gray and Sons, of Belfast, and as collateral security assigned to Gray, joined by the bankrupt, the mortgage in question. Gray subsequently got the bills discounted in the Provincial Bank in Belfast, and in the meantime he presented a petition in the Landed Estates Court on foot of his mortgage, and a sale of the mortgaged property was had, out of which he received a sum of £387. And the Bank having made proof for the entire amount of the bills, the assignees sought to have it reduced by the sum thus reserved by Gray. The facts fully appear in the very clear judgment given by Judge Berwick.

Kernan, Q.C., was for the Provincial Bank; Heron, Q.C., for Mr. Gray; and Lawless, Q.C., with Wilson, for the assignees.

JUDGE BERWICK.—This case comes before me on an application of the assignees to reduce the proof made by the Provincial Bank on foot of three several bills of exchange, of which the bankrupt was the acceptor, amounting altogether to £1,027 18s. 8d., by a sum of £387 5s. 11d. received out of the estate of the bankrupts under the circumstances which appear in the evidence laid before the court. The facts on which the application is sustained are to be found in the depositions of Mr. Murray and Mr. James Gray,

and the correspondence between these gentlemen now on the files of the court, and admitted to be read by the consent of the parties. It appears that the bills of exchange in question were drawn by one John Porter, and accepted by Gustavus Wilson, the bankrupt, on the 9th November, 1859. As collateral security for the bills, Wilson gave to Porter a mortgage on his real estate. The bills were afterwards discounted for Porter's accommodation by Mr. James Gray, of the firm of William Gray & Son, of Belfast, and endorsed to Gray, and Wilson joined Porter in an assignment of the mortgage to Gray for his security. The firm of Gray and Son had an account with the branch of the Provincial Bank in Belfast, and on the 23rd February, 1860, Mr. Murray, the manager of the Provincial Bank in Dublin, discounted at the request, and for the accommodation of Gray, the three bills in question, and the proceeds were placed to the credit of Gray and Co. in Belfast. The mortgage security was not, however, assigned to the bank, but remained vested by Mr. James Gray. The bills were discounted by the bank on the security of Mr. James Gray exclusively, six being of a class not usually discounted by the bank. None of them were paid when they arrived at maturity, and they still remain in the hands of the bank unliquidated. Due notice of their dishonour was given to all the parties, but the bank have since taken no step to enforce their payment, continuing to charge interest thereon in the meantime. That the bank has continued to hold the bills solely at the request, and for the accommodation of Gray, is abundantly proved by the correspondence in this case. The letter of Gray of 14th Nov. 1860, to Mr. Murray, directly requests him "to hold over the bills, as the transaction cannot be closed till the property which secured the debt be sold in the Incumbered Estates Court;" and Mr. Murray's reply of the same date shews that he looked on Gray as the only person interested, for in it he says, "There is no hope of payment from the other parties." Every successive letter demonstrates more fully that the bank was acting under the suggestion, and consulting the interests of Gray, conceiving that they were sufficiently secured by him to be freed from all risk of loss. On 1st February, 1862, Gray writes to Murray, "The property is sold, and I have reason to believe will soon be available; if you will exercise a little further patience it may be to my advantage, and cannot possibly be to your loss, and should you desire it I will send you the check of Messrs. W. Gray and Son, to hold in your hand as collateral security till these bills have been taken up." In March, 1862, Mr. Murray writes to Gray to say that "Wilson has been made a bankrupt," advising him "that there is to be a meeting for proof of debts on the 11th instant, and that he should really take up the bills, and attend to his own interests in it." Gray afterwards writes to say that he would keep the bank quit safe, and indemnify them from all loss in the matter, and begs of Murray "to prove the debt in the Bankruptcy Court on the bills at his expense," and again urges him to do so "in consequence of information and advice that had reached him, and that he will indemnify him against any expense incurred, as well as all loss;" and in his deposition Mr. Gray admits that "it was at his request Mr. Murray agreed

to hold over the bills, he informing him that the amount was secured by a mortgage; that Murray asked him to prove himself, but that he directed Murray to prove *at his (Gray's) expense*, and that Murray's proof was for his benefit; that Murray gave him time till he was able to get whatever money was available out of the Landed Estates Court, and that he was liable to Murray both at Law and in equity."

Under these circumstances proof was made by Mr. Murray on 18th March, 1862, for the full amount of the bills, £1,027 18s. 8d., and in July, 1862, Gray received from the Landed Estates Court the sum of £387 5s. 11d. on foot of the mortgage security so vested in him specifically, to secure the payment of these very bills, and which he then held as trustee for the bank, and the question I have to decide is, whether I should permit the proof made by the bank to stand for the full amount of the bills, so as to enable them to receive a dividend on the whole, while it is conceded that Gray has got out of the bankrupt's estate the sum of £387 5s. 11d., which is properly applicable to the discharge of those bills, and my decision must turn on this question, whether the proof made by the bank is really for their own benefit, or whether it is in truth and in fact for the benefit of Gray, although ostensibly made in the name of the bank, and I can have no doubt that the proof is in reality made for the benefit, and by the sanction and direction of Gray, and that the real object of Mr. Gray is by the use of the name of the bank to gain an advantage over the other creditors of the bankrupt which will enable him to receive a dividend on the whole amount of the debt, without giving credit for the sum which he has received thereout, and thus to obtain indirectly that advantage which the law will not permit him indirectly to have. Abstractedly, it may be fair for every creditor of a bankrupt to make use of all the means afforded to him to recover out of the estate of the bankrupt to the full extent of his demand, yet the leading principle in bankruptcy which I am bound to sustain, is that there should be *perfect equality among all the creditors in the distribution of the assets of the bankrupt*, and were I to allow the parties to succeed in the course they have taken, I should virtually permit this principle to be defeated. The only difficulty which suggests a doubt as to the propriety of my at once directing that the proof of the bank should be reduced by the sum received by Gray, is that the bank are at present the holders of the bills in question, and the whole amount is still due to them on foot thereof, and it is my duty to make no order which can really prejudice their rights, and though the bank are practically secured by Gray, whose solvency Mr. Murray states to be undoubted, yet till they actually receive payment from Gray, it might be said that I ought not to interfere with the proof, which, as *bona fide* holders of unpaid bills, they were entitled to make. Two courses, however, are open, either of which would, if adopted, hinder Mr. Gray from deriving any undue advantage by his proceedings, and still secure the bank from any, even theoretical injury. The first is that which was adopted by the court in the case of *Ex parte Anon. in the Matter of Barham* (1 M. D. & De Gex, 179), in which the very same question arose which is now be-

fore me, and that is, to allow the proof of the bank to stand for the whole amount, but to reserve the payment of the dividend till further orders, and thus enable the bank to take such proceedings as they may be advised against Mr. Gray. I am inclined to think, however, that this might be attended with inconvenience, inasmuch as I am informed by the official assignee that he only awaits the result of this motion to wind up the estate, and make a final dividend. The remaining alternative is to give the bank the option of at once allowing their proof to be reduced by this sum of £387 5s. 11d., and be satisfied to take the dividend on the balance, and thus allow the estate to be closed, or, if they insist upon their right, to retain their proof for the whole sum, requiring of them to allow the assignees to proceed in their name against Mr. Gray on foot of these securities, and thus enable the court to have substantial justice done to all parties. I cannot but hope that a public body like the Provincial Bank, having obtained from the court an expression of opinion of what is just towards the general body of the creditors of the bankrupts, will not further allow their name to be used for an object which I conceive not legitimate in a matter in which practically their real interests are not involved. This, however, is for their consideration; I have only to declare that I will shape my order so as not to allow a dividend to be declared in their favour, or that of Mr. Gray, for so much of their debt as is practically liquidated by the payment of the sum of £387 5s. 11d. I think the case of *Ex parte Sherrington* (1 M. D. & De Gex) is substantially in favour of the view which I have thus taken.

Court of Admiralty.

[Reported by William G. Chamney, Esq., Barrister-at-Law

THE MARY STENHOUSE.

Salvage—Appeal to delegates—Mode of assessment—Costs.

In this case, where the property saved was admittedly worth 115,000L., the court awarded the sum on 5,750L., "one-twentieth," or "five per cent.," upon both ship and cargo to the salvors, together with their costs of suit.

Upon an appeal to the Court of Delegates, the salvage awarded by the Court of Admiralty was reduced from 5,750L. to a sum of 3,000, each party to bear their own costs of the appeal.

In fixing a proportion of the value for salvage reward, the Court of Admiralty is in the habit of giving a smaller proportion where the property is large, and a higher proportion where the value is small, and for the obvious reason, that where the property is of small value, a small proportion would not hold out a sufficient encouragement, whereas, in cases of considerable value, a small proportion would afford no adequate remuneration.

THIS was a cause of salvage promoted by the London and Limerick Steam Ship Company (Limited), the registered owners of the screw steamer, the *European*, of

Limerick, 300 tons register, and 98 nominal horsepower, Josiah Cave, master, against the iron ship, Mary Stenhouse, of Liverpool, 1,243 tons register, Henry Finlay, master, the property of Messrs. Edwards & Co., of Liverpool, to recover compensation, estimated at 8,000*l.*, for salvage services alleged to have been rendered by the steamer to the impugnant vessel upon the South Coast of Ireland in the month of January, 1862. The steamer and her cargo were stated to be worth 11,000*l.*; she had a crew of nineteen hands, together with fourteen passengers, on board, and was on one of her ordinary voyages from Limerick to Liverpool at the time of the occurrence. The impugnant ship and cargo were admittedly worth 115,000*l.*, and she had a crew of thirty hands on board, and was on a voyage from Liverpool to Bombay. The case was, by consent, heard *viva voce*, and the important facts appear fully in the judgment of the court.

Doctors Gibbon, Townsend, and Elrington, for the promovents, cited *The Raikes* (1 Hag., 246); *The Perth* (3 Hag., 416); *The Ewell Grove* (3 Hag., 209); *The Shannon* (11 Jur., 1045); *The Martin Luther* (Swaby, 287); *The George Dean* (Swaby, 290); *The Spirit of the Age* (Swaby, 209); *The Norma* (1 Lushington, 124); *The Saint Nicholas* (1 Lush., 29); *The Traveller* (3 Hag., 370); *The Vrow Margaretha* (4 C. Rob., 407); *The Sovereign* (29 Law Jour., 113).

Doctors Todd and Chatterton, Q.C., and Mr. Walter Boyd, for the impugnant ship, cited *The Salacia* (2 Hag., 262), and *The Raikes*, and *The Ewell Grove*, relied on by the promovents.

March 3.—JUDGE KELLY this day pronounced judgment. He said—The Mary Stenhouse, whose owners are the defendants here, is an iron ship, built at Belfast, in the year 1854, of the register tonnage of 1,243 tons, and classed A 1, from year to year. She was bound from Liverpool to Bombay with a mixed cargo, consigned to Edward Bates & Co., of Bombay, and with her master and crew of thirty hands had proceeded in the prosecution of that voyage from Liverpool on the 20th of January last, 1862, with fair weather, and the wind a moderate breeze from S.E. The voyage so favourably commenced was, however, so beset with storm and disaster within the three next following days as to call for the salvage services, the subject-matter of this suit. As her own sea log is the best narrator of the events of those days, the court will read them as there entered, from the evening of the 22nd, up to one o'clock, a.m., of the morning of the 23rd:—"Wednesday, January 22.—A strong gale came on at eight o'clock, p.m., with a heavy sea. She took a quantity of water upon deck. At 4.30 a.m. a sudden shift of wind from W.S.W. came in heavy squalls; at five o'clock the wheel-chains broke; at noon a fierce gale; stowed the close-reefed mizen-topsail; ship labouring heavily, and taking a quantity of water; pumps attended to." "Thursday, January 23, p.m.—Blowing a perfect hurricane; at two the lower foretopsail blew away, and the foresail blowing out of the gaskets, the crew sent up to make it fast. Whilst in the act of doing so the cap of the foremast-head broke, carrying away the foretopmast and topgallantmast, and broke the foreyard in three

pieces. Mr. Cross, the second mate, was struck by some of the spars that fell on the deck and was killed, six of the other men were so injured that they could not work; cut away all the wreck on account of the ship rolling so fearfully, and took a quantity of water upon deck; when the foretopmast came down, it brought the main and mizen topgallantmast with it. Not being able to attend to them all, it burst the close-reefed maintopsail; then we had nothing set but the three storm staysails; ship rolling heavily and taking a quantity of water on deck; employed at the wreck." Now, just eight hours after, namely, about nine o'clock on that morning of the 23rd of January, she was sighted by the European, S.S. of Limerick, three to four miles W.S.W. off her starboard quarter, the European being then on her voyage from Limerick to Liverpool, about eight miles southward of Mine Head, with the wind blowing a strong gale, S.S.E. The master of the European immediately taking in sail and putting his helm hard a-port, made for the Mary Stenhouse, and coming up with her in about half an hour, her ensign being then hoisted in her mizen-rigging, found her, as deposed by him, in a very disabled state, nothing forward but her foremost jibboom and bowsprit, with nothing whatever attached. She had lost her foretopmast, foreyard, main and mizen topgallantmasts, the latter swinging about from the top, and still held on by the rigging; the wreck of the foreyard hanging from the slings, with part of the foresail attached; the jibs hanging down into the water from the jibbooms, and the ends of the sails knocking and blowing about. Hailing the Mary Stenhouse, and asking "Did she want assistance," the master of that vessel at once replied "Yes," and preparations to render it being immediately made, two hawsers were, within half an hour, streamed by means of buoys to the Mary Stenhouse, and made fast, she drifting at the time; and the European commenced about eleven o'clock to tow her to Cork harbour, to which place she herself had been steering that morning, after the wind had come round eastward, in order to refit after her mischances. The evidence as to the exact distance from Mine Head, at which the towing commenced, and the exact hour of it beginning there, and its termination in the harbour or Cork, presents some trifling and not material discrepancies; and, upon the whole, it may safely be assumed that the vessels were about twelve miles from that headland when the towing, which began about eleven a.m., ended at five o'clock in the afternoon of the same day. Many particulars having reference in a greater or less degree to the labour of that voyage, require to be noted. It is deposed that the Mary Stenhouse made at times, that morning, six or seven points leeway, and that when in her course to Cork, the wind being then favorable to her, she made from three to four points leeway. The weather, inclined to be thick and rainy, increased as day wore on. According to the evidence of Gunster, one of the crew of the Mary Stenhouse, it became so thick, and rained so heavily, that he was obliged to be relieved

from the wheel for ten minutes to get on his oilskins; and that it was so thick he could see no land all that day until they were off Poor Head. The evidence of the master of the European is, that the land was perfectly out of sight all that morning, except for the single minute in which he caught a glimpse of Ballycotton. The question, however, is put beyond doubt by the concurring evidence of the master and mate of the Mary Stenhouse, "that when in tow the weather became so thick that they would not have attempted of themselves, to go to Cork." The master of the Osprey, a large steamer, 426 tons burden, deposed that, owing to the violence of the weather that morning, he was obliged to return back to Cork, after having been out eighteen miles. This witness is a very material one, for whilst he was out that day he fell in with the Mary Stenhouse, when in tow as described, about three o'clock; seven miles off Poor Head—the wind, which had been N.E., and increasing with a heavy sea at twelve o'clock, then southerly and inclining westerly, and the sea setting heavy from the south. He then says that the ship was sometimes inclining on her weather quarter, and more times would fall off; that both the vessels (the ship and the steamer) were rolling very heavily, and nearly keel out and labouring very heavy. He saw the tow ropes break and the efforts of the steamer to lay hold upon the ship again, the wind then being S.S.W., and making the land inside Poor Head, which they had then rounded, a leeshore. The opinions of the master and mate of the Mary Stenhouse are here again corroborative of the other evidence, the entry in their log of this transaction being—"At 11:30 taken in tow by the European screw steamboat, and towed down to Queenstown, blowing a heavy gale from SE., with a high sea; when brought into port it was blowing hard from SE." It is to be observed that the balance of evidence as to the difference as to the point the wind blew from, between that stated in this entry and that by the master of the Osprey, is altogether in favour of the accuracy of the latter, he having had better and a cooler opportunity of looking on, and because that the entry was not made for some days afterwards. The breakage of the towing ropes, which occurred when off Poor Head, was an occurrence pregnant with danger, the Mary Stenhouse, from her want of head sails, being, when so cast loose, unable to keep herself from drifting on land, at that time a leeshore. The steamer coming round to her weather bow to recast the tow rope found that impossible to do, the ship drifting away faster than the buoy could be streamed to her. She then came under her lee for the purpose, thereby exposing herself to the roll of a ship four times larger than herself. The difficulty was, however, within the hour got over, by the Mary Stenhouse passing her own hawser to the steamer, and thus within a short time she was safely brought to her anchor in the harbour of Cork. These are the services for which salvage is now claimed, and claimed on the ground that they saved this vessel and cargo from a total loss, as without their aid the Mary Stenhouse, under her then circumstances, must have drifted ashore and broken. The defendants, admitting the merits of the service, deny that there was any possibility of total loss, as having plenty of

spars and sails on board, and a sufficient crew and a good offing, they could have made Cork harbour by themselves, or failing that, could have hauled off the land and run out to sea. The court is spared the consideration of the former of these probabilities, however, as the master of the Stenhouse has in the course of his evidence admitted, that with the weather as it actually turned out, he would not have attempted to have run for Cork harbour by his own means. The questions then for consideration are—had she the means to stand out to sea, and had she power to have adopted them in sufficient time? Now, the evidence of Blair, the ship's carpenter, proves that there was abundance of spare spars and additional sails, besides what were already bent, on board; but it does not prove that he had received any orders to prepare or get them in readiness. The practised knowledge of the master and mate has pointed out minutely and precisely what canvass was at their command and within their power to use, and what spars jury-rigged would have enabled them, if so refitted, that day, had not the coming up of the steamer prevented them, to have hauled off the land and stood out to sea free and far from all the perils of a leeshore; they prove too that they had still, notwithstanding the fatality which had thinned their number, sixteen or seventeen hands to carry out the necessary orders, and that within the space of four hours. Experts, men of nautical experience, have been produced to prove and disprove the effect of this testimony. Two of this class of witnesses, one being from each side, and corroborating each other's opinion, the court will select for that very reason, and also because their service at sea and general bearing will entitle them to every consideration. These witnesses are—Captain Tessiman, of the Carlisle, and Captain O'Brien, the harbour-master of Cork. These gentlemen are unconnected with both the parties litigant, and have been produced, each, by one of them, as already stated. Now, their opinions, under such antecedents, coincided, and were, "If the master of the Stenhouse could have actually done what he stated was within his power, and could have done it within the time specified, that it was possible, but with great exertion, for the Mary Stenhouse to have stood out to sea with the weather as it was at the time she was taken in tow by the steamer." The court, in weighing this opinion, cannot cast off its mind the fact that nothing of exertion in the way of repairing damage had been ordered, that morning on board this vessel, nor the impression that the violent death of the mate and the hurting of so many seamen must have tended to dishearten their shipmates, nor the strong circumstance not brought under the notice of the experts, that in the evening of that short winter's day the wind had gone round westerly, and towards midnight blew a hurricane. But waiving these, and keeping in mind what British seamen have done, and can again do, in the hour of need and in the face of danger, the court will receive and adopt the opinion so come to, and consider that, to the extent expressed, the Mary Stenhouse might have escaped the last extremity with that possible and only means of escape from total loss left open to her. The owners of the Mary Stenhouse are now called upon to remunerate her salvors. The

European is but one-fourth her tonnage—is stated to be worth £7,000; she carried cargo at the time worth £4,000, and a still more critical freight, namely, passengers, of whom fourteen were then on board. To risk the comfort and possibly the safety of these, and to endanger owner's property to the amounts stated, involved no desirable responsibility. The incidents which arose during the towage of wind and weather—the occurrences off Poor Head need not be again gone over; the crankpin of the engines also was broken, and between the repairs necessary to replace it and the necessity for coaling, six days were passed before the European could again resume her voyage to Liverpool, maintaining, during that time, passengers and crew at additional expense. In all, this, too, the European was a volunteer, and that, too, on a morning when the Osprey, a more powerful steamer, unable or unwilling to encounter the violence of the wind at sea, put back to Cork for safety. Under such circumstances was the complete and successful salvage of a fine iron vessel with a rich cargo effected. The general interests of commerce, equally as the justice of the particular case, require that the remuneration should be adequate, and even, indeed, allowed by the defendants themselves, liberal. It is to be borne also in mind that the vessel employed in the service is a steamer, the class most effective of all in rendering it. Wealthy and enterprising companies alone can build and equip such vessels of such capacity and power as to be the carriers of the trade and commerce of the world. It is then of universal interest that these companies should be encouraged to permit also of their employment in the humane, although less remunerative, service of saving life and property from the perils of the deep. No tender has been made, however, and the judgment of the court is therefore so far unassisted, no estimate of the benefit received being furnished, by the recovery of their property, by their owners. In the case of the *Blenden Hall* (1 Dod. 441), not unlike the present one as to the large amount of property saved, Lord Stowell said:—"In fixing a proportion of the value for salvage reward, the court is in the habit of giving a smaller proportion where the property is large, and a higher proportion where the value is small; and, for the obvious reason, that where the property is of small value, a small proportion would not hold out a sufficient encouragement. whereas in cases of considerable value a small proportion would afford no adequate remuneration." The *Mary Stenhouse* and her cargo, saved by the petitioners from imminent destruction and brought safely into harbour, are admitted by their owners to be of the value of £115,000; and the court must suppose that British owners would be induced to give a liberal remuneration to those who have been the means of preserving for them that amount of their property. Acting under all these views and principles, the court then awards to the salvors, the petitioners in the case, the sum of £5,750, which is the one-twentieth part of the admitted value, and exactly five per cent. upon both ship and cargo. The salvors are to have their costs also.

[Upon an appeal to the Court of Delegates, consisting of Judges Hayes and Fitzgerald, and Doctors Ball, Q.C., and Lloyd, Q.C., the amount of salvage

awarded by the Court of Admiralty was reduced to the sum of £3,000, each party to abide their own costs of the appeal.]

Proctor for the promovents—The Queen's Proctor.
Proctor for the impugnants—Mr. Robert C. Lea.

Court of Chancery.

[Reported by Edmund T. Bewley, Esq., Barrister-at-Law.]

BENNETT v. RICHARDSON.

Dec. 5, 1862; Feb. 18, 1863.

Bleach-green—Lease by tenant for life under statutory power—Right of renewal—3 Geo. III. cap. 34.

Under the provisions of the 3 Geo. III. cap. 34, a tenant for life made a lease for lives renewable for ever of certain premises to be continued and used as a bleach-green. Owing to a decline in the linen trade the bleach-green had been converted into pasture, and for several years previous to the present suit it had wholly ceased to be employed for any bleaching purpose. In a suit for a specific performance of the covenant for renewal, held, that the covenant to renew could not be enforced, the object for which the lease was granted having ceased to exist.

By indenture of lease bearing date the 2nd of September, 1780, and made between John Richardson of the one part, and Samuel Lyle of the other part, John Richardson, in consideration of the covenants therein contained, and in order to encourage, as therein stated, Samuel Lyle to continue, maintain, and keep in repair the bleach-yard and bleach-green on the land thereby demised, (upon which it was stated Hugh Lyle, the father of Samuel Lyle, had expended large sums of money,) conveyed unto the said Samuel Lyle, his heirs, and assigns, all that part of the lands of Macleary, in the parish of Macosquin, and county of Londonderry, containing 12 acres plantation measure, as then in the possession of the said Samuel Lyle, to hold unto the said Samuel Lyle, his heirs, and assigns, for the lives of three persons therein named, and such other lives as from time to time should be added by virtue of a covenant for perpetual renewal therein contained, yielding and paying a certain yearly rent of £12 sterling. The lease contained the usual powers of distress and re-entry in case the rent should be in arrear, and covenants on the part of the lessee to pay the rent, and to repair and keep in repair the bleach-yard and bleach-green. There was also a covenant for quiet enjoyment on the part of the lessor, John Richardson, who further acknowledged that the rent reserved thereby was the then present full improved yearly value of the demised premises. It was also covenanted, on the part of Samuel Lyle, that he, his heirs and assigns, would indemnify John Richardson, his heirs and assigns, for making and executing the said lease from any of the remaindermen mentioned in the will of John Richardson the elder, under whose will John Richardson, the lessor, derived his title to the demised premises. It was stated in conclusion,

that John Richardson had executed this lease under the provisions of the 3 Geo. III. cap. 34, entitled "An Act for the better Regulation of the Linen and Hempen Manufactures." John Richardson was only tenant for life of the lands and premises so demised, and had no power to make any such lease except by the provisions of the 3 Geo. III. cap. 34, and in compliance with the terms of that Act. At the time of the execution of the lease the premises were used as a bleach-yard or bleach-green by Samuel Lyle, and continued to be employed by him for that purpose to the date of his death. In 1820 a renewal of the lease of September, 1780, was executed. In 1821 Stephen Bennett became the purchaser of all the lessee's interest in the demised premises; and having entered into possession, continued for many years to carry on the business of bleaching there. In 1849 the reversion expectant upon the lease of 1780 and the renewal of 1820, came to Thomas Rumbold Richardson, the respondent, then a minor, for an estate tail. In consequence of a decline in the linen trade in or about 1851, Stephen Bennett ceased to use the demised premises as a bleach-yard, finding that the maintaining of them as such was attended with actual loss. In 1852 an application was made by Stephen Bennett to Lady Emily Richardson, the mother and testamentary guardian of the respondent, to obtain a grant in fee-farm of the premises under the Renewable Leaseholds Conversion Act. Lady Emily Richardson, however, declined to execute a fee-farm grant without the sanction of the Court of Chancery, on the grounds that the rent reserved by the lease of 1780 was not the best improved rent within the provisions of the 3 Geo. III. cap. 34; and also on the grounds that the premises had ceased to be used as a bleach-green, or for any other branch of the linen manufacture. No further steps were taken to obtain a renewal or fee-farm grant during the life of Stephen Bennett, who died in 1861, and by his will devised all his estate and interest in the premises to Frances Bennett, the petitioner. In 1860 the respondent came of age, and in October, 1861, the petitioner furnished him with a draft fee-farm grant which she required him to execute. He refused, however, to do so, upon the grounds previously stated by Lady Emily Richardson, and upon the further grounds that the right to a renewal had been lost by *laches*. It appeared that in 1855 the bleach-green was ploughed up, and having from that time been set apart wholly for tillage, was at the time of the present suit no longer available for bleaching purposes. In March, 1862, a cause petition was filed, praying that the respondent, Thomas B. Richardson, might be ordered specifically to perform the covenant for renewal contained in the lease of 1780, or to execute to the petitioner a fee-farm grant of the demised premises. Shortly afterwards an application was made to the petitioner on behalf of the respondent for permission to inspect the premises and ascertain their condition. Inspectors were accordingly sent, but the petitioner absolutely refused them admittance.

The Solicitor-General (with him Brewster, Q. C., Norman, Q. C., and J. Hamilton) for the petitioner.—The question is, whether the lease at the time of its execution was valid. If good then, it is good for all time. The Legislature thought it unnecessary to

impose the condition of a covenant to keep up the bleach-green—*Smith v. Jersey* (2 Brod. & Bingham 473). There has been no *laches* debarring the petitioner from her right to a renewal—*Lyne on Leases*, 194; *Squithcomb v. The Bishop of Exeter* (6 Hare, 213); *Clark v. Moore* (7 Ir. Eq. 515); *Sheehy v. Bradshaw* (6 Ir. Eq. 397); *Cartan v. Bury* (10 Ir. Ch. 387).

Serjeant Sullivan (with him Warren, Q. C., and J. J. Twigg) for the respondents.—The preservation and continuance of the bleach-green is an essential part of the contract, and is the only equivalent given to the remainderman for the statutory power conferred on the tenant for life. If the original lease had been properly framed in compliance with the Act, the tenant for life should have inserted, and could, as against the lessee, have insisted on inserting, a condition avoiding the lease on a breach of the covenant to maintain and continue the bleach-green. Therefore, when the lessee seeks a renewal in equity, such a condition should now be implied as fully as if it had been inserted in the original lease, especially as Stephen Bennett had on the face of the lease full notice of the circumstances under which it was made, and the purposes for which it was granted—*Doe v. Withers* (2 B. & Ad. 896); *Jones v. Verney* (Wil. 169); *Doe v. Burrough* (6 Q. B. 229); *Sharp v. Milligan* (22 Beav. 606).

Feb. 18, 1863.—THE LORD CHANCELLOR.—This case came before me on a petition to obtain a renewal of a lease dated the 2nd September, 1780. The lease, to a renewal of which the petitioner claims to be entitled, is a lease for three lives renewable for ever; and the peculiarity of the question in cases of the present kind is, that it depends not only on the construction of the instrument, but also on the construction of an Act of Parliament. Having regard, then, to the lease, it purports to be made under the provisions of the 3 Geo. III. cap. 34, being one of a numerous class of enactments in reference to the linen trade of Ireland. The 41st section of this Act declares that "it shall and may be lawful to and for every person or persons whatsoever being seised in possession in law or equity, of an estate in fee tail or for his life, with immediate remainder over to or in trust for his issue, to demise any part of the land whereof he or they shall be so seised, being no part of the demesne usually occupied with his or their mansion house, and not exceeding fifteen acres plantation measure, for one or more life or lives renewable for ever, or for any term of years, at the full improved yearly value of such lands, to be set to a solvent tenant at the time of making such lease, for the purpose of making a bleach-yard or bleach-green thereon, or of preserving and continuing a bleach yard or bleach-green already made thereon." The lease was made, then, under this section of the Act. There is a subsequent Act on the same subject, the 5 Geo. III. cap. 9; but this does not bear directly on the present case, and was only used in the argument as to the form of the lease required by the statute. These Acts were all repealed by the 6 Geo. IV. cap. 122; but this, of course, would not affect past transactions and leases already existing and made under the powers conferred by the former Acts. It serves merely, *valde quantum*, to show what was the

policy of the Legislature at that time. The lease being thus made, the first question is, whether it is valid under the Act; and, first, as to whether it was made by the parties entitled to do so, John Richardson being tenant for life under the will of John Richardson, the elder, his granduncle, had an estate sufficient to warrant him to make this lease. But the first objection in point of fact that was brought is, that the lands demised by the lease were not let at the best improved rent. Now, the lease is very peculiar, and suspicious in some of its provisions. It contains an express declaration that the rent reserved was the best improved rent, and covenants to indemnify the lessor from any of the remaindermen—a circumstance which in itself is very suspicious. The lease recites, that in order to encourage Samuel Lyle to continue, maintain, and keep in repair the bleach-yard and bleach-green already existing, John Richardson demises the premises containing twelve acres plantation measure, upon which Hugh Lyle had expended large sums of money, to hold the same at a yearly rent of £12 sterling. Now, it is difficult to conceive that this was the full value of the land, assuming that a bleach-green was then existing there, and that large sums had been expended on it, unless in fact we consider "large" to be in a measure equivalent to "small." But this is a question which, after so great a lapse of time, the Court can hardly take on itself to inquire into and determine. For the present, passing this by, we next come to the form of covenants that the Act of Parliament requires; and the question arises, whether in the present instrument they might be treated in law as void. The covenants are found to be very much of the ordinary character, the covenant to repair being in the following terms: "That he, the said Samuel Lyle, his heirs, and assigns, shall and will, from time to time, and at all times during the continuance of this demise, well and sufficiently repair, preserve, and keep the said bleach yard and bleach-green, and all and every of the ditches, drains, edifices, buildings, and improvements of what nature or kind soever in the said demised premises, or any part of them, built, erected, or made, or which shall at any time or times hereinafter during the continuance of the demise be on the said demised premises built, erected, or made in good sufficient repair and condition." I should be very sorry to pronounce this an insufficient covenant to keep up a bleach-green or bleach-yard established under the provisions of the Act. There have been authorities, however, cited to show the great particularity with which the law requires leases made by virtue of a power to be executed. In *Taylor v. Horde* (1 Burr. 125), when declaring the lease to be void as not adhering to the terms of the power with sufficient strictness, Lord Mansfield observed, "As to the rent reserved, the power requires the best rent that can be reasonably got to be reserved, payable during the term. There is no covenant for payment. Under a mere reservation it could not be payable till entry, and therefore, in fact, it might never be payable during the term. It is not found to be the best rent due. As to the remedy, there being no covenant to pay the rent, the lease might be assigned to a succession of beggars." Two other cases, *Jones v. Verney*, (Wil. 169) and *Doe v. Withers* (2 B. & Adol. 896),

in reference to building leases, go to show that such covenants will be expected to bear the marks of being *bona fide*, and must be framed so as to secure to the estate the performance of every condition imposed by the donor of the power. These cases do not bear on this question directly more than this; but in another point of view they affect it most materially, for they show that the Court will always consider what was the object of the donors of the power, and looking to their meaning and intention, will hold that the lease must be so framed as to secure the purposes for which the power was created. This is a suit to enforce specific performance of a covenant for perpetual renewal in a lease whose object was to preserve and ensure the continuance of a bleach-green. Everything, then, should be so construed as to carry out that object, not in any temporary way, but during the entire term granted by the instrument. To the proprietor the bleach-green might cease to be profitable, but it was for the interest of the public that it should be kept up. The question, then, is, whether this covenant is to be enforced. Suppose it had been a lease for 999 years with proper covenants and a clause of re-entry in case the bleach-green was abandoned. If the party entitled to the reversion brought an ejectment on breach of this condition, would it be any defence in a Court of law, that it was no longer valuable to keep up the bleach-green? It was argued by counsel for the petitioner, that if the lease was made *bona fide* at first for the purposes of the Act, it was good for all time, even though during the continuance of the term the premises have confessedly ceased for some years to be used for the purposes for which the lease was made. I cannot concede to that, nor does such appear to be the substance of this instrument. From 1857 the bleach-green has been broken up and used as pasture; and the answer made to this is, that there is no use in keeping it up any longer. Can I, then, compel a renewal of a lease for a purpose that has ceased to exist. It strikes me that I cannot; and I have less hesitation in dismissing the petition, as the petitioner's conduct in refusing to allow an inspection of the premises has been such as to disentitle her to relief.

Petition dismissed with costs.

IN RE ROWLES, A LUNATIC.—Feb. 21, 1863.

Lunatic—Carrying on trade for benefit of.

Where a lunatic is the proprietor of a trading establishment yielding large annual profits, the true value of which cannot be realised by a sale, semble, the court will allow it to be carried on for his benefit under a manager.

THE lunatic, Thomas Rowles, was the proprietor of the "Ravensdale Mills Corn and Flour Stores" in Dublin, and the business which he had carried on there in the sale of corn, flour, &c., produced, it was stated, an annual profit of £300 or £400. He was also possessed of considerable property in Government and other securities, amounting, on the whole, to about £17,000. An application was now made on behalf

of two of the lunatic's next of kin, for an order to vary Master Murphy's report, so far as it found that the "Ravensdale Mill Stores" should be sold, and it was alleged that if this trading concern were given up, a large source of income would be cut off. It was proposed to carry on the business by means of a manager for the lunatic's benefit.

Harris, Q.C., (with him, *J. W. Harris*) in support of the application.—The proceeds of a sale would by no means be equivalent to the value of the business, the premises being held merely under a yearly tenancy. In England the Court has allowed extensive coal mines to be worked under the committee of a lunatic.—*In re Robins* (2 R. & My., 449).

Serjeant Sullivan (with him *F. Walsh, Q.C.*, and *G. Foley*) *contra*, on behalf of some of the next of kin.—The lunatic is already supplied with an ample fund for his support, and the milling trade at present is most variable, and attended with enormous risk. Under these circumstances the Master's report should be confirmed, especially as there is no case to be found where any such application has been granted. We have medical certificates, also, to show that there is no probability of the lunatic's recovery.

THE LORD CHANCELLOR.—I do not see why the business, if profitable, should not be carried on. I shall make an order of reference to the Master to ascertain the annual profits, so that if they prove to be considerable, the stores may be continued under the direction of an experienced manager.

Court of Queen's Bench.

[Reported by William Woodlock, Esq., Barrister-at-law.]

CROGHAN v. M'ENROE.—Feb. 2, 1863.

Slander—Implication of allegation of defamatory sense—Verdict.

The summons and plaint stated that the defendant spoke of the plaintiff the defamatory words—"You" (meaning the plaintiff) "are a robber, and I" (meaning the defendant) "will prove it." Defence, that the defendant did not speak the words in the defamatory sense alleged. Issue thereon—The jury, to questions put by the judge at the trial, answered that they were of opinion, first, that the words were spoken of the plaintiff; secondly, that they were not spoken in the sense of imputing to him the crime of robbery. Held, that the defendant was entitled to a verdict.

THIS was a motion to shew cause against a conditional order to have the verdict which was had for the plaintiff turned into a verdict for the defendant, pursuant to leave reserved. The summons and plaint in the action complained that the defendant spoke of the plaintiff the false and defamatory words following—"You" (meaning the plaintiff) "are a swindler and a robber, and I" (meaning the defendant) "will prove it." To this the defendant pleaded that he did not speak the words in the defamatory sense alleged. Issue was taken in the terms of this defence. At

the trial before O'Brien, J., at the sittings after last Michaelmas Term, the judge put the following two questions to the jury—first, whether the words complained of were spoken of and concerning the plaintiff; secondly, whether they were spoken of in the sense of imputing to the plaintiff that he had committed the crime of robbery. The jury answered the first question in the affirmative, and the second in the negative, whereupon the judge directed them to find the issue on the record for the plaintiff, which they did with sixpence damages, the judge reserving liberty for the defendant to move to have the verdict entered up for him.

Sidney and Curtis, to support the verdict, contended that the meaning of the defence was, and could only be, that the words were not spoken of the plaintiff. There was no allegation of a sense in the plaint, except the sense that the words were spoken of the plaintiff.—1st Chitty on Pleading, p. 339; *Williamson v. Gallagher* (8 Ir. Jur., 50); *Babmean v. Farrell* (3 Eng. C. L. Rep., 429). The verdict here was for a trifling amount, and the court would not disturb it.—*Purcell v. Nolan* (1st Ir. L. Rep., 258).

Coates and Semple, for the defendant, contended that the meaning of the defence was, that the words were not spoken with the intention of imputing the crime of robbery to the defendant, and that, the jury having found that they were not so spoken, the defendant was entitled to the verdict. The summons and plaint having averred in the introductory part that the defendant spoke the words of the plaintiff, and that averment being untraversed, and therefore admitted, it could not be supposed that it was only the innuendo "meaning the plaintiff" at which the defence was directed.—*Tomlinson v. Brittlebank* (4 B. & Ad., 630); *Slowman v. Dutton* (10 Bingham, 402); *Rowcliffe v. Edmonds* (7 M. & W., 12); *Thompson v. Bernard* (1st Campb., 12).

O'BRIEN, J.—We are all of opinion that the verdict should be entered for the defendant pursuant to the leave reserved. It may be that the defence is an objectionable one, but the objection was not raised at the proper time, and issue was joined in the very words of the defence. The whole question is, whether we are to construe the words of the defence as meaning that the words complained of were not used in the sense of imputing to the plaintiff the crime of robbery, or whether, as the plaintiff says, they are to be taken as meaning that the words were not spoken of the plaintiff. Taking the latter meaning, we should have to strike the word "defamatory" out of the defence altogether. On the other hand, the meaning which the defendant asks us to take is, that he has traversed, is included by necessary implication in the plaint. I think that is the more rational construction, the more especially as, as Mr. Semple has well remarked, there would be an inconsistency in holding otherwise, as there is a distinct allegation untraversed in the plaint, that the words were used of and concerning the plaintiff.

HAYES, J.—I adopt the argument of Mr. Semple, and, in my judgment, the defendant is entitled to have the verdict.

FITZGERALD, J., concurred.

Order absolute, with costs.

[CORAM O'BRIEN, HAYES, AND FITZGERALD, JJ.]

FORD v. BYRNE.—Feb. 3.

Ejectment—Parties—Service—Estoppel.

Where a party who had been served with an ejectment was put out of possession, and again let into possession under that ejectment—Held, that he could not, in a second ejectment against him, dispute the sufficiency of the proceedings in the first to get rid of a lease alleged to have been thereby evicted, and that the facts so proved in the second ejectment were sufficient to warrant the jury in finding a verdict for the plaintiff.

THIS was a motion to shew cause against a conditional order obtained by one of the defendants named Lowry, to have a non-suit entered instead of the verdict had for the plaintiff at the trial. The action was one of ejectment on the title, to recover certain premises in the city of Dublin. At the trial at the sittings after last Michaelmas Term, the plaintiff produced a lease dated the 8th December, 1840, made by the Rev. B. Ford, whose heir-at-law the plaintiff was, to a person of the name of M'Donnell, for a term yet unexpired. He then gave in evidence the proceedings in an action for non-payment of rent brought by him against, amongst others, the present defendant, Lowry, to recover the premises, the subject matter of the present action. The summons and plaint in that action was issued on the 22nd of January, 1861. The affidavit of service of the summons and plaint, which was also given in evidence, shewed that the defendant, Lowry, and some other persons in occupation of the premises, were served, but no service was proved upon M'Donnell, the lessee in the lease of December, 1840, nor was it shewn what had become of his interest in the lease, or whether he had assigned it to any party. Neither did it appear whether he was living or dead, nor did his name appear as a party upon the record. Judgment was marked in the ejectment on the 4th April, 1861, and a *habere* was issued, which was executed on the 22nd April, when the following proceedings took place. The sheriff's officer gave up possession to a Mr. Dwyer, who appeared for the plaintiff; and Mr. Dwyer having been thus put into possession, gave it up to a person named O'Brien, to hold as care-taker. O'Brien immediately admitted the defendant, Lowry, and the other defendants, into possession, taking from each of them a payment of one shilling per week, which payment continued to be made for about three weeks. Upon this evidence it was objected on behalf of the defendant in the present action, that the plaintiff having himself put in evidence the lease of 1840, and not having shewn that it had come to an end by time, and no evidence having been given of service of the ejectment on M'Donnell, or of an assignment by him, the lease must be taken as still existing, and the plaintiff must be non-suited. The judge refused to non-suit the plaintiff, and the defendant not having gone into evidence, the jury returned a verdict for the plaintiff, liberty being reserved to the defendant to move to have that verdict turned into a non-suit. Defendant

having obtained a conditional order, the plaintiff now shewed cause.

D. R. Pigot (with him *Harrison*) for the plaintiff.—It being shewn that Lowry was served with the ejectment of January, 1861, and the judgment in that ejectment having been proved, on the principles of estoppel Lowry cannot now dispute the validity of that ejectment. Secondly, Lowry was, after the ejectment, let into possession by a caretaker of Mr. Ford; and before any person so let in can contest the title of the person under whom he has been admitted, his course must be, if he seeks to raise a title in himself, to give up possession to the person who let him in, and then seek to recover by proceedings of his own.—*Doe v. Baker* (3 Ad. & Ell., 188).

Philip Keogh for the defendant, Lowry, to sustain the conditional order.—The plaintiff exposed his own defective title, and we are entitled to rely upon that. The plaintiff having produced the lease of 1840, it lay on him to shew the determination of it.—*Roe v. Harvey* (4 Bur. 2484). The plaintiff can only recover on the strength of his own title.—*Doe dem. Carter v. Barnard* (12 Q. B., 945). The ejectment of 1861, by which the plaintiff seeks to get rid of the lease, was brought subsequent to the passing of the late Landlord and Tenant Act. The affidavit of service is not evidence to shew that all necessary parties were served.—*Hawkshaw v. Sutter* (Batty, 319). [*Fitzgerald, J.*—The judgment is evidence to shew that all previous proceedings were regular.] If the Landlord and Tenant Act is retrospective, the effect of the third section is, that no lease can be evicted unless the lessee or his assignee is a party to the record. All the old authorities shew that the rule was, that an ejectment was not binding on the person who had the legal interest if he was not served. [*Fitzgerald, J.*—The very fact that M'Donnell did not appear when the *habere* came to be executed, is *prima facie* evidence at all events that he had parted with his interest. It lay upon you to shew that he was not served.] The affidavit of service which was produced shewed that. The only evidence of payment to the plaintiff's caretaker was of a payment for three weeks, and Lowry is as much entitled to the presumption that he was in as tenant to M'Donnell, as that he came in under the plaintiff's caretaker. The relation of landlord and tenant is now one merely of contract. How can that contract be considered as put an end to by a record to which one of the parties to the contract is not a party? If the Landlord and Tenant Act is not retrospective, the 4th General Order of 1856 would make the ejectment defective. He cited also *Biddulph v. St. John* (2 S. & Lef., 521); *Murphy v. Carey* (12 Ir. C. Rep., App. ix.); s. 103 of the Landlord and Tenant Act.

Harrison was not called upon to reply.

O'BRIEN, J.—We are all of opinion that the verdict in this case is quite right. Mr. Keogh's client says that the proceedings in the first ejectment were all wrong, it appearing nevertheless beyond dispute that he was put out of possession, and put into it again under that ejectment. He, therefore, cannot now dispute the correctness of the proceedings in it. We all think that there was quite evidence enough to warrant the jury in coming to a conclusion in the plaintiff's

favour. It is not necessary to go into the other questions in the case.

The other judges concurred.

Cause shewn allowed with costs.

Court of Common Pleas.

[Reported by J. Field Johnston, Esq., Barrister-at-Law.]

THOMAS FOSBERRY, APPELLANT; THE WATERFORD AND LIMERICK RAILWAY COMPANY, RESPONDENTS.—Nov. 14, 1862.

Construction of the Railways Clauses Consolidation Act (8 Vict., c. 20), ss. 46, 53, 56—Authority of Decision of Court of Co ordinate Jurisdiction, from which there was no Appeal.

A railway company, for the purpose of carrying their line of railway over a county presentment road, and giving to the bridge which spanned it the proper legal height, had lowered the level of a portion of the road, and put it into a state of permanent repair. Held, that they were not bound to keep in repair the surface of the portion of the road so lowered.

And, per Monahan, C. J., that the portion of the road so lowered was neither an "approach," nor a "necessary work connected" with the bridge within the 46th section, but came within the provisions of the 53rd and 56th sections of the 8 Vict., c. 20.

And, per Christian, J., that the excavation of the road so lowered was so far a "necessary work connected" with the bridge within the 46th section, that the company would be bound in all future time to repair an alteration of the level to which they had lowered it.

A decision of one of the Superior Courts, from which an appeal lay, is binding upon a court of co-ordinate jurisdiction; but where there was no appeal it is not binding.

THIS was a special case stated by the justices of the County of Limerick, for the opinion of the court pursuant to the 20 & 21 Vict., c. 43, s. 2. It appeared by the case, which was stated at considerable length, that on the 30th October, 1862, a summons of which the following is a copy, came on to be heard before the justices assembled at petty sessions at Limerick.

Petty Sessions (Ireland) Act, 1851,
14 & 15 Vict., c. 93.

Petty Sessions District of Limerick,
County of Limerick.

Thomas Fosberry,	{	Whereas a complaint has been made to me that notwithstanding ten days' notice from complainant
Complainant;		
The W. & L. Co.,		
Defendants.		

to you that twenty-eight perches, or thereabouts, of the public road from Bruff to Castleconnell are out of repair, same being the portion of said road in which a descent was made by you for the purpose of carrying same under your railway bridge at Peafield, in the County of Limerick, you, the defendants, have failed to put said portion of said road into proper repair, contrary to the provisions of the 8th Vict., c. 20.

This is to command you to appear, as defendants, on the hearing of said complaint at the County Court House, Limerick, on the 30th day of October, 1862, at 12 o'clock, noon, before such justices as shall be there.

J. W. MAHONY, J.P.
Oct. 28, 1862.

The W. & L. R. Co.

The case stated the facts, and the evidence given upon the hearing of the complaint, by which it appeared that for the purpose of carrying the line of railway over the said road, and for giving the railway bridge crossing same the proper legal height, and to have the proper ascent and descent on the road, the company had lowered or cut away the portion of the said road mentioned in the summons, and that it was the surface of the portion thereof so lowered or cut away by the company, but which was not used by it, being the public road worn and cut down solely by the public traffic that the company was asked to put into repair; that the company had sunk the road to the depth of twelve feet at the place where the arch of the bridge crossed it, and that the portion of it over which the lowering or sinking extended, that is, from where it began on one side of the bridge to where it ended on the other, was as obvious and as easily defined as where, in the case of the road being carried over the railway, the ascent or rise in the road begins at one side and ends on the other; that the railway bridge, with the immediate approaches thereto, and all the works connected therewith, were then and always in proper repair; that the late county surveyor, Mr. Kearney, and the grand jury, had taken up the road after the decision of the Court of Queen's Bench in favour of the company in a similar case stated before that court (12 Ir. C. L. Rep. 224), and continued to keep it in repair until the Spring Assizes, 1862, when they desired their contractor to let this portion of the road go out of repair; that all the magistrates felt bound by the authority of *The Waterford and Limerick Railway Company v. Kearney* (12 Ir. C. L. Rep., 224); and two of them by the merits proved and made an order dismissing the case on the ground that they were of opinion the Waterford and Limerick Railway Company were not liable. The complainant appealed, and contended that the respondents were bound to keep in repair and metal the surface of that portion of the road which was altered by them for the purpose of constructing a bridge over the said road; that said alterations were a "necessary work connected therewith, and as executed should be maintained at the expense of the company;" that the case did not differ from the case where the road is carried over the railway, and relied on the 46th and the other sections of the 8 Vict., c. 20.

Joshua Clarke, Q.C., (with him *James Murphy*) for the appellant.—The 46th section of the Railways Clauses Consolidation Act provides that when a railway shall cross a public highway, either the road shall be carried over the railway, or the railway over the road by means of a bridge, and such bridge, with the immediate approaches, and all other necessary works connected therewith, shall be executed, and at all times thereafter maintained at the expense of the

company. The 49th section gives the specifications when the railway is carried over the road, and the 50th when the road is carried over the railway. [Christian, J.—Where the road goes under the railway, it is not part of the bridge. The respondents say that when once they had put it into a state of repair under the 56th section, they had done all that was necessary.] There is not one of this latter class of sections (beginning with the 53rd) which applies to cutting away and permanently lowering a road, as has been done here. The 53rd section enacts that “if it be found necessary to cross, cut through, raise, sink, or use any part of any road so as to render it impassable, or dangerous, or inconvenient, the company shall cause a sufficient road to be made, instead of the road to be interfered with.” This merely means that where a company obstructs a road by tearing it up, or putting their materials on it, they are bound, before they do so, to make another road. The interference supposed is temporary. The 54th section imposes a penalty for violating the 53rd and the 56th provides that if the road so interfered with can be restored, it shall be. This section refers back to the 53rd, and does not contemplate a substantial alteration in the character of the road. The 46th, and 49th, and 50th sections specifically provide for a railway running over or under a bridge. [Christian, J., referred to *North Staffordshire Railway Company v. Dale* (8 El. & Bl., 836), in which Lord Campbell held that the 46th section provided for the two cases, of the bridge over the road, and the bridge over the railway.] [Monahan, C.J.—There will be no appeal from our decision, and if we should differ from the Court of Queen’s Bench in the *Waterford and Limerick Railway Company v. Kearney* (12 Ir. Com. Law Rep. 224), the company will have to go the Court of Exchequer.] [Christian, J.—Is there no decision in England?] There appears to be none. [Christian, J.—The absence of any decision in England goes to show an agreement in opinion which is generally acted on, otherwise there would be litigation.] The cutting away of a portion of a bank is a work in common language, and in legal language, and in the language of Acts of Parliament. The Court of Queen’s Bench were not unanimous, and this court will come to a conclusion irrespective of their decision, farther than the reasons of it appear. [Monahan, C.J.—The decision is not an authority, but unless we are of opinion it was wrong, we ought to yield to it.] O’Brien, J., and Fitzgerald, J., were misled into the error of dealing vaguely with this question, and speaking of classes of sections. If what was done here be a work, the company are bound to keep the road in repair; and it would be an interference on the part of the grand jury to do so. Fitzgerald, J., says in his judgment that the language of the 46th section admits of some doubt—that in his opinion the words “necessary works” may be satisfied without extending them to such as these. There is no doubt that they do extend to other things, such as parapets. *Trustees of Newcastle, &c., Turnpike Roads v. North Staffordshire Railway Company* (5 Hurl. & N., and 29 L. Jour., N. S., Mag. Cas., 150), decided that that company were bound to repair the approaches to and road over the bridge. In that case the railway ran under the road.

Charles Barry, Q.C., and H. P. Jellett, contra.—Unless this Court is satisfied of the wrongness of the decision in *The Waterford and Limerick Railway Company v. Kearney*, it cannot overrule it.—Coyne v. Brady (12th Ir. Com. Law Rep.) [Monahan, C.J.—We went very far in *Coyne v. Brady*. It was a criminal matter, which this virtually is not, and there was an appeal.] The argument of inconvenience was pressed upon the Court of Queen’s Bench, but the 46th section has obviated inconvenience. A work, a railway work, is something constructed, a permanent structure, which remains after the railway is completed, and must be maintained. Cutting and lowering is a necessary operation, but not a work. [Keogh, J.—Do you say that when the road is depressed, the depression ceases to belong to the railway?] Yes; where a road is depressed, the fences must be altered, but there will be no obligation on the company to keep the fences in repair. [Christian, J.—It may be that the railway company are bound to keep the depression at the proper level when depressed, and yet not bound to repair the surface of the road.] No one travelling on a railway can fail to have observed that the road on both sides of the railway is somewhat lowered; but there is no obligation on the company to keep these lowered roads in repair. The 46th section does not apply. The case is governed by the 53rd and following sections, which, no doubt, include the case of roads being interfered with, but which also contemplate an alteration in the level, for the words are, “if it be found necessary to cross, cut through, raise, sink, or use any part of any road,” &c. Such an alteration in the level is not a work; the road was there before—it was not called into existence by the company. By the 56th section the road is to be restored, if it can, compatibly with the construction of the railway; that means, compatibly with the limits prescribed by the 49th section, and if it cannot, then a substituted road is to be put into a substantial condition, but there is no provision for keeping the substituted road in repair. It is to be handed over to the county. It would then follow, upon the appellant’s argument, that if the company restore a road, they must not only hand it over to the county grand jury, but must repair it ever afterwards, while they could escape from this result by adopting the other course of providing a substituted road. [Ball, J.—What is a sinking for the purpose of making a railway, but a work—a work connected with the railway?] [Christian, J.—If it be a work at all, and if without it the railway could not be made, it would be very hard to say it was not a work connected with the railway. The difficulty is, that upon the words of the 46th section, whatever the railway company are bound to execute, they are bound to maintain. What is the meaning of “maintain?” Will not that be satisfied by the diversion being kept level? It would not follow that the railway company are bound to keep the surface of the road in repair.]

James Murphy in reply.—Looking at the 46th, 49th, and 50th sections, and others, and the construction put upon them, there is ample provision for the two cases of the railway going under the road and the road going under the railway. If so, it is sufficient to say of the latter class of sections that they apply to a different state of things. The word

"bridge" is not made use of in them at all. How are the "immediate approaches" to be ascertained in the case of the road going over the railway? By ascertaining the alteration made by the railway. For the words "immediate approaches" substitute "all other necessary works." Could the railway company leave an overhanging bank on either side which might fall down in a week? That the 46th section includes both cases was held in *North Staffordshire Railway Co. v. Dale*. [Christian, J.—In that case the superstructure was held necessary to be maintained, as being part of the bridge.] The descent is as necessary in the one case as the ascent in the other. [Ball, J.—The descent is not a work, it is an operation.] This is only to change a Saxon into a Latin word. [Ball, J.—It is insisted that it is not a work; it may be a thing.] Whatever that be called which is prescribed by the 50th section, must that be called which is prescribed by the 49th section. If it be admitted that in case of a road going under the railway it be necessary to cut away a portion of it and make it passable for carriages, then the words "necessary works" apply to the descent as much as "immediate approaches" apply to the ascent where the railway goes under the road. It is admitted that the company must keep the bridge and the buttresses of the bridge in repair. Would it not be more convenient to leave the repairs of the road running under the bridge in the same hands? [Christian, J.—As I understand the English cases they do not go upon convenience, but upon the language of the Act. There are not the same words, and to argue from these cases will not avail much.] *Monahan, C.J.*—The whole question is, whether the surface of this road comes under the words "all other necessary works." It was not necessary to decide that in *Trustees of Newcastle, &c. Turnpike Roads v. North Staffordshire Railway*; but the language of Watson, B., shows that there is no distinction taken between the case of the road going over, and that of the road going under the railway. [Ball, J.—But no case has occurred in England where the road did go under the railway.] No.

Cur. adv. vult.

Nov. 21.—*MONAHAN, C.J.*—This question comes upon a case stated by the magistrates of the county of Limerick pursuant to the 20 & 21 Vic. c. 43, s. 2. The facts are identical with those in the case which came before the Court of Queen's Bench (12 Ir. Com. Law. Rep. 224). The practice is now settled. If there were an appeal we should be bound by the decision of a court of co-ordinate jurisdiction. But there being no appeal we are in the present instance obliged to decide upon the merits for ourselves. Are the railway company or the grand jury bound to keep that part of the road in repair which runs under the railway? The appellant, who represents the grand jury here, relies upon the 46th section of the Railways Clauses Consolidation Act (8 Vic. c. 20), which enacts that "if the line of the railway cross any turnpike road or public highway, then either such road shall be carried over the railway, or the railway shall be carried over such road by means of a bridge of the height and width, and with the ascent or descent, by

this or the special Act in that behalf provided; and such bridge, with the immediate approaches and all other necessary works connected therewith, shall be executed, and at all times thereafter maintained at the expense of the company." We have been referred to *North Staffordshire Railway Co. v. Dale* (8 Ell. & Bl. 836), and *Trustees of Newcastle, &c. Turnpike Roads v. North Staffordshire Railway* (5 H. & N. in the latter of which it was held that under this section the company were bound to keep in repair the approaches to the bridge and the road over it. And from some expressions of the judges it has been sought to be collected that they would have included the case of the road going under the railway. I shall not consider the case where the railway is carried over the road at so great a height that no alteration is necessary in the level of the latter, and the road remains in the same state as it was, with the simple exception that it is spanned by a railway bridge. In that case (as for instance the case of the bridge which crosses the road that goes to Howth) it would be impossible to hold that the road was a work, or a part of the necessary approaches, or a part of the bridge within the 46th section. It would be unreasonable to throw upon the railway company the repairs of that road. It has been argued that the present case is different, because the lowering of the road is one of the necessary works to be executed. I confess I cannot see how the road when made fit for traffic, is a necessary work to be kept in repair. The 53rd and 56th sections, in my opinion, govern this case. The 53rd section enacts that "if, in the exercise of the powers by this Act granted, it be found necessary to cross, cut through, raise, sink, or use any part of any road, whether carriage road, horse road, tramroad or railway, either public or private, so as to render it impassable for passengers, or extraordinarily inconvenient to passengers, or to the persons entitled to the use thereof, the company shall, before the commencement of any such operations, cause a sufficient road to be made instead of the road to be interfered with, and shall, at their own expense, maintain such substituted road in a state as convenient for passengers and carriages as the road so interfered with, or as nearly as may be." And the 56th section provides that "if the road so interfered with can be restored compatible with the existence and use of the railway, it shall be." The 57th section subjects the company to a penalty if they infringe this provision. If the railway company had occasion to sink a road can anyone doubt that their liability is such as is provided for by the 56th section? and is not their duty done when they have complied with its requirements? Can anyone doubt that the railway company would be bound to provide a substituted road under the 53rd section? If so can we stop short and say that the 56th section does not apply? The words are general. I am quite aware that by the 49th section the bridge must be built of a certain height; and if it were not, there is no doubt that the company would be bound to remedy the defect. And similarly, if from any cause the road beneath the railway bridge should rise up and approach the bridge, there would be a duty cast upon the company. But that extremely improbable event I shall not take into consideration until it occurs. Otherwise

there is no more obligation on the company than when the level of the road is not disturbed. I do not think this is an "approach," nor do I think it a "necessary work" to be kept in repair; and therefore I concur in the judgment of the majority of the Court of Queen's Bench.

CHRISTIAN, J.—Though I agree with the result of the case brought before the Queen's Bench, I shall state my own views respecting the question. I think that each of these sections applies at a different stage of the railway works. If there needed to be an excavation of the road running beneath the bridge, I think that excavation is a "necessary work connected with the bridge," under the 46th section. I cannot discern in what particular such cutting away, such excavating, fails to come under this designation. It is necessary. It is connected with the railway. It is said that it is not a work. Why not? What is commanded by the Act to be done, what may spread over a considerable extent is surely a work. I think this is as much a work as an embankment. I therefore agree with Hayes, J., in *W. & L. Railway Co. v. Kearney*, that there is a work which the company are bound to maintain. But the next question is,—what is that which they are bound to maintain? Here I differ from Hayes, J. It is not necessary for the safety of the bridge that the road be in good repair. The language used in *North Staffordshire Railway Co. v. Dale*, is inapplicable to where the road runs under the railway. It applies where the road runs over the railway. The road is then part of the bridge, and *qua* "bridge" and *qua* "approaches" must be kept in repair. But the high road below the railway is neither part of the bridge nor part of the approaches. Therefore, though the 46th section should apply to the making of the road, it does not apply to the state of things found by this case. If that section did not impose the duty of restoring the road to a state fit for traffic, were the company to leave it in its unfit condition? No; but that is provided for by the 53rd and 56th sections, the duties under which sections are occasional and not permanent as are those imposed by the former class of sections. Nor do I think it impossible that the road might rise up; that the excavation might be filled up by the action of the elements, by the mud washed down by the rain. So often as this might happen, if I be right in holding the excavation to be a work, the company would be bound to restore the level of the road under the 46th section. Upon the case presented to us this has not happened; the level of the road is not alleged to be altered, but only its surface to be out of repair.

Judgment for the respondents.

Costs were not given against the appellant as there had been one dissentient judge in the *W. & L. Railway Co. v. Kearney*. (12 Ir. C. L. R. 224).

ROWLEY v. REILLY AND OTHERS.

Nov. 18, 20 1862.

Ejectment—New Trial Motion.

A deed-poll executed by the Commissioners of the Incumbered Estates Court conveyed to the plaintiff "the townland of C., containing 659a. 3r. 27p.,

more or less, and which are more particularly set forth in the schedule hereto annexed, and as delineated and described in the map attached hereto." The schedule annexed contained several headings, of which the first was, "No. on the Map," the second, "Denomination of the Townland," and the fourth, "Statute Measure." Under the first of these appeared "No. 60," and opposite to it, in the second column, the words, "Road and waste land," and under the words "Statute Measure" 1a. Or. 10p. Upon the trial of an ejectment brought to recover the sites of certain cottages and gardens, it was proved that the ground on which they stood was within the limits of No. 60, as marked upon the map; and evidence was given on the other hand that the road and waste, exclusive of the defendant's holdings, contained what was set opposite to "No. 60" in the fourth column. The jury having found a verdict for the defendants, a rule for a new trial, on the grounds that such verdict was against evidence, and the weight of evidence was made absolute. The maxim that there is a difference between new trial motions in ejectment and other new trial motions on the ground that a new ejectment may be brought by the plaintiff, if he likes, applies to cases in which there is a bona fide question, as, for instance, whether there be a life in being or not.

THIS was an ejectment on the title tried before Monahan, C.J., at the summer assizes for Trim, and brought to recover "that part of the lands of Clondoggan now in possession of John Reilly, Catherine Brennan, Charles Ashe, Catherine Ledwitch, Michael Fitzsimon, and John Gomeran, upon and adjoining the road commonly known as the Clondoggan bogroad." The plaintiff, the Hon. Hercules Rowley, gave in evidence at the trial a conveyance from the Commissioners of the Incumbered Estates Court, dated 31st October, 1851, to Richard Thomas Rowley and his heirs in fee-simple of "the townland of Clondoggan, containing 659a. 3r. 27p., more or less, and which are more particularly set forth in the schedule hereto annexed, and as delineated and described in the map attached hereto." The annexed schedule contained four headings: 1. Number on the map. 2. Denomination of the townland. 3. Tenant's name. 4. Statute measure. Under the first of these headings appeared (with others) "No. 60," opposite to which, under the second heading, were the words "road and waste land," and under the fourth heading "1a. Or. 10p." The plaintiff produced a surveyor, George Taylor, who deposed that he surveyed the lands in question in the year 1848; that the map annexed to the Incumbered Estates Court conveyance appeared to be copied from his map; that No. 60 on the map was a road passing through a farm in the tenure of one Williams (whose holding was also comprised in the conveyance and schedule), which farm was on both sides of the road; that there were cottages on No. 60, which cottages were also there in the year 1848, but were not marked upon the map; that No. 60, running between the two fences, was called road and waste, but that where the cottages stood was not then waste. The defendants produced a surveyor, a Mr. Malone, who proved that he had surveyed the

same lands; that No. 60 on the map represented the portion on which the defendants' cottages stood; and that if not within No. 60 they must be within Williams's holding; that the defendants' holdings contained 30 perches; and that the road and waste, exclusive of these holdings, contained 1a. Or. 10p. The plaintiff's surveyor explained the discrepancy between his survey and that of the defendants' surveyor as regarded the contents of the road, by alleging that one included the fences and the other did not. One of the defendants was examined, and stated that he had lived for 30 years in one of the cottages now claimed by the plaintiff; that he had built the said cottage, and more than 20 years previously enclosed the garden which belonged to it; that the land was at that time waste; that neither he nor any of the defendants ever paid rent to anyone, nor was it ever demanded; and that he got no notice from the Incumbered Estates Court. The defendants' counsel then asked the judge to tell the jury that if the road contained the quantity mentioned in the schedule, irrespective of the defendants' premises, the defendants were entitled to a verdict, which he refused to do, and told the jury that the plaintiff was entitled to recover if the premises in dispute were part of the lands of Clondoogan as comprised in the map and schedule attached to his conveyance. The jury found that the cottages and gardens were neither road nor waste, and that they were not included in the map and schedule attached to the conveyance. The plaintiff having obtained a conditional order for a new trial on the ground that this verdict was against evidence and the weight of evidence,

W. J. O'Driscoll (with him *C. Palles*), for the defendants, showed cause and cited *Boyle v. Mulholland* (10 Ir. C. L. Rep. 150); *D. & K. Railway Co. v. Bradford* (7 Ir. C. L. Rep. 57); *Roe v. Lidwell* (9 Ir. C. L. Rep. 184); *Pistrucci v. Turner* (28 L. T. 104).

G. Battersby, Q.C., and *F. L. Dames*, in support of the rule.—*Lewellyn v. Earl of Jersey* (11 M. & W. 183) is *quatuor pedibus* with the present case. In some of those cited the map has been rejected; in others it has been taken to qualify and explain, or to govern. The conflict is not between the body of the conveyance but between the schedule or one portion of the schedule and the map. It is admitted that we must travel out of the conveyance, and this is irrespective of the explanation given by the plaintiff's witness, Mr. Taylor. An additional description of waste is not of equal certainty with a description by metes and bounds. If the certainties be equal in degree we must adopt the first and reject the second. In this instance the schedule cannot be adopted *per se*. The conveyance *per se* will not tell exactly what was purchased or where the property is. [*Monahan, C.J.*—It is clear the plaintiff does not get the whole of Clondoogan.] There is nothing to identify what the tenant holds but the first heading. Suppose an ejectment brought, and the conveyance and schedule set up, could the plaintiff ever identify the lands sought to be recovered as waste land? It is plain that he could not. The only effect to be given to the number mentioned in the first column is to treat it as equivalent to stating "all that portion of the lands of

Clondoogan bounded by No. 5 on the north." If the schedule stopped there, and there were no other description, it could not be said that there was not an adequate description of the portion passed. Subsequent misdescription will not vitiate this. [*Monahan, C.J.*—The schedule referring to the map makes the map a portion of the schedule.] Therefore the reasoning for rejecting the map in *Roe v. Lidwell* is relevant. The Court did not reject the map in that case because it was a map. [*Christian, J.*—We stand upon the map here for the same reason as we rejected it in *Roe v. Lidwell*.] *Errington v. Rorie* (6 Ir. C. L. Rep. 279) is identical with this case. "If one grant in this manner 'all my meadow in D. containing ten acres,' whereas in truth his meadow there doth contain twenty acres, it seems this is a good grant for the whole twenty acres. So if one grant thus, 'all those forty-seven acres of land by the sleight, whereof fifteen lie in D., twenty in E., and twenty-five in F.' and, in truth, all of them do lie in F., and none of them in D. or E., this is a good grant to carry the whole forty-seven acres."—Sheppard's Touchstone, pp. 248, 249; Plowden's Reports, 191; Broom's Maxims, 492.

C. Palles in reply.—No objections were taken to the charge of the Chief Justice at the trial. There were two constructions of the conveyance then urged upon the court—first, that its effect was to pass the entire townland, and secondly, that there was such a *præsentia corporis* as required the map to be referred to, and it may be assumed that the first of these constructions has been disposed of. "The townland of Clondoogan" would by itself pass the entire, but the conveyance reduces Clondoogan to "that part of Clondoogan." Clondoogan, therefore, is not sufficient; there is want of certainty in the first description. If there were certainty in the first description, everything else must yield to that; but if there be not, the court cannot go to the second word and the third word in order to find certainty, but must go to the whole to find certainty. There is no *falsa demonstratio* in the present case. In *Boyle v. Mulholland*, Fitzgerald, B., says, "The meaning of that rule ('*falsa demonstratio non nocet*') as applied to cases like the present, I take to be this—if a grant indicates the thing conveyed by an enumeration of several particulars, and there be in existence no subject-matter, the property of the grantor, in which all those particulars concur, but there be a subject in which some of them do, that subject shall pass, and the inapplicable particulars shall be rejected as mistaken description." The court must see if, giving the description every qualification, there be a sufficient description. *Lewellyn v. The Earl of Jersey* would apply to the present case if the words "road and waste" were not here. As to the passage cited from Sheppard's Touchstone, stopping at D., there is a sufficient description. Here the description is insufficient. [*Keogh, J.*—Suppose the schedule referred to "all that part of the road and waste land marked red upon the map," would that not carry a squatter's house upon it?] It would not, but that is not this case. [*Christian, J.*—It seems to me that to make Fitzgerald, B.'s, rules applicable, the quantities must be equal.] The court cannot compare the lucidity of the descriptions, where the

first is insufficient. The Incumbered Estates Court may have intended to pass, and the purchaser to purchase this land, but that will not be sufficient unless it did pass. There is no definite boundary of No. 60 on the map, and that is on the map which is not intended to be passed. There is the greatest difference in all the cases reported from the Landed Estates Court since *Errington v. Rorke* was decided. The present case must be taken to be that of one description having three particulars, to which the reasoning in *Fitzgerald, B.*'s judgment would apply, or that of three descriptions, and the first of them an insufficient one.—*Doutie's Case* (3 Rep., 10 a, note); *Dodding-ton's Case* (2 Rep., 33 a, note); *Viner's Abridgement*, title Grant P.; *Roe d. Connolly v. Vernon and Vyse* (5 East., 80). There is no case which makes against these views decided in the Incumbered Estates Court. [*Monahan C.J.*—In any of the cases cited by you, did the rule apply where the descriptions varied in degree of certainty?] The question of the degree of certainty has never been raised in any of these cases, nor in the passages taken from *Sheppard's Touchstone*. [*Christian, J.*—The maxim, "*falsa demonstratio non nocet*," does not, I conceive, apply to where there is first a description which would be sufficient of itself, but to where it is of that high class that it actually presents the *præsentia corporis*.] A new trial ought not be granted in this case after the manner in which the trial was conducted. Evidence was received, and not objected to, and went to the jury, and it is a hardship on the defendants to come to the court and ask for a new trial on the ground that the verdict was against the weight of evidence. The plaintiff's evidence was not sufficient to entitle him to a direction. The grounds for granting a new trial in ejectment differ from those in any other case. Where the verdict is for the defendant, the court will seldom grant a new trial, because the plaintiff may bring a new action.—*Chitty's Archbold*, 1520. This verdict cannot be unsatisfactory to the court. To grant a new trial would encourage plaintiffs to bring forward their cases in a slovenly manner.

Cur. adv. vult.

Jan. 22, 1863.—*MONAHAN, C.J.*—This was an ejectment on the title to recover certain premises to which the plaintiff claimed title under a conveyance by the Incumbered Estates Court, of "the townland of Clondoogan, containing 659a. 3r. 27p., more or less, more particularly set forth in the schedule hereto annexed, and as delineated and described in the map attached hereto." What was intended to be conveyed by this? All that was within the limits of this map. It is also certain, looking to the map and the conveyance, that it was not intended to convey the entire townland of Clondoogan, for that is much more extensive than the number of acres mentioned. Evidence was gone into at the trial. The schedule consists of several columns—the first containing the number on the map; the second, the denomination of the townland; the third, the tenant's name; and a fourth, the statute measure. John Williams is described to be the tenant of lots 4, 5, 6, and 7, and the quantity of his holding to be 80 acres. It appears by the map that these 80 acres are intersected by a small farm

road or boreen, which upon the map is designated "No. 60." The statement regarding this, *i.e.*, by way of denomination in the schedule, is "road and waste land," and the quantity is marked as 1a. Or. 10p. The surveyor's evidence, if that be accurate, is this, that the road and waste land is one acre and ten perches in extent. The operative part of the conveyance did not convey the cottages and gardens. I thought at the trial that the schedule included them, and that it was the intention of the parties to the conveyance to include everything. I left the question to the jury without arguing with them, intimating that there was no law in the case, and if they had found that these gardens and cottages were included, there would be no question. But they made short work with the matter, and, without leaving their box, said, "We do not think that cottages and gardens are road and waste land." No objection was taken to my charge, nor could there have been. The only thing possible would have been to call on me to go more minutely into the case, and I would have done so if I had expected the result. We must consider if there be any evidence to induce the jury to hold that these cottages and gardens were not included in the schedule. That depends upon what in point of fact is the operative or conveying part in the schedule. It is "that piece of ground marked No. 60 on the map." And No. 60 on the map shows clearly that these cottages and gardens are included. If there be any discrepancy (which I do not think there is), the governing portion of the schedule is "that piece of ground marked No. 60 on the map." We think, therefore, that this verdict was without any evidence at all to sustain it. We were referred to authority to show that there is a difference between new trial motions in ejectment and other new trial motions, on the ground that a new ejectment may be brought. But this refers to where there is a *bona fide* question, as, for instance, whether a life is in being or not. But here there was no evidence, and the miscarriage was, perhaps, partly a miscarriage of my own. We must, therefore, make absolute the order for a new trial, but as the defendants have been guilty of no misconduct, the costs of the former trial must be paid.

Rule absolute.

Court of Exchequer.

[Reported by H. J. Wrixon, Esq., Barrister-at-Law.]

[BEFORE PIGOT, C.B., HUGHES AND DEASY, BB.]

BURNS v. THE CORK AND BANDON RAILWAY COMPANY.

Nov. 10th, 1862; Jan. 31, 1863.

Demurrer—Liability of railway companies for defects in the construction of their engines—Christie v. Griggs, Grote v. The Chester and Holyhead Railway Company.

A Railway company are responsible for all defects in their engines, whether concealed or not, and are not protected by pleading that they bought the engine from a competent manufacturer.

Action by plaintiff against the Cork and Bandon Railway Company for injuries resulting from alleged ne-

gligence in carrying him. Defence: That the alleged breach of contract was occasioned solely by an inevitable accident which occurred without default or negligence on the part of the defendants, to wit, that while the plaintiff was, pursuant to the aforesaid contract, being carried by the defendants from Cork to Bandon in their carriages on their railway in the second count mentioned, a fracture occurred in a crank-pin in one of the leading wheels of the locomotive engine attached to the train. And the defendants say that the said fracture was occasioned by an original defect in the material and construction of the said crank-pin, and in the inside or centre thereof, which said defect, before the said fracture occurred, was not capable of being detected by the defendants upon due and proper examination. And the defendants say that the said crank-pin was purchased together with the said locomotive engine by the defendants, in the due course of business from competent manufacturers thereof, and was not made by the defendants; and that on the day of, and before the said journey the defendants duly and properly examined the said locomotive engine and crank-pin, and had not at any time before the said fracture any notice of the said defect; and that the said alleged breach of contract was occasioned solely by the said inevitable accident.

Waters (with him *Barry, Q.C.*) for the plaintiff, in support of the demurrer.—The fracture in the crank-pin is, *prima facie*, proof of negligence, and the defendants are bound to discharge themselves of that negligence. In *Christie v. Griggs* (2 Camp. 79) a case of accident in a coach, Sir J. Mansfield, C.J., stated the principle of law to be, that it lay on the defendant to show "that the coach was as good a coach as could be made." The defence here, therefore, should disclose an unavoidable accident, one which no diligence could have averted. Whether they made the engine themselves or bought it from a manufacturer, their responsibility is just the same. If there was negligence on the part of the manufacturer they must account for it. *Sharp v. Grey* (9 Bing. 457) is exactly in point. It decides that if an accident happen from a defect in the construction of a coach, the proprietor is liable, although the defect be out of sight and not discoverable upon ordinary examination. Here defendants ought to have averred that they got a good manufacturer, and also that he made this engine properly. They only say that they got it in due course of business from a competent manufacturer; and it is quite consistent with this averment that they paid him a low price and got an inferior engine. They should aver, as is laid down in *Christie v. Griggs*, that they got as good a machine as could be made. "In due course of business" means nothing. How can the court know what the course of the company's business is, or whether it is a proper course? It should be "in due course of their duty." If the company is discharged of all liability by going to a competent manufacturer a person injured has no redress, for *Winterbottom v. Wright* (10 M. & W. 109) decides that he has no remedy against the manufacturer. [*Pigot, C.B.*—The real point is, that the negligence of the manufacturer is the negligence of the company.] And the manufacturer should come forward and prove that he used all possible care

and skill in the construction. [*Pigot, C.B.*—But if a railway company buying an engine with a secret defect not discoverable by any investigation are guilty of negligence, everyone using an instrument with an unknown defect, which he has purchased, is also liable, e.g. a sportsman with a gun which bursts and does mischief. [*Hughes, B.*—Is a railway company which buys its engines to have a less liability than one which makes its own engines? Public safety requires that the liability should be the same in both cases.] The case of a sportsman with a gun is different from that of a railway company using an engine. The liability of the latter is the same as that of coach proprietors, as ruled by the old cases; and it ought to be tightened instead of relaxed, as there is no competition between railway companies to insure efficiency. They also cited *Israel v. Clarke* (4 Esp. 259); *Christie v. Griggs* (2 Camp. 79); *Grote v. Chester and Holyhead Railway Co.* (2 Ex. 251.)

W. M. Johnson (with him *Chatterton, Q.C.*) in support of the defence.—Does the duty of a railway company in purchasing carriages from a manufacturer extend beyond matters of cognizance? [*Pigot, C.B.*—(1) In this defence you must argue that there is no obligation on the company to make inquiry into the goodness of their engine when they buy it, provided they purchase from a competent manufacturer.] Railway companies are not warrantors for the safety of their passengers. The gist of this action is negligence, and the defence is a clear denial of negligence. It avers the purchase from a good manufacturer and careful examination as well during their use of the engine as before they bought it. Under this defence the company should have proved that at no time could they have discovered the defect by examination. No inspection, however close, could have discovered a defect in the centre of the crank pin. If the company are responsible for the negligence of the manufacturer, it can only be on the principle that he is their servant. But how far back is this fictitious relationship to be implied? Are the company to answer for the conduct of the iron-founder? "Due course of business" must mean a course of business in discharge of their proper duty. It means more than according to their ordinary habit, because such an averment would be ridiculous and nugatory. The same rule must apply to all carriers as well as railway companies; and on the principle contended for, a steam-packet company would, in case of accident, be answerable for the negligence of all persons concerned in the making of their steamers up to the extractors of the raw material. *Grote v. The Chester and Holyhead Railway Company* is analogous to this case; but the company were there held liable, because it was their legal duty to make their own line, and they were answerable for the defects in a bridge made by one of their own servants, as the builder was there held to be. Railway companies are not recognised by the Legislature as manufacturers of their own rolling stock. Here the defence alleges that the sole cause of the accident was the latent defect in the crank pin. In *Sharp v. Gray* there had been no complete examination of the axle-tree before the coach started, which is the point of that case. They also cited *Aston v. Heaven* (2 Exch. 531); *Harris v. Costar* (1 Car. & Pay. 636); *Ross*

v. Hill (2 C. B. 877); *Chitty on Contracts*, 6th ed. 440; *Patience v. Townley* (2 Smith, 224); *Dudlow v. Watchorn* (16 East. 39).

Cur. ad. vult.

Jan. 31, 1863.—The judgment of the court was delivered by

DEASY, B.—This case comes before the court upon a demurrer to the defences to the 1st, 2nd, and 3rd counts in the summons and plaint. The first defence, which is the subject of demurrer, states that the accident was caused solely by an unavoidable mishap which occurred without default or negligence on the part of defendants. So far the defence is good, because a carrier of passengers does not warrant the safe or due arrival of his passengers. But the defence then sets out the nature of the accident, by reason of which the breach of contract admittedly occurred. I am of opinion that the introductory averments are governed by those which describe the accident, and that on these grounds the defence fails to justify the defendants. A carrier of passengers must be considered as warranting his vehicle free from all defects at the commencement of his journey so far as care and foresight can avail. In *Christie v. Griggs* (2 Camp. 81) Sir James Mansfield says,—“For goods the carrier is answerable at all events, but he did not warrant the safety of passengers. His undertaking as to them went no farther than this,—that as far as human care and foresight could go he would provide for their safe conveyance.” And a little before he observes, “It lies on him to show that the coach was as good a coach as could be made, and the driver as skilful a driver as could anywhere be found.” *Sharp v. Grey* (9 Bing. 45) is a still stronger case. There the axle-tree of the defendant's coach broke at a part of the axle which was covered with wood; the maker of the coach proved that the whole vehicle had been made of the best materials; and it was clearly shown that the defect was not not discoverable by ordinary examination, yet the defendant was held liable, Gaselee, J., observing, “The burthen lay on the defendant to show that there has been no defect in the construction of the coach.” And Rosanquet, J., says, “If when the coach started it was not road-worthy, the defendant is liable for the consequence upon the same principle as a ship-owner who furnishes a vessel which is not sea worthy.” If the defendants are not responsible for an original defect of construction, coach proprietors might buy badly made or dangerous coaches, and the passengers would be without remedy. In *Grote v. The Chester and Holyhead Railway Co* (2 Ex. 255), Parke, B., says, with reference to *Sharp v. Grey*, “In that case defendant is liable for an accident which arises from an imperfection in the vehicle although he employs a clever and competent maker.” And with reference to the case in 2 Ex., Pollock, C.B., says, “It cannot be contended that the defendants are not responsible for the accident merely on the ground that they have employed a competent person to construct the bridge.” In my opinion the defendants have not shown any facts to exempt them from the rule laid down in these cases. They admit a defect in the engine at the beginning of the journey, and that the defect caused the accident. In the plea

there is no averment of care or skill in the manufacturer of the engine, nor of care having been taken by the defendants in selecting the engineer. There might have been gross neglect on defendant's part. The contrary does not appear. If the defendants had made the engine in their own factory they must have proved due care and skill in its construction. They cannot escape from that liability by averring that they bought the engine from a competent manufacturer. To hold otherwise would be to leave the public without remedy at the mercy of railway companies. This is the view which the court takes, and which directs its judgment, which I have been requested to deliver.

Demurrer allowed.

Court of Probate.

[Reported by W. R. Miller, Esq., LL.D., Barrister-at-Law.]

DALY AND WIFE v. BURKE.—Feb. 20.

Lost will—Contents—Proof by one witness—Part in favour of drawer condemned—Costs of executor of former will impeaching a later will, and failing—Costs of Attorney-General intervenient.

Since the Probate Act of 1857 (20 & 21 Vict., c. 79, s. 68), a will, or the contents of a lost will, may be established by the evidence of one witness only.

Where a testatrix was in extremis, and her capacity doubtful, and the drawer of the will gathered her intentions as to the dispositions from previous declarations, words in favour of himself and his wife, which he introduced into the will, were omitted from the probate—the court not being satisfied that the testatrix understood their meaning, or intended them to be inserted.

An executor in a former will, who was also an express trustee for charities, was justified in pleading, as to a later will with a clause of revocation, undue execution and want of capacity, and was allowed his costs, where the later will was made when testatrix was in extremis, and contained peculiar words in favour of the drawer and his wife, and was destroyed by the drawer; but nevertheless the jury found it was a valid will.

As a general rule, intervenients do not get costs, but where the Attorney-General is a necessary party, and intervenes, he will be allowed them.

This was a suit instituted by the plaintiffs in order to establish a will bearing date the 30th day of April, 1860, of Anne Kenny, deceased, who died on the 13th of February, 1862, in which the plaintiffs were named executor and executrix, and which will the plaintiffs had propounded in their declaration. The defendant, by his plea, alleged that the will of the 30th April, 1860, was revoked by a later will of the 12th of February, 1862, which contained an express clause of revocation, and which later will was afterwards destroyed, and (by amendment by the judge's directions) that the defendant was the maternal aunt and sole next of kin of the deceased. The plaintiffs replied—impugning the alleged will of the 12th February, 1862, on the ground of undue execution, and

want of testamentary capacity of the deceased. The assets consisted principally of monies which belonged to a brother of the deceased, who died at Brazil, and had bequeathed portions of it to the deceased, some parts of which were not yet realized. The cause was tried at the sittings after Michaelmas Term, 1862, before the Court and a special jury. Two issues were sent to the jury—first, whether the destroyed will, of the 12th February, 1862, ever was the last will of the deceased? Secondly, if so, whether that will contained an express clause of revocation? The jury found that the will of the 12th February, 1862, was the last will of the deceased, and also that it did contain an express clause of revocation. The cause now came on for final hearing before the court, in order to ascertain and determine the contents of the said will of 12th February, 1862, and to dispose of the question of costs. The Attorney-General who had intervened before the trial, now pleaded specially, and in his plea he set out the contents of the will of the 12th February, 1862, as detailed in an affidavit sworn by Mr. Denis Florence M'Carthy, who had drawn the will—the contents being (after revoking all previous wills), "I devise and bequeath all my property of every kind to Mr. D. F. M'Carthy and his wife Elizabeth, for their sole use and benefit, trusting to their pious and charitable recollection of the spiritual wants of me and mine," and, after reference to a debt of £100 due by Mr. Brassill, to be paid by instalments, appointing said M'Carthy and wife executor and executrix. Mr. M'Carthy himself, after the death of the testatrix, had destroyed the will under the erroneous impression that it was wholly inoperative as to the charitable purposes, by reason of the death of the deceased within three months after the making of the will. In the will alleged by the plaintiffs, the property was given to them expressly for charitable purposes (without any devise or bequest for their own use), and they were appointed executors.

Dr. Ball, Q.C., (with him *Geo. Waters*) for the Attorney-General.—The Attorney-General insists that all the words deposed to by Mr. M'Carthy, should be set out in the probate. The defendant, on the other hand, says that only the clause of revocation should be set out. The first question is, can a lost will be established by one witness? It is not necessary to consider what was the law prior to the Probate Act of 1857. By the 68th section of that Act the rules of evidence in the Probate Court are to be those of the Common Law Courts. There the evidence of one witness might suffice. In *Browne v. Browne* (8 Ell. & Bl., 876), the solicitor who prepared a will proved its contents from recollection. In the *Goods of Browne* (1 Sw. & Tr., 32), and the *Goods of Gardiner* (ib., 109), Sir C. Cresswell followed that authority. See also *Trevelyan v. Trevelyan* (1 Phillim., 149), as to proving the contents of a lost will. There is no degree of secondary evidence. If a deed is lost, you may prove the contents by a copy, or by parol evidence; they are all secondary evidence of the same degree. [*Keatinge, J.*—Under that section one witness might prove the entire case.] In *Belbin v. Skeates* (1 S. & T., 148), Sir C. Cresswell so decided. Probate cannot be given of part of the contents—the construction of the words is for another court.

Dr. Battersby, Q.C., *Dr. Walsh, Q.C.*, and *St. John C. Armstrong*, for the defendant.—The question is, what credible evidence is there of the contents. M'Carthy drew the will, and without any authority destroyed it. He knew of the dispositions made in a former will for charitable purposes, but the deceased never expressed to him her pious intentions. nor had he any authority to insert the words, "for their sole use and benefit." No doubt, if she adopted the will as drawn, understanding it, it is her will; but she was *in extremis*, and her capacity was very doubtful; but M'Carthy's object was to evade the law, as he thought, by giving the property absolutely to himself and wife, in case the charitable purposes should fail by the death (as he erroneously fancied) within three months of the testatrix. The only finding of the jury as to the contents is, that it had a revocatory clause. *Browne v. Browne*, and the other cases cited, do not overrule the old law, which, by requiring two concurrent witnesses to prove the contents, protected testators. Those cases only decide that the general effect of a will may be established by one witness, as that a will had a revocatory clause; but as to the contents of a dispositive clause, depending on minute circumstances, as the use of a negative, or the use of the definite or indefinite article, &c., the case is very different. [*Keatinge, J.*—If one witness could prove the one, why not the other?] But here the drawer of the will is the spoliator of it, who is to establish its contents. *Barry v. Batlin* (2 Moo., P.C.C., 480), and other cases of that sort, apply here, where the drawer gives himself the property for his own absolute use, and if in this case the contents be established on his evidence, then all spoliators of wills may prove their own case without any support. In *Barton v. Robinson* (3 Phill., 455), the part benefitting the drawer was omitted.—*Ingram v. Wyatt* (4 Hagg., 391); *Durling v. Loveland* (2 Curt., 225).

Waters replied for the Attorney-General.

Cur. adv. vult.

Feb. 26.—*KEATINGE, J.*—This is a suit to establish the will of Anne Kenny, bearing date the 30th of April, 1860. The plaintiff, William Daly, and his wife, Jane Daly, were named executor and executrix in that will. The defendant is Bridget Agnes Burke, who is the aunt and sole next of kin of the deceased, and by her plea, not disputing the validity of the will which the plaintiff relies on, she alleges that the deceased made another and a later will, which expressly revoked the former will, and that the second will was destroyed. The peculiarity of that plea is, that the defendant does not allege that the will had any other provisions in it, as to the property of the deceased, save the clause of revocation. In that plea, as first pleaded, it was not stated who the defendant was, or in what character she appeared and pleaded, and the plea was on that ground opposed, and I required it to be amended, and accordingly it now states that she is the maternal aunt and sole next kin of the deceased, and as such she has a right to rely on the clause of revocation, as giving her a right to the undisposed of property of the deceased. To that plea the plaintiff replied that the second will was not executed according to the statute, and also that,

at the time of its execution, the deceased was not of sufficiently sound mind, memory, and understanding. It appeared by affidavits that the second will had been destroyed after the death of the deceased, but it did not appear in a manner satisfactory to the court what were the contents of that will. The only portion of the contents alleged in pleading was the portion which revoked the former will. In that state of things I directed two issues to be tried by a special jury before myself—first, if the will destroyed ever was the last will of the said deceased? second, if it was, did it contain an express clause of revocation? The first issue involved two questions, viz., whether the deceased was of sufficient testamentary capacity at the time of the execution of the will, and also, whether the document was executed with all legal formality. The case upon those issues went to trial, the Attorney-General having previously intervened, and the jury found both issues in the affirmative, that is, they found for the second will, and that it did contain an express clause of revocation. They consequently also found that the deceased was of sound mind when that will was executed, and that it was executed with all legal formality. The first will was thus set aside, and the second established with a clause of revocation. But as to the other contents of that will, I then intimated that they should form the subject of another enquiry before myself. The verdict has been acquiesced in, and no motion has been made to set it aside. The will was prepared by Mr. Denis Florence M'Carthy, a gentleman of the bar, but not in practice now, and it was also destroyed by him. He has been examined as a witness, and he also has made an affidavit as to the preparation of that will, and one also for this hearing, giving the very words of the will, according to the best of his recollection. He appears in this transaction to have acted with great indiscretion, but he plainly intended to do what was right, and no charge has been made by anyone against him of impropriety. Having now the words of the will stated in Mr. M'Carthy's last affidavit, I am now to deal with the case as if the will itself was forthcoming, and treating that affidavit as embodying the original will itself, I am to enquire whether, on the evidence in the case, any of the words contained in that will are to be excluded from it, as not forming part of the will of the deceased. The words of the will as set out in the affidavit, and which I am fully persuaded are as near as Mr. M'Carthy could recollect, are as follows. After revoking all previous wills it proceeds—"I devise and bequeath all my property of every kind to Mr. Denis Florence M'Carthy and his wife Elizabeth, for their sole use and benefit, trusting to their pious and charitable recollection of the spiritual wants of me and mine," and, after referring to a debt due by Mr. Brassil, it named Mr. M'Carthy and his wife executors. The first will of 30th April, 1860, had given nothing to Mr. Daly or his wife; they were express trustees for charitable purposes. The wife, during her life, was to apply the property to such charitable uses and purposes as she should think fit, and if, at her death, any part remained undisposed of, then the husband was to dispose thereof in like manner for charitable uses as he should think proper. The provisions of those two wills are very important. The

first creates clearly and unambiguously an express trust. The second contains words which may or may not create a trust. It is not for this court to put a construction on the will, and therefore I say that those words, "trusting to their pious and charitable recollection of the spiritual wants of me and mine," may or may not create a trust; but besides those words are the words, "for their own sole use and benefit," in the second will alone. In my opinion, on Mr. M'Carthy's evidence, the entire of the words deposited to by him (excepting those latter words) are clearly part of the will, and probate must be granted of so much; but whether those words are to stand will depend on a consideration of all that occurred in the preparation of the will. It appeared that the deceased had complained of Mr. Daly, who had managed her affairs for her, and said that he was too sharp for her; and that on the 13th February, 1862, when the second will was made, she sent for Mr. M'Carthy. He and his wife were on most intimate terms with the deceased; and on a former occasion he had drawn wills for the deceased and her two sisters, under which their property was to go to the survivor, and the deceased was the survivor. Mr. M'Carthy found her in bed, suffering very much from asthma, and he thought that she wanted him to draw a will for her. It was impossible to hold a regular conversation with her on account of that complaint; but she did ask him to make her will, and he proceeded to do it. Mr. M'Carthy, in his evidence, admitted that it was from her previous declarations that he collected her charitable intentions; and that he understood that he was only to be the agent to carry them out. When he asked her to whom her property was to go, she answered, "You, you, you;" but that it was not either M'Carthy's or deceased's intention that the property should go for his and his wife's benefit is evidenced by the question put by M'Carthy, and the deceased's answer,—"Do you wish Mr. Daly or I to act for you," her answer was, "You." In fact she scarcely said anything else, except yes or no; but the word charity never came from her at all. However, she approved of the will as drawn and said it was all right. As to the words "for their own use and benefit," it is fortunate for Mr. M'Carthy that he is a gentleman of such high character; and the destruction of the will by him is itself a negation of any fraudulent intent on his part. He was under the impression that a will of that kind should be made at least three months before the death of the testator, being under the mistake that the three months clause applied to personalty. But those words were introduced without the knowledge of the deceased, and might have the effect of defeating her will altogether. The next of kin might, with those words in the will, find it difficult to raise the questions they intended to rely on, or they might take nothing if the charitable purpose was too vague. In any case they would be seriously embarrassed; and I am bound to watch every word in this will very narrowly, for the words in question may be in favor of the party who drew it; and in that case the Court before which the validity of the will was tried should be very watchful, for that party comes forward, in every case, with a certain degree of suspicion, from the fact that, as drawer of

the will, he might introduce words for his own benefit, and which were not intended by the testatrix. Besides, we have here another element to deal with, viz., that though the verdict of the jury finds that the deceased was of sound mind, yet it is plain that her testamentary capacity was of the very lowest kind; so much so, that he was sure that but for the high character of the gentleman who drew the will, the jury would have found against it. Several cases were cited, but a case not cited of *Carroll v. Carroll* (Milw. 434), is very much in point as an authority; where the court struck out such parts of the codicil as benefitted the drawer, and which might have escaped the attention of the testatrix, whose capacity was doubtful. I therefore am of opinion that probate must be given of the will as contained in the affidavit of Mr. M'Carthy, omitting, however, the words "for their sole use and benefit." On the question of costs

Armstrong argued that the plaintiff should be condemned in costs, or at all events should not be allowed any costs out of the estate, being an executor in a former will, who impeached a later one on the ground of incapacity and failed. He cited *Mansfield v. Shaw* (3 Phil. 22); *Martin v. Robinson* (2 Lee, 625); *Fyson v. Westropp* (1 S. & Tr. 279).

Dr. Townsend contra, relied on the capacity of the deceased as being so low as to justify the plaintiff in impeaching it. He cited *Summerville v. Clements* (32 L. J. Pr. 33).

KEATINGE, J.—I consider that Mr. Daly was quite justified in requiring proof of the capacity of the deceased; and under the circumstances of the case he would not have acted right if he had not done so, as he was a trustee for charitable purposes and not beneficially entitled. He had been the confidential agent of the deceased, and it was his duty not to give up legal rights except he clearly saw a later will revoking his. But it is said he is not to get costs on account of his replication. His replication merely obliged the parties who relied on the second will to prove the matters which were essential to give validity to it. There is no replication of fraud or contrivance—merely one requiring the formal proof of execution and of soundness of mind. If ever there was a case where a party was justified in requiring such proof, this is that case. It appears that during the preparation of this will the deceased, for some hours, was actually, from her state of insensibility, unable to proceed—her recollection seemed gone. She was sustained by brandy, beef tea, and such stimulants; and at one time she was wandering so much that she fancied Mrs. M'Carthy was present when she was not there at all. But the cardinal fact is, that Mr. M'Carthy destroyed the will, and therefore Mr. Daly thought that there was something in the will which would prevent it being established and justified him in the course he adopted. I therefore allow him his costs out of the estate. As to the Attorney-general, he is an intervenient; and though the general rule is not to give costs to intervenients, yet, as the Attorney-general was a necessary party, and the case could not well have gone on without him, I also allow him and the defendant their costs out of the estate.

Decree accordingly.

Landed Estates Court.

[Reported by R. H. V. Archer, Esq., and H. Fawcett, Esq.
Barrister-at-Law.]

[BEFORE JUDGE LONGFIELD.]

IN THE MATTER OF THE ESTATE OF ROBERT KING PIERS,
OWNER; EX PARTE HENRY BROWN, PETITIONER.—
Feb. 26.

Act 3 & 4 Wm. 4, c. 74—Construction of section 74
(section 66 Irish Act)—Two disentailing deeds—
Effect of priority of enrolment.

W. I. R., a tenant in tail, executed a disentailing deed which was enrolled within the period prescribed by the Act (section 41), but not in the lifetime of *W. I. R.* *C. M. W.*, who was entitled to an estate in remainder expectant on the estate tail, upon the death of *W. I. R.*, executed a disentailing deed, which was duly enrolled before the previous deed of *W. I. R.* Held, that the enrolment of the deed by *W. I. R.* was a valid enrolment, notwithstanding his death.

Held also, that the subsequent deed, being for valuable consideration, and being first enrolled, took priority over the prior deed by *W. I. R.*

Held also, that the 74th section of the Act applies to a remainder in fee, or for life, as well as to a remainder in tail, expectant on the determination of an estate tail.

THIS was a motion to make absolute the conditional order for sale, notwithstanding cause shown, under the following circumstances:—In the year 1815 J. N. Richards being seised in fee-simple of certain lands in the Co. Wexford, by articles dated 2nd March, 1815, made upon the marriage of his son, Wm. Nunn Richards, put the lands into settlement. By these articles (after declaring the uses of a term of 99 years thereby created), J. N. Richards covenanted to settle the lands to the use of William Nunn Richards for life, with remainder to the first and every other son, the issue of said marriage, successively in tail male; "and in default of such issue then to the issue female of said marriage if more than one and their heirs in such share manner and proportions and subject to such restrictions provisos and limitations as the said William Nunn Richards shall by any deed or deeds in writing duly attested by two or more subscribing witnesses or by his last will and testament limit and appoint and if but one child son or daughter then to such only child subject as before and after-mentioned and in case there shall be no issue male of said marriage and issue female more than one child and that the said William Nunn Richards shall not by deed or will limit or make an appointment of said estate to or for such female children that then and in such case from and after the death of the said William Nunn Richards such female children as shall be living at the time of the decease of the said William Nunn Richards and their heirs shall take and inherit the same as tenants in common share and share alike" The articles contained a proviso that in the event of William Nunn Richards surviving his wife without any issue of the marriage, the trustees should hold upon the same trusts for the issue of any after-taken

wife. "And if it shall so happen that the said William Nunn Richards shall die without issue male or female with his present intended or any after-taken wife, as the case may be subject to the aforesaid term and as after-mentioned then the said towns and lands . . . shall revert back to the said John Nunn Richards and his heirs for ever as his estate in fee as if these presents never had been made or entered into." The remaining clauses of the articles dealt with the personal property of the settlor, and are not material to the present case. There were only two children issue of this marriage, William Irwin Richards and Caroline M. Richards. Upon the death of Wm. Nunn Richards in 1822, William Irwin Richards entered into possession of the lands as tenant in tail, and upon the 5th of March, 1849, he executed a disentailing deed, which was registered upon the 4th of April, and enrolled upon the 11th of June following. In April or May, 1849, William Irwin Richards died, having made a will upon the day of his death, whereby he devised the lands to the owner in this matter, Robert K. Piers. The will was duly proved. In February, 1849, Caroline M. Richards married Henry William Woodhouse, and previous to that marriage a settlement was executed dated the 28th of February, 1849. This settlement recited, *inter alia*, that Miss Richards was entitled to the lands "as tenant in tail or otherwise in remainder expectant upon the decease and failure of issue of her brother William Irwin Richards" and contained a covenant on the part of Miss Richards and her intended husband, that so soon as they should become entitled in possession to the lands, to execute a deed barring the estate tail (if any) which might be subsisting in the premises, and to settle the lands upon certain uses therein declared. Pursuant to this covenant, Mrs. Woodhouse and her husband executed a disentailing deed which bore date the 1st of June, 1849, and was enrolled upon the 4th of June, 1849, a week prior to the enrolment of the deed executed by her brother, W. I. Richards. Upon the death of William Irwin Richards, the present owner, Robert King Piers, entered into possession of the lands as devisee under his will, and has continued in possession up to the present time. In November, 1862, the petitioner, as assignee of a mortgage dated the 24th December, 1857, presented a petition to the Landed Estates Court, praying for sale of the lands, and, on the 12th of November, a conditional order for sale was made thereon. Against this order Charles Rolleston and Coventry Mark Woodhouse, the trustees of the settlement of 1849, now showed cause, alleging that under the articles of 1815 William Irwin Richards and his sister took successive estates tail, that William Irwin Richards did not effectually bar the entail, inasmuch as the deed executed by him for that purpose was not enrolled until after his death, nor until after the enrolment of the deed of the 1st of June, 1849, and, therefore, that the estate was vested in them upon the trusts of the settlement of 1849. The affidavit of the petitioner's solicitor in reply, denied the allegations in the affidavit of the trustees, and charged that Mrs. Woodhouse and her trustees had notice of the disentailing deed of the 5th of March, 1849, and also of the will of William Irwin Richards.

Mr. Flanagan, Q.C., for the petitioner, contended that upon the construction of the articles of 1815, Mrs. Woodhouse did not take an estate tail in remainder, but either an estate in fee simple, or no estate at all. The 74th section of the Act applies only to persons claiming under the same estate tail, and does not apply to parties claiming under successive estates tail. If it did apply to successive estates tail, the trustees by reason of the registration of the deed of March, 1849, and the notice thereby given are precluded from taking any benefit under that section. So far as regards the limitations to the male issue of the marriage, the articles are formal and technical. Then comes the limitation to the heirs female. If we stopped at the word "heirs," there would apparently be no provision made for the case of only one daughter. The words "if more than one," should be transposed, and inserted after the word "heirs." Then the whole passage after the word "heirs" should be read as if in a parenthesis. The intention is to provide for the daughters of the marriage, and to give the father a power of appointment, and another clause provides that in case of no appointment the daughters should take as tenants in common. It is clear that the daughters, if more than one, would have taken a fee-simple subject to the father's power of appointment. There is a proviso that if any advance or portion be given to any of the daughters, her share was to vest in her father, which shows that the event intended was that the daughters should take the fee. Mrs. Woodhouse must take the estate as in default of appointment, and she took an absolute estate in fee on the determination of the prior estate tail vested in her brother, or she took no estate at all. In putting a construction upon this document, the court should notice that it is not a *settlement*, but *articles*. The true meaning of the 74th section is, that the parties must claim under two deeds by the same tenant in tail affecting the same estate. There is no provision in the Act whereby a tenant in tail can deal with or affect any estate prior to his own. All the provisions refer to his own estate, and the remainders over. In every section the Act draws a line between estates prior and subsequent to the estate tail. The power conferred by the Act is analogous to the power of levying fines, and does not touch prior estates. The 38th section clearly refers to deeds executed by the same tenant in tail, and the 74th is only a proviso or addition to the 38th. The fair construction of the 74th section is to restrict it to deeds executed by the same tenant in tail. If the 74th section is not to be read in connection with the 38th, a purchaser taking with notice of a deed creating a voidable estate will confirm the voidable estate, but if the estate be not voidable he will not confirm it. Lord St. Leonards in his Real Property Statutes, sect. viii., chap. 2, expresses an opinion that the two sections are to be read together. The trustees claim under the deed of 1st June, 1849, which purports to have been made in pursuance of the covenant in the settlement, but it is not for valuable consideration. The consideration was the marriage in 1849. In other words the deed of the 1st June, 1849, is not for valuable consideration within the meaning of the 74th section. The parties showing cause suggest that the deed of 5th March, 1849, is

invalid, as it could not be enrolled after the death of the tenant in tail. This point has been settled by recent authorities.—*Honeywood v. Foster* (30 Beav. 1).

Mr. J. E. Walsh, Q.C., for the trustees, shewing cause.—The deed executed by William Irwin Richards was wholly inoperative to bar the entail, inasmuch as it was not enrolled until after the death of the tenant in tail. The power which is given to the tenant in tail is stated in the 15th section, and it should be treated as a statutable power. Every single requisite of a power must be done in the lifetime of the donee.—*Hawkins v. Kemp* (3 East. 410). The analogy is as close as it would be possible to find. In *Buller v. Baker* (3 Coke's Rep. 28), it was held that enrolment of a deed under a power after the death of the donee was invalid. It is clear from the 41st section that the Act requires enrolment, and therefore it is an essential part of the deed. It was intended as a substitute for the old formality of recoveries, and it cannot be argued that the tenant in tail should have a *locus penitentie* up to the last moment. The argument on the other side that the enrolment is a mere ceremony, makes it a matter of accident, and it makes the effect of the deed depend not upon the will of the tenant in tail, but upon that of another. It may be argued that a different construction is given to the statute of enrolments—27 Hen. VIII. c. 16; but the cases are different. Under that statute the enrolment of a deed after the death of the grantor would be valid, because the deed does not destroy or defect any estate, but deals with a continuing one. The disentailing deed destroys an estate, and creates a new one. From the 74th section of the Act it would appear that enrolment at any time within the six months shall be sufficient. But up to the date of the enrolment the deed is inoperative, and if the estate of the tenant in tail has ceased at that time, it makes the enrolment invalid. Under the articles, Mrs. Woodhouse took an estate tail. The recitals plainly intimate that the settlement was for the benefit of W. I. Richards, and that the reversion in fee was intended to come back to John Nunn Richards, the settlor. The limitation to the issue female is not without authority. Such a clause has been held to give an estate tail with cross-remainders to the daughters.—*Whitelocke v. Hedden* (1 Bos. & Puller, 243). (See also Lord Hardwicke's remarks in *Marryatt v. Townley*, 1 Vesey, sen., 105). It is not possible to give effect to the limitation without giving estates tail to the daughters. The limitation of the fee to the settlor in the event of William Irwin Richards dying without any issue, contemplates such an estate as will permit another estate to be grafted upon it, that is an estate tail. The trustees who have shown cause are unquestionably purchasers for value, and if so, the concluding words of the 74th section will place them in priority to Piers. The enrolment, therefore, of Wm. Irwin Richards' deed was void, and, if not, the second deed is in priority of the first, in either of which cases the petitioner is out of court.

Ryan followed on the same side, and cited *Egerton v. Brownlow* (1 House of Lords Cases); *Glenorchy v. Bosville* (1 White and Tudor, Leading Cases, Notes); *West v. Ellis* (2 P. Wms. 346). There is nothing in the 74th section to restrict it to deeds by

the same tenant in tail. The section seems to have been purposely left in general terms. The 38th section is so restricted, and it is to be inferred that the 74th section was intended to be general. The articles are informal, resting merely in covenant, and the only settlement which could be executed in pursuance of them would be, to give the daughters estates tail with cross-remainders.

O'Donnell for the petitioner, in reply.—The enrolment under the Fines and Recoveries Act is analogous to that under the statute 27 Hen. VIII. c. 16, and is not like the case of a donee of a power under a settlement. The disentailing deed operates from the day it bears date after enrolment, in like manner as a bargain and sale (Com. Dig. tit. Bargain and Sale, B. 9). There is a wide difference between the execution of a power under a settlement, and under an Act of Parliament.—*Marlborough v. Godolphin* (2 Vesey, sen.) This has been called a *power* in the tenant in tail, but it is merely a substitute for his old right.—*Digges' case* (1 Rep., 173; 2 Preston, Abstracts, 268). Under the articles, Mrs. Woodhouse took a fee-simple. The entail ended with the death of the male issue.—I. Fearn. Cont. Rem., 376.

LONGFIELD, J., in delivering judgment, said—This is a petition by a creditor of the owner, Robert King Piers, to sell the estate for payment of his debts. Cause is shewn by Charles Rolleston, a trustee for a person claiming the estate itself by an adverse title. The title is derived under John Nunn Richards, who was seized in fee of the premises in 1815. On the marriage of his eldest son, William Nunn Richards, the property was put in settlement by articles inartificially drawn, dated the 2nd of March, 1815. By those articles, after prior estates which have long since expired, the lands were settled to Wm. Nunn Richards for life, remainder to his first and other sons successively in tail male, and in default of such issue male, then to the issue female and their heirs. Here a transposition of words is necessary to give meaning to the sentence, but in the event that has happened I think the instrument must be construed so as to give the fee to the only daughter on failure of issue male of the marriage. The first limitations are sufficient to give her that estate, and there is nothing sufficiently definite or certain to deprive her of it in the unmeaning rambling clauses that follow. There were only two children issue of that marriage, namely, William Irwin Richards, a son, and Caroline Maria Richards, a daughter. The son, William Irwin Richards, became equitable tenant in tail in possession, and executed a disentailing deed dated the 5th of March, 1849, and enrolled on the 11th of June in the same year. He died before the enrolment of the deed, and by his will, dated the 20th of May, 1849, he devised his estates to the present owner, Robert King Piers. The sister, Caroline Maria Richards, married Henry William Woodhouse in February, 1849, and previous to her marriage she entered into a covenant to bar the entail and settle the estate, if she should become entitled to it. In pursuance of this covenant, Mrs. Woodhouse executed a disentailing deed after her brother's death. It bore date the 1st of June, 1849, and was enrolled on the 4th of June, i.e., a week prior to the enrolment of the deed which had been executed by her brother. The party

now showing cause claims under Mrs. Woodhouse. This is one of the very few cases of litigation which have arisen out of the admirably drawn Act for the abolition of fines and recoveries; and notwithstanding the ingenious arguments of counsel on both sides, I am of opinion that the Act is free from any ambiguity if it be only read in a fair and candid spirit, without any pre-determination to make it receive any particular construction. As the sections of the English Act have been referred to in argument by counsel on both sides, I shall adopt the same course. The sections referred to are essentially the same in both Acts, although they are differently numbered. The difference in the sections is merely caused by a reference to the registry in the Irish statute, which does not exist in the corresponding English clause, and which is immaterial in the present argument. The section on which the case turns is the 74th of the English Act (Irish, 66th), which enacts, "That every deed required to be enrolled in His Majesty's High Court of Chancery in England or Ireland, by which lands, or money subject to be invested in the purchase of lands, shall be disposed of under this Act, shall, when enrolled as required by this Act, operate and take effect in the same manner as it would have done if the enrolment thereof had not been required, except that every such deed shall be void against any person claiming the lands or money thereby disposed of, or any part thereof, for valuable consideration, under any subsequent deed duly enrolled under this Act, if such subsequent deed shall be first enrolled." It is contended that to understand this section it should be read along with the 38th (Irish, 36th,) section. I do not think that the sections have much relation to each other, although of course every part of the Act may be referred to that can throw any light on the construction of any other part of the Act. The 38th section provides that when any tenant in tail shall create a voidable estate in favour of a purchaser for valuable consideration, and shall afterwards make a disposition of the same lands, such disposition shall have the effect of confirming such voidable estate unless such disposition shall be made to a purchaser for valuable consideration, who shall not have express notice of the voidable estate, adding in the Irish Act, "And if the instrument creating such voidable estate shall not have been registered previous to such disposition." The only question that arises on the construction of this section is,—what is meant by a voidable estate? and this is, I think, clearly explained by the 40th and 41st sections, which make four points essential to the validity of a disentailing assurance. First,—It must be an assurance capable of passing an estate at law in fee-simple absolute. Second,—It must be made or evidenced by deed. Thirdly,—It must not rest in contract only. Fourthly,—It must be enrolled in the Court of Chancery within six calendar months. If it is deficient in any of these four qualities, although it may be binding on the parties to the contract, it will be voidable as against the heir in tail, or the remainderman, or reversioner. In all these four cases of deficiency the contract will be enforced as binding upon the party who entered into it for valuable consideration, and therefore upon all parties purchasing from him, either with notice or without

consideration; and no person reading the 38th section by itself could come to any other conclusion than that voidable estates from any of these four causes were equally within the spirit and meaning of the 38th section, as they certainly are within the equity and the words. There is no ambiguity in the section. It is true that Lord St. Leonards (and there cannot be a higher authority) refers to a possible construction which would exclude assurances voidable from want of enrolment from the operation of this section; but although he does not in terms strongly condemn, yet he certainly does not adopt this construction, which is destitute of any argument except that derived from the supposed necessity of excluding unenrolled assurances from the section, in order that they may be brought within the provisions of the 74th section. According to the natural construction of the 38th section, it merely re-establishes in the new assurances the old equities which existed in the cases of fines and recoveries, and which may be expressed in a manner equally applicable to the old and to the new systems of conveyancing, by saying that a valid disentailing assurance, unless made to a purchaser for valuable consideration without notice, shall have the effect of confirming any previous voidable estate made by the same person in favor of a purchaser for valuable consideration. But if we give the capriciously restricted signification to "voidable estates" in the 38th section, we shall not find the defect supplied and the rule of equity made complete by any possible interpretation that can be given of the 74th section, for this latter section only applies to deeds duly enrolled under this Act, and leaves all unenrolled assurances without protection or confirmation. I shall proceed to compare the two sections in some points, which show how far they are from being *in pari materia*. In the 38th section it is the existence of the second deed that confirms the prior voidable contract. In the 74th section the second deed has no effect in confirming the first, but when its existence is material it only prevents the first deed from having that effect which it otherwise would have had. Again, to come within the 38th section the voidable contract must be made to a person for valuable consideration. This is not expressed in the 74th section. Also the two instruments which are brought into conflict in the 38th section must be by the same person: this is not required by the language of the 74th section. Lastly, the second deed, which is protected against the first deed by the 38th section, must be to a person for valuable consideration without notice, while this absence of notice is not required in the corresponding part of the 74th section. All these points of difference, can, I think, be satisfactorily accounted for by giving its simple and natural interpretation to the latter section without unduly restricting the meaning of the words, or adding or implying anything that is not expressed. Applying this principle of interpretation to the first point raised, viz., must the disentailing deed be enrolled within the lifetime of the tenant in tail? I find that it is not so expressed in the Act. A period of six calendar months is allowed for the purpose, but nothing is said of the continuance of the life, and I do not think that such necessity is to be implied. The case of *Hawkins v. Kemp* is not to the point, for in that case there

was no limit of time fixed for the enrolment, and both the argument and the judgment rely on that fact. Although the case did not require the decision, yet the opinion of the Master of the Rolls in *Honeywood v. Foster* (30 Beav. 1) is clear that the deed may be enrolled after the death of the tenant in tail. Indeed, the enacting part as distinguished from the excepting part of the 74th section would be idle surplusage, if it were confined to the cases in which the life of the tenant and his estate continued up to the time of the enrolment. The clause is obviously introduced to meet such cases as the death of the tenant or the cesser of his estate by breach of condition before the completion of the disentailing assurance by enrolment. Such cases are provided for by the strong and general words of the 74th section, which provide that the deed, when enrolled, shall operate as if enrolment had not been required. No language could be used more fitted to make the deed when enrolled operate by relation to its original date. This point being settled, the next question which arises is,—Must the first and the subsequent deeds be executed by the same person? I answer, It is not so expressed, and it is not to be implied. If the two deeds are by the same person there might be a repugnancy between the 38th and the 74th sections if the first deed was to a purchaser for valuable consideration, and the second deed to a purchaser for valuable consideration with notice. In such a case the first deed would be confirmed by the 38th section, while it would be made void by the 74th; I think, therefore, that the 74th section is chiefly intended to meet the case where the subsequent deed is executed by the successor to the party who executed the first assurance. I am confirmed in this opinion by comparing the 74th section with the last clause of the 53rd section, which is *in pari materia*, when in contrasting the two deeds the earlier deed is called the deed of assurance by the equitable tenant in tail, language which never could have been used if it was essentially necessary that the subsequent deed of assurance should have been executed by the same party. Now, this construction fully accounts for the two circumstances to which I have adverted, namely, that there is no reference to any valuable consideration in the enacting part of the 74th section, and no reference to the absence of notice in the exceptive part. The policy of the Act is, that there is to be no consideration of equity in the relations between the tenant in tail and his successor. In ordinary contracts affecting the conscience of the party entering into them and giving them, therefore, a binding force in equity,

the substance and the consideration is everything, and the form almost nothing; but in determining the relative rights of the tenant in tail and his successor the form is everything and the consideration nothing. Accordingly in the 38th section the informal instrument for value is confirmed by the subsequent formal instrument where the conscience of the second party is affected by it. But the 74th section is not dealing with an informal assurance, it is merely declaring what shall be the effect of complying with the provisions of the Act under certain circumstances; and accordingly no consideration is required for the first deed, as the successor who is bound by it has no concern with the consideration. But the case may arise where the successor deals with the estate while it is his undoubted property, viz., in the interval before the prior deed is enrolled. The Act provides for this case by supporting the second assurance if made for a valuable consideration, and enrolled before the enrolment of the first assurance. Here absence of notice is not required, for the notice would be notice of an immaterial fact, viz., of an imperfect assurance not in any way binding on the conscience of the successor, and therefore not binding on the conscience of anyone dealing with him for a valuable consideration. It is true that the Act might, without injustice, have made provisions somewhat different. It is a mere matter of positive law, but it could scarcely have been settled in a more convenient manner than by providing that, although enrolment shall operate by relation, the deed, while imperfect, shall not prevent the successor from selling his estate. A contrary provision might deprive the successor of his best opportunity of selling an estate during the time allowed by law for enrolling an assurance which after all might never be enrolled. It is urged against this construction that the Act requires the subsequent deed to be first enrolled, whereas the successor might be tenant in fee-simple, whose deed would not require enrolment; but I see no inconvenience or injustice in requiring such enrolment in the case where the party claiming under the deed is founding his claim on the delay in enrolling a former instrument. Let the successor comply with that form which he is enforcing with such rigour against his predecessor. On this view of the Act I must allow the cause, as the deed under which Mr. Rolleston claims is a subsequent deed for value under the 74th section, and was enrolled before the enrolment of the deed by William Irwin Richards; that deed is therefore void against the deed under which Mr. Rolleston claims. I must therefore allow the cause shewn, with costs.

Court of Appeal in Chancery.

[Reported by Edmund T. Bewley, Esq., Barrister-at-Law.]

[BEFORE THE LORD CHANCELLOR AND THE LORD JUSTICE OF APPEAL.]

GRAY v. BOSWELL.—Nov. 17, 18, 1862.

Lease—Reformation of—Memorandum—Pleading.

By an agreement in writing, G. agreed to let to B. a plot of ground, "bounded on the north by a road dividing said lot from Mr. T.'s holding." On one corner of the agreement, B. indorsed the following memorandum, signed with his initials: "The little angle at the road opposite to T.'s to be added to the road." A lease in pursuance of this agreement was prepared and executed, and in it the northern boundary of the demised premises was stated to be "the road dividing the said lot from Mr. T.'s holding," and no provision was made by it for adding the little angle to the road. In a suit instituted by G. to reform the lease, by excepting the little angle from the demise—Held, that inasmuch as the prayer of the petition sought to retain the angle in G.'s dominion without any obligation on him to add it to the road, no relief could be granted.

THIS was an appeal from an order of the Master of the Rolls, made under the following circumstances. The petition was filed to have a lease, which was executed by the petitioner, Robert Gray, to the respondent, John Knight Boswell, dated the 21st of April, 1860, reformed, and made conformable to an agreement in writing, previously signed by the petitioner and respondent, and dated the 24th of March, 1860. This agreement was in the following terms: "Memorandum of agreement.—Mr. Gray agrees to let, and Mr. Boswell agrees to take the slip of ground on the west side of Belgrave-square, commencing at the ditch running up to Monkstown-road; bounded on the north by a road dividing said lot from Mr. Troke's holding, on the south by the Dublin road; on the west by ground in the possession of Mr. Hone; containing in length from north to south 553 feet, situate at Monkstown, in the county of Dublin; with the appurtenances and liberty of ingress and egress for tenants, &c., through the roads leading to and about Belgrave-square, and into Crowe's ground in case a passage be opened; at the yearly rent of 2s. 6d. a foot, per running foot, for said frontage, amounting to the sum of £66 12s. 6d.; to commence from the 1st of January, 1861, payable half-yearly; term, 900 years from this date; Mr. Boswell to get possession, and to be at liberty to take out two leases, to be prepared by him and at his own expense, paying Mr. Gray's solicitor for approval; right to run a sewer into the one made by Mr. Gray; and to covenant that any houses to be erected thereon shall front the square; and no trade, business, or manufacture of any kind shall be carried on therein. Covenants, by Mr. Gray, that no wall or building shall be erected on the square, and the trees kept lopped, so that the view from the drawing rooms of any house shall not be interrupted; Mr. Boswell to get a copy of Mr. Gray's deed under

the Incumbered Estates' Court." This agreement was dated the 24th of March, 1860, and was signed by Mr. Gray and Mr. Boswell. On one corner of the agreement the following memorandum was indorsed by Mr. Boswell: "The little angle at the road opposite Troke's to be added to the road.—J. K. B.;" and upon the construction and operation of this memorandum the entire question in the present suit depended. The evidence with respect to the time at which this memorandum had been added by Mr. Boswell was conflicting; Mr. Gray asserting that it had been made before the agreement was signed, and Mr. Boswell alleging, on the other hand, that it had been written subsequently. According to Mr. Gray, the object and effect of the memorandum was, that "the little angle" mentioned in it, should be excluded from the demise, in order that it might be thrown by him into Troke's road, stated in the agreement to be the northern boundary of the demised premises. Mr. Boswell maintained that the words merely expressed an honourable undertaking on his part to add "the little angle" to Troke's road at whatever time Mr. Gray should be in a position to widen and straighten the road in its entire length. It was further alleged by Mr. Gray that the northern boundary of the premises agreed to be demised was not Troke's road, but a certain lockspitted line, marked out for the purpose of straightening the road previous to the date of the agreement, and that "the little angle" mentioned in the memorandum was the space enclosed between this lockspitted line and Troke's road. Draft leases embodying the agreement were prepared by Mr. Boswell, and approved of by Mr. Gray's solicitor, and in these the premises were described according to the boundaries mentioned in the agreement, no provision being introduced as to "the little angle," the subject of the present controversy. The leases were subsequently engrossed and duly executed, and possession was given to Mr. Boswell of the entire ground, without any reservation or mention of the lockspitted line. Sometime afterwards, however, Mr. Gray asserted a claim to "the little angle," and having taken possession of it, planted potatoes in it for the purpose of exercising ownership. Mr. Boswell having brought an action for trespass, Mr. Gray gave a consent for judgment, being advised that, according to the terms of the lease executed, he had no valid defence at law. A petition was then filed to reform the lease, by excepting out of the premises thereby demised, "the angular portion lying between the lockspitted line and Troke's road." The matter of the cause petition having come on to be heard before the Master of the Rolls on the 31st of January, the 1st of February, and the 16th of April, 1862, his Honor, having made a careful inspection of the premises himself, delivered an elaborate judgment* of the last mentioned date, whereby he declared that, on the true construction of the agreement, the northern boundary of the demised premises was that which was stated in the body of the agreement, i. e., Troke's road; and that "the little angle" mentioned in the memorandum was not, as alleged by Mr. Gray, the space enclosed between Troke's road and the lockspitted line, but a certain other "little angle,"

* Gray v. Boswell (18 Ir. Ch., 79).

of which his Honor had a map made and lodged in the Registrar's office. His Honor then ordered that the petition should be dismissed, with costs, but took down upon the order an undertaking, on the part of Mr. Boswell, that, within three months after the time of appealing should have elapsed, he would add to Troke's road the little angle as marked out on the map lodged in the Registrar's office. From this order Mr. Gray now appealed.

The Solicitor-General (with him *Heron, Q.C.*, and *Carson*), for the appellant, stated the facts of the case in detail, and contended that, as a term which ought to have been included in the lease had not been included, the lease ought to be reformed in the manner sought by the petition.

Serjeant Sullivan (with him *Brewster, Q.C.*, and *Tandy*), for the respondent.—No reformation can be granted in any case except that sought by the petition. To obtain this it is not sufficient to establish that a term has been omitted from the lease; it must be shown that it is *that* term which is stated by the petition to be omitted. The law on this subject is laid down by *Turner, L. J.*, in *Bentley v. Mackay* (8 Jur., N. S., 1001), where he observes, "I take this to be the rule in the ordinary case of rectifying mistakes in an instrument, where it is sought to alter the instrument in any prescribed or definite mode, that in such cases it is necessary to prove, not only that there is a mistake in what has been done, but also what was intended to be done, in order that the instrument may be set right according to what was really intended; for in such a case if the parties took different views of what was intended, there would be no contract between them which could be carried into effect by rectifying the instrument." If the appellant does not maintain the lockspitted-line as put forward in the original petition, no other reformation can be given, for no emendation has been made in the petition. Moreover, the error must be proved to be mutual. If the lease carries out the intention of one of the parties, but is framed under a mistake as to the wishes of the other, it cannot be rectified.—*Sells v. Sells* (1 Drew. & Sm., 42); *Fowler v. Fowler* (4 De G. & J., 250). The question, in fact, is not whether the lease should be reformed, but whether the reformation sought should be granted. No relief can be given which was not asked for in the petition.

Brewster, Q.C. on the same side.—The evidence as to the mistake, and as to the real intention of the parties, must be clear and satisfactory, and a solemn deed entered into under professional advice will not be set aside unless a mutual mistake is plainly proved. The Court will not take a different view of the facts from that held by the Court below.—*Lindsay v. Lynch* (2 Sch. & Lef., 1); *Power v. The College of Physicians* (7 Ir. Ch., 104); *Kirwan v. Burchell* (10 Ir. Ch., 63); *Wright v. Goff* (22 Beav., 207); *Barrow v. Barrow* (18 Beav., 529); *Rooke v. Lord Kensington* (2 Kay & J., 753); *Breadalbane v. Chandos* (2 My. & Cr., 711); *Thompson v. Whitmore* (1 John. & Hem., 268).

Heron, Q.C., in reply.—The order of the Master of the Rolls is suicidal. He declares that Mr. Gray is entitled to relief, for he takes a personal undertaking from Mr. Boswell to add the angle to the road,

and yet he dismisses the petition with costs. It is immaterial to the case that the lockspitted line is mentioned as the boundary of the angle in the prayer of the petition. Although a petition may be framed with a view to a different relief, the Court can grant a decree under the prayer of general relief.—*Hanbury v. Litchfield* (2 My. & Kea., 629).

THE LORD CHANCELLOR.—I am of opinion that this appeal should be dismissed with costs, and I found that opinion principally upon the pleadings in the cause. Here is an agreement to take a certain piece of ground, marked out by boundaries well defined, well known, and likely to continue for a long time as prominent landmarks. It is to my mind important, in defining the boundaries of any demised premises, to have them, if possible, of a known description, and likely to last, and, therefore, nothing can be more suitable than the adjacent roads, which in the nature of things do not easily undergo any change or alteration. The plot of ground, then, which Mr. Gray conveys to Mr. Boswell is, by this agreement, stated to be bounded on the north by the road dividing the lot from Mr. Troke's holding, and, therefore, I must take this boundary so defined to be an essential part of the agreement. As to the memorandum indorsed by Mr. Boswell on the agreement, I allow that that there was some understanding that at some time or other, whenever Troke's road might be straightened, a small angle should be given by Mr. Boswell for the purpose of making the road of a uniform width. But this is not the question that we are now called on to consider. Mr. Gray's object and meaning, as stated in the petition, appears to be, that the angle in dispute should be excluded wholly from the demise, and that it should remain in his own dominion. But this was not by any fair interpretation Mr. Boswell's agreement. Mr. Gray mentioned to him how useful it was to have the road straightened (and no doubt it would be advantageous to the inhabitants to have a road straight, uniform, and continuous, to Belgrave-square), and Mr. Boswell willingly agreed to join in carrying out that object. But whether this was to be a formal part of the agreement, or was only meant to be an honorable understanding, is difficult, from the conflict of evidence, to determine. The contract was, however, certainly to add this small angle to the road. But this suit is not instituted with a view to add the angle to Troke's road. It seeks to leave a small, useless scrap of ground, intervening between Mr. Boswell's holding and the road, in Mr. Gray's possession, without any obligation on him to add it to the road, but to become, in all probability, a dust hole and public nuisance, or to be planted, perhaps, with potatoes, as he has already attempted to do. The petition, in fact, is framed to protect Mr. Gray from carrying out his part of the agreement. The little angle at present could not be made a part of Troke's road, for the road is not in a position to be straightened, but Mr. Gray seeks to retain it in his own dominion. The petition virtually prays that the lease should be reformed by excluding from the demise a portion of what was included in the original agreement. It does not seek to add the little angle to Troke's road. We cannot add it to Troke's road, and, therefore, under the circum-

stances, the order of the Master of the Rolls must be affirmed with costs.

LORD JUSTICE OF APPEAL.—We have been called on to correct a solemn instrument under seal, entered into after due consideration, and under eminent professional advice. To determine the present question, it appears to me sufficient simply to look at the prayer of the petition. This prays that the little angle may be excepted from the demise. If Mr. Gray retains it, he has no obligation to add it at any future time to the road. Moreover, he has not satisfactorily shewn that that the deed does not contain and express fully the intention of the parties. It is clear too that whenever Troke's road is enlarged, Mr. Boswell will dedicate the little angle to the use of the public. Accordingly, on these most fixed, certain, and salutary principles of equity, I concur in the judgment of the Lord Chancellor, that the order below must be affirmed with costs.

Order below affirmed with costs.

Court of Chancery.

MASTER FITZGIBBON'S COURT.

Reported by Oliver J. Burke, Esq., Barrister-at-Law.

PLUNKET v. MALLEY.

Tithe-rent charge—Rectorial and vicarial tithes—Certificate of composition—Applotment—15th section of Chancery Regulation Act—Presumption of ownership of tithes, by the undisputed enjoyment for over forty years—Non-performance of duty by commissioners—Costs.

The title of the lay impropiator, G. L. S., to the rectorial tithes of K., was traced from the Crown by patents of 8 Jas. 1, and 14 Car. 2, to the Earl of Clanrickarde, and by deeds from the Earl to S., and up to the present time, the family of S. have remained in the undisputed possession thereof. The rectorial were exactly equal in value to the vicarial tithes paid by the parish of K. to the vicar. In 1824, the commissioners appointed under 4 G. 4, c. 99, made out their certificate of composition, and, by s. 31 of the Act, the certificate is made conclusive. The certificate was ambiguous, and departed from the plain directions of the statute. Having stated that the parish was liable for £118 3s. 1½d., it concluded as follows—"of which sum of £118 3s. 1½d. one-half is due and payable to the rector," [not naming who the rector was] "and one-half is payable to the vicar, the Rev. J. M., as the vicar." By the 38th section of the Act, the applotment is made conclusive evidence of the sums payable in respect of such composition for tithes in any parish. After the making of the applotment, which adopted the words of the certificate, the Rev. J. M., demanded not only the payment of £8 8s. 1d., as his predecessors had always done for vicarial tithe, but also another sum of £8 8s. 1d. due to him for rectorial tithe, and the owner of the lands of B. yielded to the demand, and accordingly, ever

since, these lands have paid both the vicar and the S. family the rectorial or impropriate tithes; and, subject thereto, the lands of B. were, in 1852, conveyed by the Incumbered Estates Court to A. M., the present owner, in fee, who, in 1860, declined to pay the vicar the sum claimed by him as rectorial tithes, on the ground that same was payable to G. L. S. The Rev. T. P., successor to Rev. J. M., has been paid the rectorial tithe in dispute since his induction in 1840. Held, under the circumstance, that the court was not bound by the applotment as conclusive evidence of the incumbent's right to the entire of the sums applotted in the lands of B.

Held, also, that when the Acts prescribe things to be done by the parties themselves, they are to be construed as mandatory and imperative; but so far as they require things to be done by the public functionary, they are only directory.

Held, also, that the petition was properly framed within the 15th section of the Chancery Regulation Act, and the 9th General Rule, 1851.

THE facts of this case are fully set forth in the judgment of Master Fitzgibbon.

Battersby, Q. C., and David Plunket, appeared as counsel for petitioner.

Ball, Q. C., and Edward Beytagh for respondent.

Feb. 9, 1863.—**MASTER FITZGIBBON.**—This is a petition by which £16 16s. 2d. is claimed for one year's tithe-rent charge applotted on the lands of Ballyconlaught and Ballynlacka, and due to the petitioner, as rector and vicar of the parish of Kargins, by the respondent as owner of the first estate of inheritance in said lands; said arrears being for the year ending 1st November, 1861. The case stated by the petition is, that petitioner was inducted in 1840 to a union of several parishes, of which the rectory and vicarage of Kargins is one; that ever since his induction he received without dispute the whole tithe-rent charge of said parish; that his predecessors, Crampton, Beresford, and Meara, and all their predecessors from time immemorial, had received the whole tithes, both rectorial and vicarial, down to the time when a composition was established; that from the date of the certificate of that composition in October, 1824, up to his death in 1840, Meara without dispute received the composition and the substituted rent-charge from the time it was established for the parish of Kargins; that application was made for payment of a year's rent-charge, due on 1st Nov., 1861; that on 30th December, 1861, petitioner's solicitor received a notice from respondent, stating that he would call for the purpose of paying £8 8s. 1½d. due to the petitioner as vicar of the parish, stating that one-half was payable under the certificate to the rector, and lay impropiator, G. L. Staunton, Esq. The petition concludes with the ordinary prayer. This petition thus framed is clearly within the 15th s. of the Chancery Regulation Act, 1850, and the 9th General Rule, 1851, and was, therefore, properly referred before any answer or discussion; and, being so referred, I must now deal with it in the double capacity of Chancellor and Master. The respondent had an opportunity of answering, and both parties had liberty to make proofs in support of their respective cases. The result is,

that no evidence has been given in support of the petitioner's allegation that he and his predecessors had always received the entire tithes, tithe composition, and tithe-rent charge, for the parish of Kargina. Clear and positive evidence has been given, uncontradicted and unquestioned, that the incumbent of the union, within the memory of the witnesses (one of them 80 years of age), had never got, and had never claimed, more than half the tithe, or more than half the composition, when that was substituted, and that the other half was constantly paid to the Staunton family as lay impropriators. The undisputed pernaney and enjoyment of half the tithes, and the modern substitution for tithes for over 40 years, would raise a presumption of a legal title, but the impropriator's right is not left dependent on such presumption; his title is traced from the Crown by patents from James I. and Charles II. to the Earl of Clarrickard, and thence by assignments to Staunton. The property in half the tithes, the subject of these grants and deeds, is with the other property of the Staunton family, limited by a marriage settlement, and included in a fine, and recovery, and perception, and enjoyment, so far back as it has been traced, which is entirely conformable with the patents and the deeds, these being the title to half the tithes down to Sir George Thomas Staunton, who succeeded his father in 1801, and was found in possession and undisputed enjoyment by George Lynch Staunton, when *he as it appears in evidence*, became agent in 1817, and from that to the present time the right was never disputed except in one instance in 1827, when the Rev. John Meara had set up a pauper to resist the claim of Sir George T. Staunton, by a replevin suit, the result of which was unsatisfactory to Meara. No enjoyment of this moiety of the tithe inconsistent with the patents, or with the deeds conveying the rights of the patentees, is shewn at any time whatever in the incumbent, or in any other person, before 1824, when commissioners were appointed to effect a composition under the 4th Geo. 4, c. 99, these commissioners appear to be aware of the impropriator's right to half the tithes, and their certificate, obscure and informal as it is, sufficiently shews that they considered that the vicar, who was the incumbent, was entitled to only half the tithes; that Sir George Thomas Staunton was entitled to the other half as lay impropriator. Against this certificate there was no appeal, nor against the applotments such as they were. By 4th G. 4, c. 99, s. 31, the certificate is made conclusive—1st. As to the amount of the composition. 2ndly. That it was duly fixed according to the Act. 3rdly. That this amount shall be valid to all intents and purposes. 4thly. That it shall take effect from the 1st November next ensuing its date. 5thly. That the right to the tithe other than the composition shall be suspended. It does not appear by any evidence in the cause that before the commissioners signed the certificate, that the Rev. John Meara disputed the right of Sir G. T. Staunton to half the tithes, or that he claimed for himself more than half as incumbent. From the terms of the certificate I would infer that the commissioners intended to leave some question open as to the right of Sir G. T. Staunton as lay-impropriator, and in this way alone can I account for the departure from those

plain directions given by the Act, and for the substitution of a form substantially different from that which the Act made it their duty to follow. The certificate, however, informal as it is, obscure and ambiguous as it is, still by no tenable construction can be held to state that the Rev. John Meara, in any capacity, was entitled to more than half the composition; it states that the other half belonged to the rector. The words are, "of which sum of £118 3s. 1½d., one-half is due and payable to the rector [not naming who the rector was], as a composition for tithes claimable by him as rector of the said pariah, and one-half is payable to the Rev. John Meara as the vicar." The more I have studied these terms, the stronger has been my conviction that they were not the result of any careless or accidental inattention to the directions given by the Act, but that they were selected and used with deliberation, care, and ingenuity, and for a purpose not adverted to or expressed. The form given by Sched. B. of the Act left a blank to be filled by the name of the tithe owner. Whether he was rector, or vicar, or lay-impropriator, if they intended to designate Sir Geo. T. Staunton by the word "rector," they should have named him if they intended to express that half the composition was due and payable to him, they should have said it was so payable to him as lay-impropriator, for if it was not payable to him in that character, it was not, and could not, have been payable to him at all. They say that this half of the composition is payable to the rector as a composition for tithe claimable by him, not saying, but it appears to me studiously avoiding to say that it was *claimed* by him. They do not name the rector, and it appears to me that they studiously avoid naming him. They do not say that his name was unknown to them, and I think studiously avoid expressing this excuse for departing from the form prescribed by the Act, because they felt such a statement would not be true, and that if made it would probably excite Sir George Thomas Staunton to quarrel with the certificate. Had they stated that the tithe compounded for was claimed by the rector, this would import that they must know the name of the rector who had so claimed, and no excuse could, by any implication, be made for not inserting his name as the Act directed. If they meant that Mr. Meara was both the rector and vicar (and this is the construction for which the petitioner, his successor, now contends), they should have filled the blank in the form given by the Act, with the name of the Rev. John Meara, as they did in that part of it which related to the vicar's moiety. Had they so filled it they must have foreseen that Sir Geo. T. Staunton would perceive that such a certificate directly assailed his rights, and an appeal must be the consequence. Such being the certificate, the applotment was signed by the same commissioners; but in framing this important document the commissioners again depart from the clearly-expressed directions given to them by the 34th section of the Act, which, in the plainest terms, enacts, "that the amount of the composition shall be applotted on all land not tithe free in proportion to its true value; and that such applotment shall also state and set forth the proportion in which the rates or sums imposed on any land in respect of such

composition shall be payable by the occupier of such land, or by the owner occupying such land, from time to time, for the time being, to and amongst the persons entitled to such composition, or any part thereof, according to the certificate hereinbefore mentioned; and every such applotment shall be signed by the commissioners by whom same shall be made, and shall be entered in a book to be delivered by the commissioners to, and be carefully kept in the custody of, the resident ecclesiastical incumbent of such parish (where there is one as there is here), and such book shall be open for the inspection of every occupier of land in the said parish at all reasonable time." The 39th section enacts, that any person aggrieved by this applotment may appeal to the quarter sessions, and that the justices may amend it by altering the sums, diminishing those, which may be unjustly high, but adding whatsoever they so take off from one to the amount placed on others, so as to leave the total unaffected; and the applotment so amended is made conclusive, as the original applotment is, by the 38th section made conclusive evidence of the amount of the sums payable in respect of such composition, and of the proportion in which such sums shall be payable to the incumbents and other person or persons entitled to the whole or any part of such composition. And the amount of the composition and the several portions thereof payable according to such applotment shall be a charge on the lands. And it shall be lawful for the incumbent, and for every or any other person or persons entitled to such composition or any part thereof, to cause same to be levied as pointed out by the Act. If the commissioners intended that the total amount of the composition, in lieu of all tithes in this parish, was to be divided in equal moieties between two different persons, one described as rector, but not named, the other described as vicar and named, then it would be their manifest duty to divide equally every sum stated in the applotment, and in that applotment to express that these several sums thus divided were payable in these moieties in equal proportion, one half to the rector and one half to the vicar. Had they framed the applotment thus the vicar could have no pretence for demanding more than one half the sums applotted on any tithe-payer's land, for the applotment, so far from sustaining his demand of more, would be conclusive evidence against it. But the applotment, which the commissioners made and signed, does not divide the sums, and does not express that they are divisible or payable in any proportion but leaves them undivided, as if all were payable to one individual person; and if they were so payable, the legal inference would be, that the incumbent was that person. The original applotment made by the 38th section conclusive evidence of the amount payable by any tithe-payer would be in the sole custody of the incumbent. The certificate is not necessary evidence to sustain his claim, the applotment alone is sufficient and conclusive of the amount payable; and no division of this amount being made by it, and no other tithe-owner being named or alluded to in it, the vicar being incumbent would have a complete and conclusive case for recovery of the whole. In this case it is remarkable that the applotment does not name or describe in any way the persons or person to whom

the sums applotted are to be payable by the tithe-payers; and it would be no better evidence to sustain the vicar's claim of half the composition than it would be to sustain Sir George T. Staunton's claim of the other half. But if we are to take the terms in which the incumbent has always been collated to this union as evidence to prove that in him the two characters of rector and vicar of this parish of Kargin's are united, then there may be a foundation for a legal argument, that upon the true construction of the certificate and the applotment, taken together, and as they stand in this case, the incumbent, whether you call him rector or vicar, is the individual entitled to the undivided sums applotted on the land. In 1838 application was made to Mr. Grayden, the then owner of the lands of Ballyconlaught, for the sum of £8 8s., vicarial tithe due to the vicar, and also for a like sum of £8 8s. due the rector. Grayden yielded to the demand, and from that time until 1852, when the respondent became purchaser of the lands in the Incumbered Estates Court, and from thence to the filing of this petition, the lands of Ballyconlaught and Ballynacka have annually paid the rectorial tithe twice, viz., to the rector or lay impropriator, whose title is clearly established thereto, and likewise to the vicar. I cannot doubt that this charge had no legal or just foundation. I am equally clear, and it follows, that out of Grayden's property this groundless rent-charge had been taken by the incumbents from 1838 to 1852; that in 1852 Grayden's purchase-money was diminished by the value of the same rent-charge; and that from 1852 to 1860, inclusive, the purchaser, who is now the respondent, paid this rent-charge to which the incumbent had no right either legally or equitably. The respondent has thus lost about eight years of the rent-charge, the fee-simple value of which was taken from the price which the estate would have fetched if the rights of all parties had been enforced and protected; and the petitioner has received twenty years of this rent-charge of £8 8s. more than he was legally and equitably entitled to. The sole question now in the case is this, —have I power now to rectify the wrong that has for so many years been done to the owners of this land? Is this court, in this suit by the incumbent for the recovery of tithe rent-charge, bound by the applotment, framed as it has been, as conclusive evidence of the incumbent's right to the entire of the sums applotted on the lands of Grayden, one of the three tithe rent-charge payers in this parish? In my opinion the Court has power in this suit to refuse its aid in the continuation of the wrong; and I am of opinion the applotment is not in this case conclusive of the amount payable by the respondent to the petitioner. The 34th section of the Act 4 Geo. 4, c. 99, directs that the applotment shall also state and set forth the proportion in which the rates or sums imposed shall be payable according to the certificate. The applotment is the work of the commissioners. These commissioners are public officers directed to do certain things in order to effectuate an agreement between the incumbent on one side, and tithe-payers on the other. These officers omit or erroneously perform the acts thus directed to be done, while both the parties concerned in these acts have done all that the law re-

quires to be done by them. Shall the omission, neglect, or error of the public officer avoid or prevent the transaction as regards the parties? I am of opinion that it shall not; and in support of this opinion I may refer to the principle acted on in cases on the Ship Registry Acts and many other Acts relating to like cases, in which the rights of parties are to be effectuated by the intervention of public functionaries. In such cases, so far as the Acts prescribe things to be done by the parties themselves, they are construed as mandatory and imperative; but so far as they require things to be done by the public functionary they are held to be only directory, and the default or mistake of the officer will not destroy the rights of the parties. In my opinion it is not straining the principle of construction to apply it to the present case. The officers in this case were directed to apportion the sums in the applotment according to the certificate; they omitted to follow this direction; and why should this omission destroy the right of Sir George Thomas Staunton to half the tithes? or why should it add 50 per cent. to the amount payable by the landowners? It then appears that Grayden alone had yielded to the double demand, and that the course of conduct had been therefore more against the incumbent's construction than in favour of it. This case is so singular that I had no hope of finding any case resembling it, and no such case was cited to me; but since the hearing I have found a case in many respects like it, and to a considerable extent applicable it; is the case of *Clarke v. Younge*, and *Younge v. Younge* (5 Beav. 523). It was argued before Lord Langdale, M.R., on 26th May, 1842, and he took time for his judgment until 22nd July. The case arose on the English Tithe Commutation Act, 6 & 7 Wm. IV. c. 71. The Rev. Thomas Younge, under whom the plaintiff claimed half the tithes had been for forty years rector; for twenty-eight years of these next before his death he was entitled to the advowson in fee; and the plaintiffs also alleged that he was entitled in fee to half the tithes as lay impropriator. He died in 1837, having devised all his interest in the tithes of the parish to his brother for life, with remainder to the plaintiffs. The brother being insane, his right of presentation fell to the bishop, and Younge, the defendant, was collated in March, 1838, and inducted in April. Those who acted for the lunatic patron and for the defendant, the incumbent, took no notice of the testator's and the lunatic's right to half the tithes; and the defendant, the new incumbent, was allowed to receive the whole. In 1839 a composition was effected under the Commutation Act, the commissioners having appointed a person as substitute for the lunatic, according to the provisions in the Act. The lunatic having died, the plaintiffs, as patrons, now in possession, were applied to in March, 1840, for their consent to the composition agreement whereby a rent-charge of £905 was instituted for tithes, and to be paid to the defendant and his successors as rector and owner of the tithes of the parish. The right of the lunatic and of the plaintiff to any portion of the tithes was quite overlooked, and defendant was dealt with as entitled to the whole. On 26th March, 1840, plaintiffs certified their consent as patrons, and the agreement was duly confirmed by the commissioners. In Dec. 1840, the plaintiffs discovered their rights,

and filed their bill in March, 1841. Defendants scarcely denied that there was a portion of tithes distinct from the rectory, but alleged that if there was such a portion, and if the testator was entitled to it, there was no evidence what the portion was; and that as plaintiffs had not shewn what it consisted of, they were not entitled to receive anything. He further contended that the statute precluded any claim by adverse title. Lord Langdale, however, goes minutely into a consideration of the plaintiff's title. There was no evidence that the defendant had notice of the plaintiff's right before it was discovered by the plaintiffs themselves; and the claim was actually made, and the Court considered, under the circumstances, that the defendant was justified in requiring the claim to be established by a legal proceeding. And although Lord Langdale expressed a wish that some of his means of defence had not been resorted to, yet, considering that the error and mistake was the plaintiff's, that the necessity for the suit was entirely owing to their omission to look into their own title before they consented to the award, he was of opinion that they should pay the costs of the suit. The defendant, William Younge, the rector, having received the whole tithes from the time of his induction in 1838, and never accounted to William Younge, the impropriator, for his moiety, the bill in the second suit was filed for an account of what the defendant had so received in the lifetime of William Younge, the impropriator. The Master of the Rolls was of opinion that this bill should be dismissed with costs. I have not compared the English Commutation Act with the Irish in order to see whether this case is more or less applicable than at first view appears to be, for I had made up my mind to decide as I am about to do before I found this case. Considering the concession which Grayden made to the demand of the vicar, Meara, and his subsequent payments without objection to the petitioner, and the statement of the charge freely and voluntarily made of the liability of his estate in the rental under which it was sold, followed, as the sale was by the continued payments for eight years by the defendant, I cannot say that Dean Plunket was not justified in requiring the claim of exemption made by the notice of the 30th Dec. 1861, to be established by a legal proceeding; but I am of opinion that being himself the promvent in that proceeding he must bear his own costs of this suit.

Decretal order accordingly.

Court of Queen's Bench.

[Reported by William Woodlock, Esq., Barrister-at-law.]

M'NALLY v. OLDHAM.—Jan. 13, 22, 1863.

Libel—False representation—Justification—“The Black List”—Publication of records.

A party publishing a copy of a judgment does so at his peril; and if the judgment has been satisfied by payment before the publication, and he publishes it as an existing liability, he is liable in an action for libel, and if special damage has followed, in an action for a false representation.

DEMURRER. The first paragraph of the summons and

plaint complained that theretofore, to wit, at the time of the committing of the grievances thereafter complained of, and long before, the plaintiff was in business as a jeweller in the city of Dublin, and was in large trade and good credit in said city; that in the course of his said trade the plaintiff became indebted to one Edward Johnston in the sum of £157 4s.; that said Johnston recovered a judgment therefor in the Court of Exchequer, on the 17th day of May, 1860; and thereon the plaintiff paid the amount of said judgment and costs, amounting to the sum of £181 17s. 5d., on the 19th day of May, 1860. And plaintiff said that during all the time aforesaid, and at the time of the committing of the grievance, &c. the defendant was the proprietor and publisher of a periodical commonly called "The Black List," yet the said defendant falsely and maliciously printed and published of and concerning the plaintiff in the defendants' said publication, commonly called the "Black List," and on the 24th May, 1860, long after the said judgment had been satisfied as aforesaid, the words following, that is to say, "24th May, 1860; debtor's name, M'Nally, George; address, Colloge-green, Dublin; trade, jeweller (meaning the plaintiff); date, 17th May, 1860; court, Exchequer; amount, £157 4s.; costs, £7 4s. 11d.; creditor, Edmond Johnston" (meaning thereby that said judgment had been recovered against the plaintiff, and was then an existing liability against his estate and effects, and that said Edmond Johnston was then a creditor of plaintiff). And plaintiff said that by reason of such publication the plaintiff's trade and credit were ruined, and the plaintiff thereby became bankrupt, to the plaintiff's damage of £2,000. Second paragraph.—That being such trader as aforesaid, he, the said plaintiff, was in good credit in his said trade, and at the time of the committing of the grievances, &c. that divers persons, and in particular Joseph Myers and Co., of Birmingham, Roberts and Bridges, of Sheffield, Blanksee and Son, of Birmingham, Prince and Son, of Birmingham, John Nathan, of Dublin, and B. Boam, of London, were in the habit of delivering goods to him in his trade on credit; and that the plaintiff, on the 24th day of May, 1860, was considered by said persons as a person who might safely be trusted with goods on credit, and was in fact at said time so trusted by them. And the plaintiff was not on said 24th May, 1860, and at the time of the committing, &c. indebted to Edmond Johnston in the sum of £157 4s., or at all, yet the defendant on the 24th day of May, 1860, falsely and maliciously printed and published, and caused to be printed and published of and concerning the plaintiff a false and malicious libel in the words following, (setting out the words above given, with an innuendo that the said plaintiff was on said day a judgment debtor of the said Edmond Johnston in the sum of £157 4s., and £7 4s. 11d. costs); by reason whereof the said plaintiff had been and was greatly injured in his good name, credit, and reputation; and divers persons who had trusted the plaintiff in his said trade with goods on credit, and in particular the said persons so named as above, ceased so to do, and withdrew their credit from the plaintiff, to his damage in the sum of £2000. Third paragraph.—The plaintiff being such trader, and in such credit as

aforesaid, that at the time of the committing, &c. divers persons, and in particular the said persons in the last paragraph mentioned, were in the habit of trusting the plaintiff in his trade with goods on credit; and the plaintiff was, as the time of the committing, &c. so trusted by them. And the plaintiff was not at said time indebted to one Edmond Johnston in the sum of £157 4s., or at all, of which the defendant had notice; yet the defendant on the 24th day of May, 1860, and divers other days and times from thence up to the commencement of the suit, falsely published and represented in writing to the said persons so named as above, and to divers other persons, that the said Edmond Johnston was a creditor by judgment of the plaintiff, and that the said plaintiff was in fact indebted to the said Edmond Johnston in the sum of £157 4s., with £7 4s. 11d. costs, on said day, the 24th May, 1860, although defendant had notice as aforesaid that said debt was paid, by reason whereof the plaintiff was injured in his good name, credit, and reputation; and divers persons, and in particular the said persons so named as above, withdrew their credit from the plaintiff, and ceased to consider the plaintiff as a person who might safely be trusted with goods on credit, and refused any longer to deal on credit with the plaintiff, and the plaintiff thereby became ruined and bankrupt, to his damage of £2000. Fourth paragraph.—That at the time of the committing, &c. and long before, plaintiff was a trader in the city of Dublin, and in great business as such trader, and at the time of the publication thereafter complained of the plaintiff was not indebted in any sum to Edmond Johnston, of which the defendant then had notice; yet the defendant, on the 24th day of May, 1860, falsely, fraudulently, and maliciously made a false representation in writing to divers traders and others, and amongst others to B. Boam, John Nathan, and Joseph Myers & Co., of and concerning the plaintiff, in the words and figures following, that is to say (setting out the words above given and stating that the meaning was that the said Edmond Johnston was a creditor of the plaintiff). And plaintiff averred that by reason of the premises said persons, traders, and others, withdrew their credit from plaintiff, and he became bankrupt, to the plaintiff's damage £2000. Fifth paragraph.—That at the time of the committing, &c. and long before, plaintiff was a trader in the city of Dublin, and in great business as such trader, and at the time of the publication thereafter complained of, the plaintiff was not indebted in any sum to Edmond Johnston, yet the defendant, on the 24th day of May, 1860, falsely and maliciously printed and published in writing a false and malicious libel of and concerning the plaintiff, in the words following, that is to say (setting out the words above-given, with an innuendo that the said Edmond Johnston was a creditor of the plaintiff), whereby the plaintiff's credit was ruined, and he became bankrupt, to the plaintiff's damage of £2000. The defendant pleaded, fifthly, for a further defence to all said paragraphs that the publication and representation in writing by each of said paragraphs complained of was one and the same identical matter and thing, that is to say, the publication in said first paragraph in express terms set forth; and said that before the said printing and publishing

by defendant, the said Edmond Johnston, in said paragraph mentioned, duly obtained a judgment in the Court of Exchequer in Ireland against the said plaintiff for the sum of £157 4s. for debt, besides £7 4s. 11d. for costs of suit; and said judgment was duly enrolled and of record in said Court, and duly registered, and not annulled or satisfied on record at the time of said publication and representation in writing; and said publication and representation in writing was a matter so appearing of record and registered as aforesaid, and not further or otherwise, and was made *bona fide* and without malice. To this defence plaintiff demurred, saying that so far as it was pleaded to the first paragraph of the plaint it did not disclose any defence good in substance, because it admitted the sense imputed in and by the said first paragraph to the publication therein mentioned, but did not justify the publication in the sense in said first paragraph so imputed; and because the publication of the judgment in said fifth defence mentioned was not the publication of any public judicial proceeding in a court of justice; and because the publication of matter false in fact contained in a record of a court of justice by a person not a party to said record, whereby another, a party to the record, sustained damage, is not in itself lawful or privileged; and because, as it appeared by said first paragraph, that the judgment therein mentioned was paid prior to said publication, and the defendant published said judgment as being at the date of the said publication an existing liability against the plaintiff, any privilege for the publication of the record in said defence mentioned was taken away by the facts stated in said first paragraph. And that the said defence, so far as it was pleaded to the second paragraph, did not disclose any defence thereto good in substance, for the reasons already stated with reference to it as pleaded to the first paragraph. And that the said defence, so far as it was pleaded to the third paragraph, did not disclose any defence thereto good in substance, because said defence admitted that the defendant represented that the plaintiff was in fact indebted to Edmond Johnston on the 24th May, 1860, but did not justify the representation in the sense charged in said third paragraph; and because the publication in said fifth defence mentioned was not the publication of any public judicial proceeding in a court of justice; and because the publication by a person not a party to a record of matter false in fact contained in a record of a court of justice whereby another, a party to the record, sustains damage, was not in itself lawful or privileged; and because inasmuch as defendant had notice prior to said publication that the debt therein mentioned was paid, and yet published said record, having actual notice that the statements in said publication contained were false in fact, any privilege otherwise existing for such publication was thereby lost. And that said fifth defence, as pleaded to the fourth paragraph, did not disclose any defence thereto good in substance for the reasons assigned as grounds of demurrer to said defence as pleaded to the third paragraph. And that said defence, so far as same was pleaded to the fifth paragraph, did not disclose any defence thereto good in substance for the reasons assigned as grounds of demurrer to said defence, so far as same was pleaded to the first and second paragraphs.

S. Walker (with him *Heron, Q.C.*), for the plaintiff, in support of the demurrer.—The justification does not answer the entire charge. It admits the sense imputed to the publication, and does not justify in that sense. The charge is, that the defendant published in the "Black List" not merely that a judgment had been recovered on the 17th May, but that that judgment was, on the 24th May, the date of the publication, an existing liability against the plaintiff. It is no answer to that to say "a judgment was recovered on the 17th, which in fact I have a right to publish."—*White v. Tyrrell* (5 Ir. C. L. Rep. 498); *Edsall v. Russell* (4 M. & Gr. 1090); *O'Connor v. Wallen* (6 Ir. C. L. Rep. 378). Suppose, however, the plea answered the entire charge if any immunity exists for the publication of a judgment of record, it must be either because it is the publication of the judicial proceedings of a court of justice, or because a record is in its own nature, a thing so public that a party may safely publish it. But the publication of a judgment is not analogous to the report of a public trial. There is nothing to show in this case that the thing published is of the character which may be published; and the manner and object of publishing it are quite different from the manner and object of publishing the report of a trial—*Davison v. Duncan* (7 Ell. & Bl. 231); *Andrews v. Chapman* (3 C. & Kir. 289); *Hoare v. Silverlock* (9 C. B. 23); *Lewis v. Levy* (1 Ell. Bl. & Ell. 537). Then, a judgment of record is not a matter of so public a nature that a party may safely publish it. The publisher ought to show that he has some interest in the contents of it. The fact of being allowed to get a copy of a document is a very different thing from the right to make that document public—*The King v. Creevy* (1 M. & S. 273); *Popham v. Pickburn* (7 H. & Norm. 891); *Fleming v. Newton* (1 H. of L. 363), will be cited on the other side, but it is distinguishable. There was no allegation of malice, or of any injury having resulted from the publication in that case. Then also the publication was literally true. The statutes there giving publicity to the record of protests were different from and stronger than the st. 1 & 2 G. 4, c. 53, which relates to the records of courts of justice in this country. Lastly, on the facts as they appear in this defence, the publication here was an unfair one. It amounted not only to a statement that a judgment had been recovered, but to a statement that the judgment was in full force on the 24th May, which is translating the thing published to the injury of the plaintiff—*Lewis v. Clement* (3 B. & Ald. 702); *Lewis v. Walter* (4 B. & Ald. 605). Further, it appears from some of the counts that at the time of the publication the defendant had actual knowledge that the thing which he published was untrue, which makes the publication an unfair one.

W. Sidney and *Serjt. Armstrong* for the defendant.—The defendant had a right to make this publication as a publication of a record of a judgment. As a principle, every court of justice is open, and the publication of even an *ex parte* application for a criminal information has been held to be justified. It is true, that a regular plea of justification must justify the libel in the sense imputed to it in the innuendo. [HAYES, J.—Perhaps the defence here may be upheld as a plea of excuse.] Then, there is no case showing

that the right to publish the proceedings in a court of justice is confined to proceedings openly had; *Curry v. Walker* (1 B. & P., 525); *Lewis v. Levy* (1 Ell. Bl. & Ell., 637). *Fleming v. Newton* (1 H. of L., 363), is a strong authority in favour of the defendant. Then, publicity is required not merely for the purpose of showing that there is an existing debt, but also for the purpose of showing the status of the party, which may be very important. Under the various Bankrupt Acts, and under the statute 7 & 8 Vic., c. 90, there is express legislative authority for inspecting the various records of the courts upon payment of a fee. The inspection and exemplification of the records of the Queen's courts are the common right of the public (2nd Taylor on Evid., s. 1340). The fact of knowledge of the alteration of the position of the parties does not take away the privilege of publishing an existing record. The defence in this case is not to be looked upon as a plea of justification to the counts in libel, but as an explanation of the circumstances under which the publication took place. The words here are not defamatory, and no action will lie on them, although special damage is alleged; *Kelly v. Partington* (5 B. & Ad., 645). Nor is the publication said to have been of the plaintiff as a trader. The words here do not come within any definition of a libel, and the plaint itself is bad—*Parmiter v. Coupland* (6 M. and W., 106.) As to the counts for a false representation, the defence is good as to them, and, so far, the objection made on the ground of the defence not justifying in the sense imputed, does not apply. They also cited *Re Bagot* (8 Ir. L. R., 295); *Clarke v. Taylor* (3 Sc., 95); 1st Wms. Sess., 244 (b), note g.

Heron, Q.C., in reply, cited *Stiles v. Nokes* (7 East, 492).

Jan. 22.—LEFROY, C.J.—This case comes before the court on a demurrer to the fifth defence. In the course of the argument, the defendant took the course, which was properly open to him, of insisting on the objections which, as he considered, lay to the summons and plaint, and showed that it did not state a good cause of action. The case is one of considerable importance, and concerns the public, or at least a vast portion of the public, as well as the plaintiff. The nature of the case and of the defence can be best known, and it is important that they should be correctly known, from a statement of the summons and plaint, and of the defence that has been pleaded to it. In the case there are involved questions of importance, and the result of all is, that we are of opinion, first, that the plaintiff has shown a sufficient cause of action; and, secondly, that the defence pleaded does not state a sufficient ground of either justification or excuse. The action is brought by the plaintiff as a trader, not only alleging that he was a trader of credit, but specially stating particular persons with whom it was of importance that his credit should be maintained—persons who supplied him with goods, naming them, upon credit. After that general statement as to his credit generally, and as to the persons whom he named, who were induced, by this publication, to withdraw from him the credit they had theretofore given, it goes on to state that on the 24th May, the defendant published of and concerning him

a false and pernicious libel, stating the publication as of the 24th May, which will be found important; and, what is also material, stating it to have been made in a document known as the "Black List," a very significant term, and one fairly to be adverted to on the principle that, though this comes before the court now upon a consideration of the pleading, the law is perfectly settled that, with respect to the meaning of language, the court is to exercise the same judgment that individuals would do with respect to the meaning of terms where they are not affected by an innuendo so as to change the ordinary meaning. Well, having thus stated and given that denomination to the publication, he goes on to say: [His Lordship read the words complained of, the innuendo, and the rest of the first count.] This charge is repeated through four other counts, as we used to call them, or paragraphs, as is now the appellation to be given to them, with different circumstances of more or less aggravation. One of those circumstances is, that the plaintiff was, in consequence of this publication, driven to bankruptcy and to ruin. Another circumstance of aggravation is the allegation, that the defendant knew that this representation, that the plaintiff was, on the 24th May a judgment debtor of Johnston's, was false. I now come to the defence, which is now pleaded to this summons and plaint, making this preliminary observation, that the action is brought by this party, as a trader, for the injury done to him in his trade. Another observation important to make is, that he has, by the innuendo, alleged the meaning in which these terms were used and applied by the publication, and in which meaning, if the defendant has any justification or an excuse, he must justify or excuse the terms he has made use of. Upon that principle of law we are all agreed, and as to it we have, I must say, the candid and proper admission of the counsel for the defendant. It is said, that the innuendo cannot be used to make actionable words which otherwise would not be so. That I shall have to consider afterwards; but I proceed on the defence which has been pleaded. [His Lordship read the fifth defence.] Here, the defendant states as his defence, that, at the time of publication, namely, on the 24th May, there was a judgment standing against the plaintiff; that he published this judgment as it stood on the record; and that, as it stood on the record, it was not annulled or vacated: but he does not deny the allegation in the count, that the judgment had been previously paid off, and, therefore, was, in substance and reality, annulled; whereas it is here held out to the public that, at the date of this publication, namely, on the 24th May, this plaintiff was a judgment debtor upon a judgment duly enrolled, upon which, therefore, execution might have been at any moment issued against this trader. He thus passes by without traversing the allegation, that, previously to the 24th May, the judgment had been, in truth, annulled by payment, which operates as complete a vacancy of the judgment as if it had been vacated on the record. He, therefore, in justifying himself as he does, by arguing that he had a right to publish this as a part of the record, as part of the proceeding in a court of justice, omits a very important matter. He would have been justified if he had published the judgment

as it stood in reality, as a judgment annulled and satisfied; but if, instead of that, if, instead of availing himself of a legal right, which none of us mean to question, the right of publishing a judgment, a true copy of a judgment, so long as the party does not add a sting to it; if he adds the sting, that it is an unsatisfied judgment, this becomes an exercise of a legal right, with an addition which makes that injurious to the plaintiff in a way that it would not have been if he represented the truth of the transaction. Well, the other counts allege, and no answer is given to the allegation, that the party knew, and was apprised, that the judgment was paid off. To that he gives no answer. If the representation was false, made of a trader, the party made it at his peril, whether he knew of the falsity or not, and the peril has been realised in this case; for the allegation undenied is, that the persons whom the plaintiff was in the habit of getting credit from, withdrew that credit, the consequence of which was, that he was driven to bankruptcy and ruin. Then the question arose whether this summons and plaint discloses a cause of action. The defendant states at the outset that this is no libel, because looking to the definition of a libel given by Parke, B., in *Parminter v. Coupland* (6 M. & W., 105), the language here used was not defamatory. Why, to be sure, if the language is not defamatory, and no innuendo is added, the party cannot sustain an action. But this is not a declaration for an injury arising from defamation of the trader's character, but it is a declaration by a trader for a libel affecting his credit, and though that is attempted to be met by saying that the allegation complained of was made "*bona fide*, and without malice," the facts being admitted, the party cannot avail himself of these general words in order to screen himself from the consequence of the act which it is admitted he has done. But suppose the publication not to be a libel in the strict sense of the word, still, under the Common Law Procedure Act, a party is allowed to add to his declaration an action on the case for a false representation of him as a trader in respect of his trade, from which representation an injury has resulted, and I apprehend there can be no doubt that an action on the case will lie for a false representation made respecting a trader and his circumstances, when it produces an actual injury, if the injury is admitted. It is a *damnum cum injuriâ*, and, therefore, even admitting the objection that this is not strictly speaking a libel, that it is not stated with all the strictness that would become the statement of a libel, the publication is, at all events, a representation, stating of a man in his trade a circumstance which has, upon the admission on the face of the pleading, brought ruin and bankruptcy upon him. It cannot be doubted that that is a cause of action, though the case should fail on technical grounds as a charge of libel. It is argued on the authority of a case from Scotland which came before the House of Lords, that this publication is justified. The Scotch case came before the court upon an application for an injunction. The application was made in Scotland under a jurisdiction which belongs to the courts of that country, to enjoin a party from the publication of a matter which the court deems libellous. The judgment in Scotland was to prevent the publication of the matter which the party justified

himself in publishing, because it was published under the authority of an Act of Parliament, by which a record was made of persons in trade who suffered their bills to be protested, and there was authority given by the Act for the benefit of the liege people to publish the list of the merchants or other persons who thus suffered bills to be protested. There was a publication accordingly as against the plaintiff, as having let his bill be protested. The justification so pleaded was held insufficient. There was an appeal to the House of Lords, and the decision of the Scotch court was there overruled, on the ground that this was a publication justified by law, and allowed by statute, and accordingly that case was attempted to be pressed into service here, because it is by law allowed to a party to go to the record and get a copy of it, and it was said, I think truly and properly, that he had a right to publish the record of that judgment; and if he had published it as it stood on the record simply, it would have brought him within the protection of the Scotch case, because then he would have published it as it really existed; but, forgetting altogether that, he thought he might have published it as it appeared to exist on the record, and added to it that which did not appear on the record, and gave it a sting, which deprived the party who had paid off the judgment of the benefit of his payment, the effect of which was to annul the judgment, and not to leave it as it was published to be, an existing liability. The proceeding in Scotland of the protest being published, was the publication of a truth, for the party had suffered his bill to be protested, and I may observe, even to allow that publication an express Act of Parliament was required; and the party could only have the protection of that Act of Parliament by publishing according to the Act, that is, according to the truth of the transaction, that there was a protested bill at the date of the publication. But here it is published that on the day of publication there was a judgment unannulled, with an existing liability upon it, and though there might have been a right to publish the judgment as it stood, there was no right to add to it the sting which gave it all its pernicious consequence, namely, that it was a subsisting judgment, when in truth, so far from that, it was as much an annulled judgment as though it had been vacated and satisfied on record; for the Act of Parliament which allows a party to plead payment of a judgment as matter in *pais*, makes that payment as full a satisfaction as a satisfaction on the record. The defendant, therefore, published what was not the truth, in the exercise of a legal right, and added to it the sting which made it pernicious, and, therefore, illegal, and it is an admitted fact that by reason of that publication the party was driven to bankruptcy and ruin. I should be sorry that there could be a doubt that such conduct was the foundation of an action. I do not know how trade could be carried on, if traders were not protected against such a proceeding as this; and it imports the public, and becomes us, to look into the case anxiously, and if we find ground to condemn such a proceeding as this, to do so; and it was high time the public should cease to be infested by such a nuisance. Every trader in the community should be protected against a proceeding, which is, in fact, an invitation to all his creditors to issue a commission of

bankruptcy, in order to prevent his substance being swept away, as it would be if the judgment was such as it was represented, that is, an existing liability. The case is Scotland, therefore, was very different from the present one. The party there acted under an Act of Parliament, and what he did he did *bona fide*, and according to the truth of the transaction. The very contrary has been the case here. These are the grounds which occur to me in this case for coming to the decision that in this matter, whether we look at it as a libel, or as an action on the case for a false representation affecting a trader in his credit, and producing the consequence here alleged, there is a foundation for an action for damages in one light or other, and that, therefore, the justification attempted fails, for it passes by and omits the sting of the offence, whether we look on the action as one for libel, or as an action on the case. In every view of the case, therefore, we cannot hesitate in holding that there is here a cause of action. Our judgment therefore, must be for the plaintiff, allowing the demurrer.

O'BRIEN, J.—I also am of opinion that the demurrer should be allowed. The Lord Chief Justice has gone into the case so fully that it is not necessary for me to go over the facts again. Three of the counts in the summons and plaint are framed in libel, and two in the shape of an action on the case for a false representation. It was admitted by Mr. Sidney that so far as the counts were maintainable as counts in libel, and so far as the defence pleaded to them was pleaded as a justification of the libel, it cannot be sustained, as it does not justify it in the sense imputed in the summons and plaint. The three counts state that the meaning of the publication was, and the publication fully bears it out, that judgment was then an existing liability against the plaintiff, and that Johnston was then a creditor of his. This is not justified in the sense so imputed, and the defence, therefore, fails. But it was sought to be said that it was a plea of excuse, which is good; and it was also contended by Serjeant Armstrong, he having a right to fall back on the summons and plaint, that the counts are not maintainable as counts in libel. I was rather startled at being told that such a publication as we have here was not a libel. We were referred to the case of *Parmiter v. Coupland* (6 M. & W., 105), where Parke, B., says that "a publication without justification or lawful excuse, which is calculated to injure the reputation of another, by exposing him to hatred, contempt, or ridicule, is a libel;" and it was contended that it was thereby stated that such publications, and such only, were libellous. But that is not so; Parke, B., merely decides that the publication before the court was a libel, because it tended to impute dishonest conduct to the plaintiff; but he never laid it down that nothing save what imputed dishonest conduct was a libel. There is a very proper definition of a libel given in Addison on Wrongs, p. 578, where, enumerating the publications which are libellous, the writer says that publications "which are injurious to the private character or credit of another" are libellous. Now, here is a publication of a man engaged in trade, and it represents that he was indebted in a considerable sum by judgment, and when the statement of that is followed in the summons and plaint by the statement that the

plaintiff, in consequence of that, suffered special damage, the persons who dealt with him refusing to give him any further credit, am I to be told that the publication is not libellous? It is enough to state the general definition of the law of libel, and to state the present pleading, to shew that this publication is a libel, and is actionable. Then, am I to be told that we are to disregard the innuendo where the defendant sets up a plea of excuse where a positive meaning is put and admitted; am I to be told that we are to disregard that? It is enough to state the ground on which the privilege is contended for, namely, the right to publish proceedings in a Court of Justice. But it is necessary that this publication should be true, not only true in fact, but that it should not be given in such a way as to convey a meaning contrary to the truth. Because a man is justified upon grounds which I do not question, in publishing a record of all the judgment, is he justified in publishing it in such a manner as to convey that not merely judgment, but execution also, was obtained. Many a trader may resist a claim because he thinks it ill-founded, and the claim is paid the moment the action is decided. In this case judgment was obtained on the 18th May, and the amount was paid on the 19th. Are we to be told that the fact of the payment was to be withheld, when the judgment, which is so much affected by that payment, is published? It is an important circumstance that the publication was on the 24th May, 1860, a week after the judgment, and the charge is, that the publication was so framed as to convey a meaning that the debt was then due. Unless it could be contended that the privilege of publishing truth extended to privilege to publish untruth, I do not see how the privilege can be claimed here. I, therefore, think we do not in this case trench upon the decision of the House of Lords in *Fleming v. Newton*. It may be perfectly right that the publication in Scotland was justifiable, but that does not extend to a publication so made as to convey a false representation injurious to a party. But we are told also that two of the counts are unsustainable, because they are not counts for libel, but counts for a false representation. It comes round to the same thing. There is here an innuendo, or what in libel would be called an innuendo. Well, I do not conceive why, because it does not bear the technical name of innuendo, when the action is for a false representation, we are to throw it aside. What becomes then of the privilege? As I said before, the defence seeks to extend the privilege of publishing truly to what is untrue, or publishing in such a manner as to convey an imputation wholly false. Well, we are told now, supposing a proceeding carried on for several days, and a party publishes each morning a true account of what took place the day before, and it is said the character of a party may be greatly injured, and yet will it be contended that the publisher of the newspaper is liable? I say not, because at the time the publication was made, the publication was true, and the publisher gave truly all that took place. But I think, if, on the other hand, a man should daily tell all the proceedings that existed, and then give an unfair publication of them, the plea of privilege would be gone. Well, we were referred then to a proposition which, I think, could not be maintained, that ex-

cept words are defamatory in themselves, their publication is not actionable, although it is followed by special damage. Well, if "defamatory" includes the case which I have put above, I do not quarrel with the proposition; but if it is attempted to confine its meaning to the cases of charges of dishonesty, and matters of that description, I think there is no foundation for it, and the case in 5th Barnwell and Adolphus authorises no such proposition, because the words there were not defamatory at all, and there was no innuendo, and the court held that the words themselves being neither defamatory nor injurious, those words unaccompanied by an innuendo were not actionable, though the words were followed by special damage. On these grounds I concur with the judgment of my Lord Chief Justice. On looking to the counts of the summons and plaint, I think something might be said on the fifth count. Of course, it will be for the plaintiff to say, if he succeeds, how far he will take damages on that.

HAYES, J.—I am unwilling to go over the ground trodden by the Chief-Justice and my brother O'Brien. I feel I have little to say, except to express my concurrence with them. The declaration consists of two sets of counts. Two of them are for a false representation. That that part of the declaration shows a good cause of action there is no question. The other set of counts are in libel. Sergeant Armstrong says, that the publication complained of in them does not amount to a libel; but, looking at the whole law, I have arrived at the conclusion that these are good counts in libel, understanding by libel the publication of defamatory matter without any justification or excuse; and I take it, that this is a publication of such matter without justification or excuse; and the enunciation of those two words leads me to consider the defence which has been set up. First, then, is it a plea of justification? I think not; and the plain reading of it will convince any one of that. To the two counts for a false representation, the answer set up is by a plea of justification, that there was a judgment against the plaintiff on the 17th May, and that it remained on record. I cannot see how that justifies the publication complained of; and I do not see either, how it applies to the counts in libel. Well, is it a plea in excuse? In form it is that; and I take it, that the pleader intended this should not be a plea in justification, but in excuse. Now, a great deal of argument has been expended to show that every subject has a right to publish records of courts of justice. In the abstract, I agree to that; and even without the authority of the case in Scotland, I would agree to it. But, like every privilege a subject has, he avails himself of it at his peril, and he must be cautious, that when he is using it he does not misuse it, as he must bear in mind the axiom, *sic utere tuo ut alienum non ledas*, and when he is publishing records he must take care he does not do it without justification or excuse, to the detriment of another. I think that has been done in this case, for this party has not only published the proceeding, but has published it with a sting or tack added to it. It might not have been actionable to say that one party recovered a judgment against another; but as he goes on to say that the relation of debtor and creditor still exists,

and thus injures the character of the party who was defendant in that action, he must be responsible; and it is neither justification nor excuse to tell us that there is a record existing unvacated and unannulled, which no body means to deny. Upon principles, therefore, as old as the law, we may, I think, safely come to the conclusion that this plea cannot be sustained, and that the demurrer to it must be allowed.

Demurrer allowed.

Court of Common Pleas.

[Reported by J. Field Johnston, Esq., Barrister-at-Law.]

KELLY v. SLATOR.—Nov. 5, 1862.

Practice—Rule to proceed—178th Rule.

Where the delay in proceeding to trial was occasioned by an order staying proceedings, the Court, upon an application to make absolute a rule for liberty to proceed, under the 178th General Order, distinguished the case from that in which the delay was owing to the plaintiff himself.

Serjeant Armstrong, on behalf of the plaintiff, a widow, moved to make absolute a rule for liberty to proceed in this case, notwithstanding the lapse of four years. The Court had previously made an order, staying proceedings, and the nominal plaintiff, her husband, had since died.

H. Devitt, for the defendant resisted the motion, and cited *Kennedy v. Gregg* (4 Ir. C. L. Rep., 182, and 6 Ir. Jur., 263.)

MONAHAN, C.J.—We must grant the motion. The Court, in this instance, had made an order staying proceedings, and this is distinguishable from the case where the party has himself lain by. There has been no wilful default on the part of the plaintiff.

Application granted.

ATKINSON v. MILLS.—Nov. 6, 1862.

Practice—Consent—Amendment—Judge's Report—A affidavit.

The Court will not listen to an affidavit stating that an amendment of the pleadings made at the trial was not made by consent, when the judge's report states that it was so made.

G. Battersby, Q.C., showed cause against a conditional order for a new trial, obtained by the plaintiff on the grounds of surprise. The action was brought for the diversion of a water-course; and, at the trial, before Lefroy, C.J., at the previous spring assizes at Naas, the defendant's plea to one of the counts of the summons and plaint, which was a plea of prescription for twenty years to have a pipe running in a certain direction was amended, and made to run thus, "That the defendant used a sufficient quantity of the water for domestic and agricultural purposes for forty years." The judge's report stated that this amendment was made by consent.

C. H. Henonhill, Q.C., for the plaintiff, offered to

read an affidavit stating that the amendment was not made by consent. [*Monahan, C.J.*—We cannot hear your affidavit, if the judge's report states that the amendment was made by consent.]

BLOOMFIELD v. JOHNSTON.—Nov. 5, 1862.

Practice—*New Trial Motion*—*Extension of Time*—*88th Gen. Order, 1854.*

Time for applying for new trial extended.

James Hamilton (at the instance of his senior counsel, *Mr. Brewster, Q.C.*), for the defendant, applied that the time for moving for a new trial might be extended for a few days, on the ground that the counsel's certificate was extremely lengthy, occupying one hundred pages.

Application granted (Monahan, C.J., dissentiente.)

MONTGOMERY v. MIDDLETON AND POLLEXFEN.—
Nov. 6, 1862.

Practice—*Common Law Procedure Act, 1856, sec. 43*—*Appeal upon Motion for New Trial*—*Notice within four days.*

Liberty given to appeal, notwithstanding the lapse of four days from the decision complained of.

D. Heron, Q.C., moved in this case (the arguments in which will be found reported in 7 Ir. Jur. N.S., 370) that the plaintiff might be at liberty to appeal from the order for a new trial, notwithstanding that four days had elapsed since the decision complained of, and cited *Ward v. Lumley* (5 H. & N., 659).

T. Purcell, contra, cited *Watson v. Lane* (25 L. J., N.S., 240).

Application granted, without costs of the motion.

BAILEY v. MARQUIS OF CONYNGHAM.—Nov. 12, 1862

Pleading—*Setting aside Defences.*

A defence to an action of trespass for breaking and entering the plaintiff's fishery, and expelling him therefrom, that the plaintiff had not the fishery alleged at the time, will be set aside as embarrassing.

Byrne, for the plaintiff, moved, that the defence to the sixth count of the summons and plaint might be set aside as embarrassing. The action was one of trespass, and the sixth count complained that the defendant broke and entered the plaintiff's fishery, and expelled the plaintiff therefrom. To this the defendant pleaded that "the plaintiff had not the fishery alleged at the time." This is unintelligible, and violates the 71st sec. of the Common Law Procedure Act, 1853: *Dronney v. Dronney* (9 Ir. C. L. Rep., app. xxxvii.); *Williams v. Williams* (10 Ir. C. L. Rep., app. xxxvi.)

James Hamilton, contra.—The plea is meant to

deny the plaintiff's possession. [*Monahan, C.J.*—Why depart from the usual form? The usual form is, that the fishery in question was not the fishery of the plaintiff.] No form is necessary now: Common Law Procedure Act, 1853, sec. 81.

PER CURIAM.—Let the plea be amended, and the costs of the motion be costs in the cause.

Rule accordingly.

Consolidated Chamber.

[Reported by Edmund T. Bewley, Esq., Barrister-at-Law.]

[CORAM FITZGERALD, J.]

CULLINAN v. WALKER.—Feb. 24.

45th General Order—*Pleading several defences without a rule.*

Where counsel for the defendant has obtained leave to plead several defences, but has omitted to give in his certificate, and no rule consequently appears on the records of the Court, the plaintiff, when the time for pleading has expired, is entitled to mark judgment under the 45th General Order.

When called on to mark judgment under this order, the Master should exercise a judicial authority in determining whether the case comes within the order or not, and if he experience any difficulty, should submit the matter to the Court for its consideration. Where judgment has been marked for pleading several defences without a rule, and a rule warranting them would have existed but for the inadvertence of counsel in not giving in a certificate, the Court will set aside the judgment on terms.

This was a motion to set aside with costs a judgment that had been marked under the following circumstances:—The action was brought for libel, and on the 10th of February counsel for the defendant obtained leave from Christian, J., to plead to each of the three paragraphs contained in the writ of summons and plaint, the following defences, viz.—1. A traverse of the publication of the libel. 2. A denial of the defamatory sense imputed. 3. A plea of privilege. 4. A plea of justification. On the 13th of February counsel for the defendant applied to Christian J., for a supplemental order for liberty to plead two separate pleas of privilege to one of the paragraphs of the writ of summons and plaint. Leave was then given to plead the required pleas "according to the amended certificate of counsel;" but, by some inadvertence, this certificate was not lodged in the office until the 20th of February. On the 17th Feb., defences framed in conformity with this second rule were filed, and on the 18th, the time for pleading having expired, counsel for the plaintiff, observing that two pleas of privilege were pleaded to one paragraph of the writ of summons and plaint, and finding that the only rule on the books of the Court was that of the 10th of February, which did not authorise such defences, caused judgment to be marked by the Master, in accordance with the 45th General order. A writ of inquiry was issued on the 20th inst.

Heron, Q.C., (with him *M. O'Loghlen*) moved on

behalf of the defendant to set aside the judgment with costs as irregular.—The proper course for the plaintiff was to apply to the Court. *Doran v. The Dublin and Wicklow Railway Company* (2 Ir. Jur., N.S., 187.) When counsel had obtained leave to plead on an affidavit, it was no longer within the discretion of the Master to mark judgment. As a matter of fact the Master was unwilling to mark judgment, and only did so from the pressure of the plaintiff's counsel.

Barry, Q.C., (with him *H. P. Jellett* and *P. Keogh*) *contra*.—The only rule to plead on the records of the Court, was that of the 10th of February. That of the 13th inst. was wholly unknown to the plain.iff, and did not in fact become a rule until the amended certificate was given in on the 20th inst. Upon the corresponding General Order in England there have been numerous decisions.—*Glen v. Lewis* (22 Law Jour., N.S., Exch. 24); *Hills v. Haymen* (2 Exch., 323). On replying without leave, *Murphy v. Nugent* (6 Ir. Jur., 257) is an authority in point.

H. P. Jellett, on the same side, cited *Wills v. Robinson* (5 Exch., 302); *Gabardi v. Harmer* (6 D. & L., 481); and contended that the defences were double and embarrassing, and not warranted by the rule of the 10th inst.

M. O'Loghlen in reply.—By the rule of the 13th inst., it was not sought to plead any new defence, but merely the plea of privilege in another form. The third defence is simply a part of the fourth, and could it be contended that judgment might be marked if the clerk had accidentally copied the same defence twice?

Fitzgerald, J.—I must deal with the case as if the only rule to plead was that of the 10th inst. The third and fourth defences, though both pleas of privilege, are quite distinct and dissimilar, and therefore are not warranted by the rule of the 10th inst. It was the duty then of the officer, when his attention was directed to this by the plaintiff's counsel, to exercise his judicial authority, and either mark judgment, or, if he experienced any difficulty, send the case to the Court for its consideration. As to the question of regularity, the judgment marked by the plaintiff was perfectly warranted, being the penalty which the Court imposes on parties when defences are filed, for which no order has been obtained. As to what is now to be done, finding that these defences, however informal, are not unwarranted by the order of the 13th inst., I shall make the following rule—that the judgment be set aside, the defendant paying the costs of the judgment, and the costs of this motion, and undertaking to take notice of trial for the next assizes. I shall give no costs of the writ of inquiry, and the rule shall be without prejudice to the plaintiff's taking any such other proceedings to set aside the defences as he may be advised.

[CORAM FITZGERALD, J.]

FINN v. THE ALBERT ASSURANCE COMPANY.—Feb. 27.

Setting aside order to plead double.

Where a judge's order for liberty to plead several defences has been obtained, and the affidavit verifying the pleas suppresses important facts, or is inconsis-

tent with another affidavit previously made by the same party, on application to the same judge, the order for liberty to plead several defences will be set aside, if the facts of the case are such as, if known to the judge, would have led him to refuse making the original order.

In an action brought against a company on the supposition that they form a corporate body, when they have sued and obtained judgment in previous actions as if incorporated, ssemble, liberty will not be given them to plead that they should be sued as individuals.

Seeds, on behalf of the plaintiff, moved to set aside the order for liberty to plead several defences granted to the defendants on a previous day, on the grounds, amongst others, that the affidavit of the defendants' solicitor verifying the pleas had suppressed the true facts of the case, and was inconsistent with another affidavit sworn by the same solicitor for the same parties in another suit. It appeared that leave had been given to the defendants by Fitzgerald, J. to plead, amongst others, a defence to the effect that "the Albert Assurance Company were not, and had never been, incorporated, and had never been entitled to sue as a corporate body, or to be sued as such, and had not at any time held themselves out as parties entitled to be sued otherwise than as individuals." On two former occasions, however, it was now shown, the Albert Assurance Company had recovered judgment in actions in which they had sued as if a corporate body; and affidavits had been made in these suits by the solicitor engaged in conducting the present one. It appeared further that in the present case a conditional order had been made to substitute service on the public officer of the company, on the supposition that they were incorporated, and that the defendants had allowed the conditional order to be made absolute without raising any objection.

Seeds in support of the application.

Heron, Q.C. (with him *Harty*), *contra*.

Fitzgerald, J.—If any other judge had made the order I should not have dealt with it, but should have left the plaintiff to take it, if advised, to the Court on appeal. However, having made the order myself, I feel bound to rescind it, as I certainly would not have allowed the defence in question to be pleaded, if I had been fully acquainted with the facts of the case at the time. No blame, however, is attributable to the defendants' solicitor, who in the former actions, from the absence of instructions to the contrary, imagined the company to be incorporated. I shall now make an order that the first defence be struck out, the second and third, which did not require any rule to plead, being allowed to stand.

[CORAM KEOGH, J.]

JACKSON v. BARTON.—March 24.

Security for Costs—Summary Bills of Exchange (Ireland) Act—Common Law Procedure Act, 1853, sec. 52—Affidavit of merits.

In an action under the Summary Bills of Exchange (Ireland) Act, the defendant may apply to the

Court to compel the plaintiff to give security for costs, without having previously obtained leave from a judge to appear and defend.

In the Court of Queen's Bench such a motion may be grounded on the ordinary affidavit of merits required by the 52nd section of the Common Law Procedure Act, 1853.

Martin v. Wilson (7 Ir. Jur., N.S., 335) not followed.

THIS was an action under "The Summary Procedure on Bills of Exchange (Ireland) Act." The writ of summons and plaint had been served, but the defendant had not as yet applied to a judge for liberty to appear and defend.

J. B. Dillon now applied, on behalf of the defendant, to compel the plaintiff, who resided out of the jurisdiction of the Court, to give security for costs. The motion was grounded on the usual affidavit of merits required by the Court of Queen's Bench, under the 52nd section of the Common Law Procedure Act, 1853.

Purcell, contra.—This application is irregular in two respects. The motion cannot be made until the defendant has obtained leave to take defence; and the affidavit in support of it should fully indicate the nature of the defence. The object of the Summary Bills of Exchange Act was, to protect the holders of dishonored bills of exchange from unjust delay and unnecessary expense in recovering the amount of their claims; and it would be inconsistent with the spirit and policy of the Act, if a defendant, who may never be allowed to file any defence, should be able to throw difficulties in the way of the plaintiff, by requiring him to give security for costs. The case of *Martin v. Wilson* (7 Ir. Jur., N.S., 335), decided in this Court, is an authority in point.

KEOGH, J.—The provisions of the Common Law Procedure Act have not been repealed by the Summary Bills of Exchange Act. That Act gives extraordinary relief and extraordinary remedies, but it does not deprive the defendant of his right to obtain security for costs. The 52nd sec. of the Common Law Procedure Act, 1853, enacts that "any defendant served with any writ of summons and plaint in any action, shall thereupon be deemed to be in Court for the purpose of making application to the Court or a judge to compel the plaintiff to give security for costs." This is an "action;" here is a "writ of summons and plaint;" the affidavit required by the Court has been made, and I do not see why the defendant is not entitled to obtain security for costs from the plaintiff. The case of *Martin v. Wilson* appears to me to have been decided rather upon individual experience of what was the intention of the framers of the Act, than upon the construction of the Act itself. I must deal with the language of the Acts of Parliament; and, therefore, I must grant this application.

[CORAM KEOGH, J.]

GUINNESS v. HILL.—March 27.

Attachment of Rents—Garnishee—Common Law Procedure Act, 1856, sec. 63.

Under the 63rd sec. of the Common Law Procedure

Act, 1856, several distinct debts due to the judgment debtor may be attached by a single order.

Where rents are attached under this section, semble, the tenants will not be required to show cause until that time at which their rents would otherwise have probably been collected.

Owen, on behalf of the plaintiff, applied, under the 63rd sec. of the Common Law Procedure Act, 1856, for an order to attach the rents of certain tenants of the defendant. The affidavit in support of the motion stated the fact of the recovery of the judgment, the amount of the judgment debt, and the other particulars required by the Act; and stated further that the rents, which it was now sought to attach, had become payable to the defendant on the 25th inst.

KEOGH, J.—Although rents when due are, of course, attachable, I have very great doubts that the garnishee clauses of the Common Law Procedure Act were designed for sweeping up in this way the whole of a rent-roll. This is the most immediate and oppressive form and process of receivership. Does the Act contemplate attaching two or more separate debts by one order?

Owen—If several orders are made the result will be the same, but the expenses will be considerably increased.

KEOGH, J.—I have no wish to multiply expense, but I am convinced the Legislature had not in view applications of this nature. I have refused a similar motion before; but I understand that a learned brother has since decided otherwise. It seems to me that the result will be often to compel tenants to pay their rents in a day or two after they become due. It would be harsh, indeed, to require tenants, as in the present instance, to pay on the 27th, rents which had only accrued due on the 25th.

Owen—This application is only for an attachment of the debts. The plaintiff is willing to give the tenants any reasonable and customary time for payment.

KEOGH, J.—In Dublin it is usual, I believe, to collect rents about three months after they fall due. I shall make an order, then, to attach the rents, ordering at same time the tenants, within three months from the date of the service of this order, to appear, to show cause why the rents should not be paid to the plaintiff.

THE GALWAY COMMISSIONERS v. DOYLE AND OTHERS.

Ejectment—Indorsement of service of writ—Common Law Procedure Act, 1853, sec. 31—Striking out names of defendants after verdict.

Where the indorsement of service of the writ of summons and plaint was irregular in respect to some of the defendants, the Court, after verdict, refused to allow the indorsement to be amended, but permitted the plaintiff to strike out the names of these defendants.

THIS was an application for liberty to amend the indorsement of service on the writ of summons and plaint. The action was an ejectment, and was tried at the last Galway Assizes, when a verdict was given

for the plaintiff. Some of the defendants had not taken defence. The indorsement of the process-server was, as regarded some of the defendants, irregular, omitting, in the case of one, the place of service, and, in another instance, the day of the week.

Beytagh applied to make the indorsement *nunc pro tunc*.

KROGH, J.—The language of the 31st sec. of the Common Law Procedure Act, 1853, is imperative as to the time within which this indorsement must be made. I understand, too, that the Court of Queen's Bench has issued an order to the effect that, in no case will leave be given to amend the indorsement of service.

Beytagh then requested permission to strike out the names of those defendants in reference to whom the indorsement of service was irregular.

KROGH, J.—I will allow their names to be struck out.

Court of Bankruptcy & Insolvency.

[Reported by John Levey, Esq., Barrister-at-law.]

[BEFORE LYNCH, J.]

IN RE WILLIAM SHAW.

Prima facie reputed ownership of goods—Furnished hotel let on lease—Presumed knowledge of creditors of the true position of a trader with regard to property in his apparent ownership.

Where a trader is for some years the lessee of a furnished hotel, the furniture of which belongs to the lessor, and where he carries on his business, and at the end of that period he fails in his circumstances, and enters into a composition with his creditors of seven and sixpence in the pound, which he pays, but after that he still continues to deal with the same creditors, and with a new class of creditors, who know how he is circumstanced, and is then made bankrupt, the assignees claim the furniture of the hotel as being in the reputed ownership of the bankrupt at the time of his bankruptcy; but it appearing that he had the same furniture in his possession at the time he entered into the composition with his creditors, and that it was of sufficient value to pay double what he owed at the time, it might safely be presumed that he obtained no fresh credit on account of the possession of the property, and that the reputed ownership clause did not apply,

THE bankrupt was the lessee and proprietor of an extensive hotel at Malahide, near Dublin, which had been originally erected by a sort of joint stock building company, who also furnished it. It appeared not to have succeeded, and the whole concern was sold to a merchant named Fagan, who employed the bankrupt to conduct it for him. Fagan subsequently sold it to Lord Talbot of Malahide, on whose estate it was built, and Lord Talbot let it furnished to Shaw, who had been its previous manager, and on his becoming bankrupt, the assignees claimed the furniture as property in his apparent ownership with the consent of the true owner. The facts are fully stated in the judgment of Judge Lynch.

Kernan, Q.C., was for Lord Talbot.

Heron, Q.C., and *Sidney, Q.C.*, were for the assignees. They cited *Mullet v. Green* (8 Car. & P. 382); *Ex parte Taylor, Re Campbell* (Ment. 240); *Mullen v. Moss* (1 M. & Sel. 335); *Loughlin v. Briggs* (1 Bos. & Pul. 82); *Watson v. Peache* (1 Scott, 149); *Re Robert Pilman Harris* (1 L. T., N.S., 467); *Ex parte Sheppard, Re Clapham* (4 L. T., N.S., 808); *Newport v. Hollins* (3 Car. & P. 223); *Ex parte Wiggins* (2 Dea. 269.)

JUDGE LYNCH.—In this case the assignees, by their charge, claim to be entitled to the furniture and moveables in the Malahide Hotel, on the ground that they were in the reputed ownership of Shaw at the time he became bankrupt. Lord Talbot de Malahide, by his discharge, insists on his title as the true owner of this property, and controverts the reputation of ownership in Shaw as alleged in the charge. The case is of considerable importance to the parties, by reason of the value of the property in question, and it is also of some public importance, by reason of the principle in controversy, for the provisions of the statute as to reputed ownership is one of the most salutary provisions of the bankrupt code, protective as it is of trade, and repressive as it is of the mischief of false appearance of property inducing credit, while, at the same time, it is so capable of being stretched beyond the scope intended, that while it demands a liberal application to meet the mischief intended to be guarded against, it, at the same time, demands a prudent and sensible application, not going beyond the objects intended. Therefore it is that I have felt it my duty to consider this case with care and diligence, and somewhat fully to state the grounds of my decision. The facts of the case are shortly these:—The Malahide Hotel was originally built by a company consisting of some of the leading merchants of Dublin, as a speculation. It was built and furnished by them, and was for some time apparently carried on by them; but the speculation seems not to have been successful, and accordingly they, in 1848, sold the hotel, and its furniture and chattels, to Mr. Fagan. In his hands, also, the speculation was unsuccessful, and he, in 1852, sold the hotel, and its furniture and chattels, to Mr. Cusack, the agent of Lord Talbot de Malahide, who admittedly was, in that purchase, the trustee for Lord Talbot; therefore, it is not questioned, and it is beyond question, that since 1852, and up to the time of the bankruptcy of Shaw, Lord Talbot was the true owner of this furniture. The devolution of title, showing specifically how it came to Lord Talbot, is only important as clearly showing that Shaw never had actual title to this property as true owner thereof, and as far as it can be used to do so, as showing that the transfer of title to this property was by open and express dealing with it, with any publicity naturally belonging to dealings with property of this nature. Mr. Shaw's connection with this property arose thus: He was originally the manager of this hotel. The evidence here is not very clearly given on this point, and there is some want of care in its preparation; but I deduce from it the facts, that Shaw was first merely the manager of the hotel; that, being in such position, he afterwards became tenant to Mr. Fagan of the hotel and the furniture, and that Lord Talbot con-

tinned him as such tenant, after he (Lord Talbot) had purchased the house and furniture in 1852. The tenancy of Shaw was under some proposal not produced here. On this point again the evidence is loose, and wants artistic arrangement; but I have only submitted to me evidence to shew him to have been tenant from year to year of the hotel, as a furnished hotel. It may not be altogether unimportant to remark, that from the outset this hotel was not a prosperous one, that it seems never to have become such, and that Shaw's succession to the proprietorship was while the business was not prosperous. But Shaw did become the proprietor by becoming the lessee of the hotel. By public advertisement he announced himself as such proprietor. In his own name he carried on the business of the hotel, and in all his dealings, and all his transactions with guests and with traders, he appeared to be, and actually was, the owner of the business of the hotel. He was lessee of the hotel and its furniture; he was owner of the business, carrying it on by his own credit, and in his name, and when he announced himself by advertisement as proprietor of the hotel, I cannot say that he did not thereby give a true description of his character in respect of the hotel. No doubt, proprietor might mean out and out owner of the hotel, and everything contained in it, and might be so understood; but, at the same time it seems to me the natural phrase to use in the advertisement by one holding the interest Shaw did in this hotel. It is proper for me here to add that though true in fact in a limited sense, yet if the statement was capable of being understood in a larger sense, and if the large sense were the one naturally to be inferred from it when expressed by a trader to the world, here, in my judgment, its capacity to express the minor right would not prevent its bringing a reputation of the larger title. But all at present I say is, that this advertisement does not seem at all to make any case of deception or impropriety even against Mr. Shaw. So far, then, as I have gone, I have Lord Talbot the true owner of this furniture, and I have Shaw in possession of it under his tenancy; he, therefore was visible in such possession—his possession was open and notorious. Does this, of itself, conclusively show that he was by reputation the owner, and was such by the consent of the true owner? It is scarcely argued that such a conclusion follows as a legal conclusion. It is a question of fact, not of law, and, therefore, essentially it arises in each individual case, to be determined on the particular facts of that case, and, therefore, as has been done here, the parties always show the surrounding circumstances as guides to the mind on this point. To hold nakedly that possession inferred reputed ownership, would be too large a measure of confiscation, even to attain the wise end of guarding against false credit, while making each and every case a question of fact, undoubtedly leaves a vast deal to discretion, with all the risks of its uncertain application; but, in my opinion, such has been done, and the law commits it to the good sense of juries, or of the judge, when put in the same position, to look to each case, and all its circumstances, and then to apply this provision, with an anxiety to advance this wholesome enactment, but yet with a fair regard to the rights of others, when sought to be af-

fectured by this provision. Now, I must here add, so as not to be misunderstood, that some cases may arise where naked possession must necessarily bring such a reputation of ownership, that though still a question of fact, it must be an irresistible inference to every candid mind. A retail trader's possession of the articles of traffic in his shop is of this class, and would be so, irrespective of any distinction between the cases as to whether he once had a title to the articles or not; for, recognizing, as I do, the distinct rules to be applied to the cases where the trader once had the true ownership, and where he never had, I think it has not much force, if any, in the case I put, in cases such as the one I describe. The reputation of ownership arises out of possession, without regard to true ownership, from the very nature of the thing possessed; but where possession may naturally bring an influence of limited, as well as general ownership—where the inference as naturally is of a minor title, as of a full title to the thing possessed, then the rule is applicable forcibly and plainly, and on the principles of common sense. In the case I state of articles of merchandise in a ship, the possession in such a case is a profession, and leads necessarily to the inference of full power of disposition; for the only use of the possession is the ability to have full control as to its disposition, and, therefore, the resulting reputation from mere possession is almost a necessary consequence. Another class of cases I now state—namely, the furniture in the residence occupied by the bankrupt. Now, the possession of this furniture does not bring with it at all the same inference of ownership; its primary use is to make the house habitable; the power of disposition of it does not necessarily belong to its use, and it must become a question of circumstances in each particular case, whether the possession naturally brings the reputation of ownership. The possession of a summer lodge at Brighton does not naturally bring a reputation that the occupant is owner of the furniture therein; so, in this country, the summer resident of a house at Kingstown, Killiney, or Bray, is not naturally considered the owner of the furniture therein. So, I would say, if a merchant now becomes the tenant of a furnished mansion to be let in Merrion-square, that *per se*, by his tenancy thereof, he cannot necessarily or naturally be held as the reputed owner of all the furniture therein. In each case in this class, it becomes a question of fact, from the surrounding circumstances, whether the reputation of ownership was the natural result from the apparent possession having regard to the ordinary dealings of the public. The case before me is intermediate. The furniture here, being the furniture of the hotel, is part of the stock in trade of the possessor, and not merely in use to give completeness, but, at the same time, its essential use is, to keep it and preserve it, and not to have power of disposition over it. Limited control over it, or a tenancy in it, is quite compatible with the possession, which is apparent to the public. In my opinion, this case ranges in a class intermediate between the class of cases where possession in common brings with it the reputation of ownership—for why should a trader have exposed for sale in his shop an article of which he had not the full property to convey?—and the class, as strong almost the other way, in which

any one would ask, why should you suppose that a temporary occupant of a large mansion was the owner of all the furniture therein? I say it is intermediate; no violence is done to ordinary undertakings by learning that a furnished hotel has been let; while, at the same time, I admit that the case does not range in the class, that, by merely showing the true ownership in another; the onus of proof is altered, and cast upon the assignees; it was a possession of a trader for the exercise of his trade; and this, in my mind, is a *prima facie* case to be displaced, not merely by showing the true ownership, but by showing general circumstances wherefrom reasonable minds considering the matter ought not to have been misled into the belief that Shaw was the owner of the property. I now, therefore, come to consider this case on the evidence before me—both the evidence of facts and the more general evidence of reputation, such as it is. The first matter of fact I must observe on is, the great size and extent of this hotel, and the publicity of its commencement. It was not an ordinary business establishment, erected to meet the existing necessity of the times; it was of unusual extent, and intended to create a new trade in a selected locality, not then requiring it; it could, therefore, only be created by extensive capitalists able to adventure in such a speculation. This character remained with it to the last; it never passed into a prosperous concern, and notoriously changed hands into large capitalists, having a great stake in the locality, till, with full publicity, it passed into the hand of Lord Talbot, the lord of the soil. In the actual conducting of the hotel business, Shaw was first the manager, acting for the owner; in time he became the owner of the business, interested in its profits, and he acquired a limited tenancy in the hotel and its furniture, to conduct therein this business; and yet, during all this time, it is material to remark, that the business was not prosperous. Again, evidence is laid before me of what was called a usage, as to the letting of large hotels, as a trade usage; the evidence seems to me of no avail; nor, indeed, did I get any definition or statement of what trade usage I was called upon to recognise. This evidence I receive simply as showing, that in public and notorious instances large hotels, requiring great capital for their institution, and established manifestly not to meet the existing exigencies of the trade, but to create a new traffic, or otherwise benefit interests outside the trade, are let on tendering to parties; that is, that hotels furnished and completed for the carrying on of the hotel business, are so let; and I see nothing unnatural or out of ordinary dealing in this mode of creating tenancy in such concerns. Next come, as adduced on both sides, the evidence of reputation of ownership. On both sides, this evidence is not given in a manner satisfactory to my mind. A naked statement by a witness, that he supposed the party was owner, without showing on what he founded the supposition; or, that there was a reputation, without showing his means of knowledge thereof, is not satisfactory. Mr. Thwaites founds his belief on the advertisement; and, really, his evidence advances the case very little, beyond the fact of the advertisement itself, which is in evidence. The evidence of Messrs. Hamilton and Gordon, again, is very vague—perhaps, a little fanci-

ful; the very small dealing with them being considered—not a trade dealing, but a few shillings' worth of a prescription for Mrs. Shaw—and the extreme views of property arising from promises stated by them, is hardly evidence of great weight wherefrom to judge of trade reputation applied to such a case as this. But the evidence of Mr. Copeland, of course, brings with it the weight of his character and his great experience. I think I would be unfit to sit here in judgment on the dealing of the mercantile public, if I could be misled, by any power of counsel, to hesitate for an instant in giving full credence to Mr. Copeland's testimony to the full extent it goes: the only matter open to me to consider is, what his testimony was, and fairly to consider the grounds of any opinion stated by him. Now, in the first instance, Mr. Copeland had never occasion to consider Shaw's status with any view to give him credit—the only occasion on which it can arise with him is to consider his solvency; he rejected him as a customer not to be trusted; therefore, it is quite certain that he never gave him credit on the faith of his reputed ownership of this property. Then, to what extent on this point does his evidence go? Simply, as he himself admits, with that candour belonging to his character, that this reputation of ownership was never thought of by him—to it his mind was never directed; and, in truth, I do not regard Mr. Copeland as a witness at all on this point; the rejection of the small bill for £25 presented by Shaw, then in occupation of this hotel, known to Mr. Copeland, is, in my mind, the strongest point on this subject in the evidence of Mr. Copeland. On behalf of Lord Talbot, several witnesses are produced on this question of reputation. Most of them are witnesses resident in Malahide, and speak of the public reputation there. Now, I cannot agree that the reputation of the neighbourhood alluded to in the cases would be satisfied by a reputation in the small district of Malahide. The creditors of such an establishment would naturally be in Dublin, and the dealings would be there; and, therefore, though I believe the notoriety of the true ownership in Malahide, I do not think that *per se* would satisfy the rule stated; but it is evidence on the point as far as it goes. The evidence of Mr. Hodges, and others, is of a more general notoriety, though this evidence wants the statement of any facts warranting the belief stated. But I come to one matter in this case, peculiar to this case in contrast to any cited to me; and which, on this point of public notoriety of the nature of Shaw's ownership with the trading public of Dublin, seems to me of great importance. It appears that Shaw, in 1859, was obliged to compound with his creditors; at that time he owed about £700. The furniture and moveables of the hotel were worth nearly £2,000; and, therefore, if this property was part of the assets of Shaw, he could plainly, then, have paid every farthing he owed; through bankruptcy, at that time, his creditors certainly had specific notice of his limited ownership actually given to them. Of the present creditors a large number were then creditors; therefore a large class of the present creditors became such having special knowledge that Shaw had only a limited title in this property. However, there are creditors who became such without the knowledge; and,

therefore, without at all ruling as I was asked in the course of the argument to rule—that notice to all the creditors, before they became creditors, of the limited title of Shaw would be no ground on which I could let them as not reputed ownership. I have still to consider if this evidence has any fair bearing on the question of reputed ownership. Now, in my judgment, it has an important bearing on this question. A large body of the creditors, the principal body of his trade creditors in 1858, dealt with Shaw, and they did not then insist that he was reputed owner of all this property; but on the express ground of his limited ownership, dealt with him in the arrangement made; the right claimed to-day existed as strongly (if not more strongly) in 1858 as now. Of course, a great many clever reasons may be given to encounter the weight of this trade dealing, on the foundation of a limited ownership at that time. However, despite of all such reasons, it stands before my eyes as a strong fact in the case, going to show that, in and before 1858, the traders did not deal with Shaw on the reputation of his being the absolute owner of all this property. What happened, then, after 1858, to alter the reputation of his ownership? The fact that he had compounded is the only new fact, and it, certainly, does not go any length to show that he became the owner of the goods in the subsequent period. Holding then, as I do, that the possession of this property by Shaw brought with it, *primâ facie*, a reputation of ownership to the extent of making it a case, the onus of proof of which lay on Lord Talbot claiming the true ownership in these goods, I am satisfied, first, that Lord Talbot has shown the true ownership to be in him; second, that the possession which Shaw had of these goods, by his consent, was a possession by way of tenancy only; third, that, having regard to the nature of the property, the use made of it by Shaw was consistent with the title of a lessee, and did not necessarily import any higher title than a tenancy therein; fourth, that the circumstances of Shaw's tenancy in this hotel, from the very nature of the property, were of considerable notoriety, and that the trading public of Dublin, in dealing with Shaw, had sufficient grounds before them to lead to enquiry before they came to a belief that he was the owner of all this valuable property, and that enquiry would have led them to the knowledge of his true title; fifth, that his creditors in 1858 did not insist on this title by reputation, but dealt with him according to his real title, and that a majority of his creditors now knew as a fact that he had not the ownership which is now claimed for their benefit as acquired by reputation; sixth, that Shaw never professed to have a title beyond his true one, and Lord Talbot did no act which was not in strict accordance with the title he conveyed to Shaw; and, seventh, that it is not proved as a fact that there was the reputation of ownership in Shaw; on the contrary, that the weight of evidence is plainly in favour of there being no such reputation of ownership in him. On these grounds, in my judgment, I would not be justified in declaring that this property, admittedly the property of Lord Talbot, and purchased by him, is now to be disposed of to answer the debts of Shaw. The provision as to reputed ownership in the bankrupt code is a most valuable one, and demands a fair

extension to meet the case of false credit, gained by appearances likely to mislead men in ordinary mercantile dealing, it always, of course, entails the loss of the property of the real owner; but it is not the less, on that account, to be applied, for the public interest demands that it should be so applied. But, at the same time, good sense must be always used in its application, to see that it is not turned into a technical ground of forfeiture where, reasonably considered, the dealing was not within the mischief intended to be guarded against. Therefore, it is, that the matter is always left as a question of fact, to be decided on the particular circumstances of each case. I have gone very fully into the facts of this case; I was anxious to give all the parties, as fully as I could, the reasons on which I found my conclusion—that they may canvass them, and, judging of them, see if grounds exist, in their minds, for bringing the case further by appeal. I, therefore, rule that this furniture belongs to Lord Talbot. But, in my mind, I ought not visit on the creditors the costs of this inquiry, necessarily incurred by Lord Talbot. I hold the onus of proof to rest on him, although the dealing with Shaw has not brought the penalty of forfeiting his property—I think it reasonably impressed on the parties the necessity of this inquiry—and, therefore, I think Lord Talbot may fairly be left to discharge his own costs, and the assignees' costs I award to them as costs in the matter.

Court of Admiralty.

[Reported by William G. Channay, Esq. Barrister-at-Law.]

THE NIMROUD.

Salvage—Appeal to Delegates—Tender—Costs.

In this case, which was a suit for salvage, where the property saved was admittedly worth £12,500, the Court awarded a sum of £400, amounting to nearly "one thirtieth," at "three per cent," on the total value, to the salvors, together with their costs, overruling a tender of £150; and upon an appeal to the Court of Delegates, the judgment of the Court of Admiralty was affirmed, each party to bear their own costs of the appeal.

THIS was a cause of salvage promoted by "The London and Limerick Steam Ship Company," (Limited), the registered owners of the Screw Steam Ship "Mangerton" of Limerick, 363 tons register, and 130 horse power. William Morgan, Master, against the ship "Nimroud" of London, 911 tons register, William Paynter, Master and part owner, to recover compensation for salvage services alleged to have been rendered by the steamer to the impugnant vessel upon the West and South Coast of Ireland in the month of December, 1861. The steamer was on one of her ordinary voyages from Limerick to Liverpool at the time of the occurrence; and the impugnant vessel, which, together with her cargo of corn, was admittedly worth £12,500, was on her homeward voyage from Quebec to Liverpool. The case was, by consent, heard *viva voce*, and all the important facts appear fully in the judgment of the Court. The impugnants

admitted the services, and tendered a sum of £150 on the acts of Court.

Doctors Townsend and Elrington for the promoters, cited *The Reward* (1st W. Rob., 174); and *The Vanguard* (5th Irish Jur., N.S., 364.)

Doctors Gibbon and Chatterton, Q.C., for the impugnants. The services rendered were scarcely more than towage services; and the amount tendered was sufficient compensation for the salvors.

Feb. 10.—Judge KELLY this day pronounced judgment. He said it was a cause of salvage, instituted by the owners, master, and crew of the steamship *Manger-ton*, of Limerick, 363 tons burthen, against the ship *Nimroud*, of London, and her cargo, for salvage, by having towed the *Nimroud* into Valentia Harbour on the 24th of December last. At the close of the trial, and subsequently, the Court having been, at its own request, furnished with the log and other ship's papers of the *Nimroud*, was enabled to pronounce its judgment, with the conviction that every circumstance bearing upon the cause had been submitted for its consideration. It appeared that the *Nimroud*, a ship of 911 registered tonnage, the defendant in the suit, sailed from Montreal on the 28th of October last, dropping down to Quebec, from whence she sailed on the 8th of November following, with a cargo of wheat in bulk, and American flour in barrels, bound for Liverpool. Her crew, according to her articles, consisted of her master and twenty-four hands; but as the official endorsement upon them had stated, before leaving Montreal one of these hands had deserted and two others of them had been discharged, and as no substitutes were provided, this large ship, it appeared, sailed from Quebec with three hands short of her ostensible and prescribed complement—one of these hands, moreover, being her second mate. As the incidents of the voyage bore very materially upon the issues of the cause, the Court would refer to them in the very words in which they were narrated in the ship's own log—a source of evidence in such a matter beyond impeachment, at least by the defendants, and entitled to full credence on the part of the Court. On the 6th day, after leaving Quebec, namely, on the 14th of November, the *Nimroud* being about six leagues west of Cape Gaspe, the entry in her log of that day was—"The breeze increasing and a heavy head sea on; the ship laboured and made water; the pumps attended to; at four the following morning she shipped a heavy sea forward, carrying away her head rails." Four days after—the 20th—the log was—"3 30—The gale still increasing; double reefed fore and aft sails; at six, furling the mainsail; sea making high; ship labouring heavy and making water; pumps carefully attended to. 10—Gale still increasing with sea running high and shipping large quantities of water." The following day, the 21st, the log was—"Begins with a heavy gale; ship under two close-reefed topsails; sea making high; ship straining and making water; pumps attended to. At two, a heavy gale, shipping large quantities of water; pumps attended to; midnight, a perfect storm; sea running mountains high; ship rolling heavy and making a great deal of water, carrying away bulwarks on the starboard side." The next day, the 22nd, again the log was—"Begins with a storm; sea moun-

tains high, ship rolling heavy, straining and making water; pumps constantly going." On the 23rd the log was—"Heavy gale, ship labouring heavy and making water; pumps carefully attended to." On the 24th the log was—"More moderate weather, pumps attended to." On the 27th, three days after, the log was—"Heavy gale. Midnight, shipping large quantities of water upon deck; ship straining and making water; pumps carefully attended to." On the 28th the log is—"At 10 a.m. the wind increased to a storm, the sea ran fearfully high; furling all square sail, and hove ship to, under storm trysail; the cargo shifted, and hove the ship over on her beamends, when she made much water; keeping both pumps going, and the men frequently washed away from the pumps, with the force of water on the decks. At noon, blowing a fearful gale, and sea very heavy, everything about the decks washing away." The log of the next morning, the 29th, was as follows—"Begins with a storm; ship lying under water on her starboard side; crew unable to stand at the pumps, owing to so much water on deck, and bulwarks washed away; carpenter reported pumps choked and water increasing in the well; under the necessity of throwing the cargo overboard to save the ship; cut out a scuttle under the cabin, and one half the crew worked at the cargo, while the other half worked at the pumps. Midnight—crew exhausted, ship lying on her beam-ends, making water enough to keep the pumps continually going." The log of the following day, the 30th of November was—"Moderate winds; a very heavy sea, making the ship roll; her starboard rails many feet under water; the decks constantly filled with water; part of the crew kept the pumps going, the remainder making every effort to get the cargo trimmed over to the port side. Four p.m.—A strong breeze sprung up, which assisted in getting the ship upright." The log of the next day, December 1, was—"At 5 30 shipped a sea, and damaged the well of the pumps and stanchions. Ten—Gale still increasing; split the foretop-sail." The log of the 2nd December was—"At eight a.m. sea running mountains high. Midnight—A storm; at one a.m. ship broached to; shipped a sea, carrying away bulwarks, a water cask, stove in the front of the poop, carrying away the rudder head, and sprang the mainmast head." The next day, December 3, the log was—"Begins with a strong gale and a high sea; ship labouring heavily, and filled the decks with water; at eight a.m. the gale increased to a storm; a heavy sea broke in the stern dead light and filled the cabin, doing considerable damage, and keeping the pumps going; all hands employed securing rudder head and keeping pumps going." On the day after, the 4th, the log was—"Ship running under close-reefed maintop-sail and foresail; rolling heavy; on searching for the running gear, found almost every rope parted or worked overboard, causing considerable difficulty in setting sail." The next day, December 5, the log was—"A strong gale; ship filling the decks with water; pumps attended to." On 8th, the log was—"Begins with a strong gale; at midnight the gale increased to a storm; ship broached to; were obliged to cut away foresail and topsail to save the ship, she having been thrown on her beam-ends; the water began to increase on the

pumps, and to save the ship from foundering threw overboard more of the cargo; sea washed away skylight and binnacle, and stove in all the boats; hove everything off deck to lighten ship; both pumps kept constantly going." The logs of the 9th, 10th, 11th, 12th, state, more moderate weather, but that of the 13th of December was as follows—"Begins with strong gales, attended with a heavy sea; at 6 p.m. the mainmast head gave way in the fishing, and the wreck would have torn the topside out of the ship had we not cut away the mainmast to free the ship, the mizen-topmast coming down with it; crew in a very exhausted state; the cook broke his leg; crew employed in clearing the wreck." It may here be observed that this misfortune to the cook, which as will appear, terminated in his death, added a fourth to the deficiency of three hands in the full complement of the crew already adverted to. The log of the 14th was—"Ship rolling heavy; pumps attended to." The logs of the 15th and 16th—"More moderate weather;" and that of the 17th states, "The people were employed getting up a jury-mast to set a mainstay-sail." On the 18th the log was—"Took on board four hands from the *Sir William Wallace*, whom she spoke that morning." Now, from the evidence of Lorry, one of these hands, there can be no doubt but that they were taken in the ship's extremity to supply the places of the four deficient hands. On the 21st the log was, that the cook, whose leg had been shattered by the falling masts, died from the effects of it. On the 22nd the Skelligs were made, and at noon Mizen Head bore E.S.E., six leagues. The log of the 23rd was—"Strong gales, with a high sea; pumps carefully attended to; at seven a.m. Dursey Head bore N.E., distant about ten miles." The log of the 24th of December, the last to be read, was—"Ship tacking off and on in Bantry Bay, making very little progress; at 11.30 ran through the sound between Dursey and the Calf, and at noon shaped a course for Valentia." Such, from the daily noting in her own log, is the recital of the incidents which befel the *Nimroud* from the sixth day after her departure from Quebec until she made the Irish coast—a recital full of suffering to ship, cargo, and crew, from the continuing violence of storm and sea during that period of thirty days and nights. Twice was she on her beam-ends, and on the first occasion for the space of two entire days. Repeatedly she was straining, making water, and shipping it in such quantities on deck that the crew were washed away from the pumps. Once her sails were cut away to save her from foundering, and again her mainmast and mizen topmasts; her sails were split, her rudder-head carried off, her water casks washed away, her boats stove in, her running gear gone or worn overboard, her stern deadlights burst in, and her cabin filled with water; her skylight, her binnacle, and her bulwarks washed off; her cargo shifting and twice thrown overboard, as well as everything upon deck, to lighten the ship; both pumps going at times, and constant pumping from day to day; at one time the pumps choked, at another the wells injured by the violent inrush of the water, and the crew, short-handed as they were, working one half at the cargo the other half to keep the ship afloat, and twice reported as quite exhausted. Such and so various were

the disasters, which had become almost familiar to the *Nimroud*, when about noon, on December 24th, about four miles north of Dursey Head, the *Mangerton* steamship, having heard of her condition an hour before from a passing schooner, who had spoke the *Nimroud* early that morning, came up to her. The *Mangerton* was then upon her appointed and customary voyage from Limerick to Liverpool, with passengers and goods, having left Tralee in prosecution of it at six o'clock that morning. On nearing the *Nimroud* she found her mainmast gone by the board, her mizen topmast gone, her foresail, a close reefed top-sail, and topgallant sail set, and a mainstay sail on a jury mast, going northward, the wind E. by S., her master, the mate, and crew upon deck. As to what then occurred the Court will resort to the evidence of that mate—evidence least likely to be excepted to by the defendants. That man heard the conversation which then immediately ensued between the two captains, and has deposed to it as follows:—"The *Mangerton* coming up first upon the port, and then on the starboard quarter, her captain hailed the captain of the *Nimroud*—"ship ahoy"—to which the latter replied, "Hollos, what will you take me to Valentia for?" The captain of the *Mangerton* replied he could not make any bargain. The men of the *Nimroud* were at the time busy in getting out their towing rope under this mate's superintendence, and he heard no more from the *Mangerton*, except have you a rope? We have a rope of our own," they said, and insisted on using their own rope. Under an agreement so formed, the *Mangerton* sent her 10½-inch Manilla hawser on board the *Nimroud*, and it being made fast and parcelled, the towing commenced towards Valentia, the harbour indicated, and also the safest, according to the evidence, for the *Nimroud* to be brought to. The distance to be thus traversed was about twenty-five miles; the water was stated to be smooth, with a little joggle. Some sea, however, came out of Kenmare Bay, and the wind a single reef breeze from E. by S., after rounding Breahead, would be naturally right against them. This towage having proceeded uninterruptedly for about twenty miles, stopped close to the lighthouse at the entrance to the harbour, in order that each vessel should take a pilot; and after having done so it was at once resumed; but, scarcely had the *Mangerton* gone a-head, when, by some fatality, the hawser parted, about one fathom outside the *Nimroud*'s bows. This occurrence caused a delay, until the hawser of the *Nimroud* was brought into service, when she was towed by the *Mangerton* safely into her anchorage within the harbour, about six o'clock on the evening of that day. The *Mangerton*, however, in this latter part of the service was not so fortunate in respect of her exertions, for in her eagerness to clear her broken hawser, she fouled it with her propeller, round which it wrapt itself so closely that the engines were stopped, and she was obliged to have recourse to extraordinary means to force them to work again—which means, as deposed to, involved some danger as well as straining of the machinery. Another difficulty attendant upon the towage, was the bad steering of the *Nimroud*, yawing, as was stated, from one quarter to another, three or four points. The master of the *Nimroud*, it

was true, contradicted this; but Lorry one of his crew, swore that his sole duty was to take the wheel and to look out, and that she did steer very badly after the Mangerton, going backwards and forwards three points. The evidence of Connell, the pilot on board the Mangerton, admitted that the Nimroud did steer badly attributing it, however, to the very unlikely blunder of his brother pilot, on board of her, always mistaking port for starboard. For the towage thus performed, which the defendants most properly admitted was a salvage service, they had tendered a sum of £150, and that tender had been rejected by the petitioners. The defendants insisted upon its sufficiency upon two averments in their pleading and in their evidence—first, that the Nimroud could have reached the harbour of Valentia without any assistance: secondly, that she was perfectly seaworthy, and in a condition to have made her destined port, Liverpool, but averments such as these could be taken at their worth only, when the sole evidence in support of them was merely opinion, and when the facts and whole bearing of the case were in direct contradiction to these opinions. As to the former one, for instance, if the Nimroud could have got into this harbour without any assistance why did she not do so; and why, on the contrary, did she solicit the aid of the Mangerton, agree to receive that aid—price unnamed—express her thankfulness for it when it was all over, and afterwards proffer to pay £150 for it? Again, if at the time she was in such a seaworthy condition as to have been able to have made her voyage to Liverpool, where her market was awaiting her arrival, and to which the very nature of her cargo suggested the speediest arrival, as the most desirable for her interests, why did she not proceed thither, or request the towage to be made to it, rather than to Valentia, seeing too, that such a proposition would have been at the same time a more convenient one for the Mangerton, bound also to Liverpool that same morning? And why, on the contrary, as the Master's evidence and her own log shows, did she delay in Valentia Harbour for upwards of fourteen days, the earlier part of which, according to her own log, was mild weather?—and when at last she did leave it for Liverpool, why did she do so, not by her own means of navigation, but in tow of a steam-tug sent from Liverpool purposely to fetch her there? But further, it was not possible that such averments could stand in the face of the accumulated evidence against them, which the ship's own log presented, in those plain speaking, truth-telling, daily entries, which have been already read through by the Court; nor yet could they stand in the face of the sworn protest of the ship's own Master, in which he stated that that voyage up to the 13th of December was a series of disasters. Now when it was remembered that some of these disasters were the straining and leaking of the ship, the loss of masts and sails and running gear, and that during the remainder of that voyage, and until taken in tow by the Mangerton, there existed no possible opportunity of repairing these losses, the Court could entertain no doubt but that the aid and assistance of the steam ship were no less necessary than they were timely. The general interests of commerce, as well as the obvious policy of encouraging owners of large and powerful steamers to permit the employment of them in salvage services,

required that salvage remuneration should be always adequate and even liberal, at the same time each particular case being regulated, in accordance with these principles, by its own particular circumstances. In the case before the Court, there were some prominent circumstances. The Mangerton abandoned her own voyage, and postponed the more immediate interests and purposes of her owners and employers, for the service of the Nimroud, and carried successfully into a safe harbour that vessel in her then impaired condition, and yawing from quarter to quarter. If in the Mangerton's eagerness to clear her broken hawser she fouled it with her propeller, and in consequence strained her machinery, the Court was inclined to place that incident to her credit, and attribute it to her zeal in the service, when it was considered that the occurrence took place after dark, on a December evening, at the very entrance of the harbour, the urgency of the occasion requiring that not a moment should be lost lest the Nimroud, at the time cast loose, should be blown out to sea by the wind then blowing freshly out of the very mouth of the harbour. Lastly, Mr. Randall's evidence was not to be passed by; it being, that no steamers whatever plied on that part of the coast save the steamships of the petitioners. Now, on the other hand, the distance towed was but twenty five miles, the time consumed but six hours, and the weather moderate. All these circumstances were to be duly weighed, and with them a just forbearance used towards the defendants. The admitted value of the Nimroud and cargo was £12,500. Under all these considerations the Court would award to the petitioners the sum of 400*l.* which was little more than three per cent. upon the admitted value, and overrule the tender of £150, with costs of suit.

Upon an appeal by the impugnants to the Court of Delegates, consisting of Judges O'Brien, and Hayes, and W. C. Kyle Esq. LL D, heard in February, 1863, the judgment of the Court of Admiralty was affirmed, each party to pay their own costs of the appeal.

Proctor for Promoveants—The Queen's Proctor.
Proctor for Impugnants—Mr. J. H. Doran.

House of Lords.

Reported by James Paterson, Esq., of the Middle Temple,
Barriester-at-Law.

MASSEY v. LLOYD.—March 3, 1863.

Settlement—Construction—Interest on portion—Interest severed from principal—Time of payment—Vesting.

The question as to the time when portions become payable is one of construction; and when, according to that construction, the period has arrived when the portion is directed to be raised and paid, this must be done, although it can only be done by a waste of property and sale or mortgage of a reversionary term.

A portion is not properly said to be payable by trustees until two things have occurred, namely, when the time appointed for raising has arrived, and

when the person entitled is able to give a discharge; but a portion is often said to be payable to a child so soon as the event has happened which gives the child a vested right in it.

Circumstances in which, under a settlement, held (reversing the decree of the Court of Appeal in Chancery of Ireland) that there could be no severance of the interest from the principal, but that both should be raised and paid at the same time.

THIS was an appeal from a judgment of the Court of Appeal in Chancery of Ireland. The judgment declared that interest upon a sum of £15,000, from the date of the marriage of the respondents, Eyre Lloyd and Anne Lloyd, was by an indenture dated 15th May, 1804, a valid charge in favour of them and their issue on certain estates belonging to the appellant, Massy. The deed in question was the marriage settlement of the parents of the respondent, Anne Lloyd, and the sum of £15,000 was a portion, payable to the said Anne Lloyd at twenty-one, or marriage, and charged on the said estate. By the marriage settlement of 1804, made between Hugh Massy, jun., of the first part, Alice O'Donnell, sen., otherwise Hutchinson, of the second part, and trustees, after reciting that the said Alice O'Donnell was then seised in fee of certain lands known as the Hutchinson estate, charged with £5,000 for Alice O'Donnell, jun., daughter of the said Alice, party thereto, and that she was also seised in fee of certain other lands known as the Massy estate, charged with a further sum of £5,000 for her said daughter Alice, the said Alice O'Donnell, sen., did convey the said estates, subject to the said sums of £5,000 and £5,000, to the use of the said Edward Syngé Townsend and John Moore, for the term of 999 years then next ensuing, upon trust to pay the rents and profits of the said lands for as many years as the said Alice O'Donnell, sen., should live, to the said Alice O'Donnell, sen., or such person or persons as she should in writing appoint, for her separate use, and after her death to raise out of the said lands, by sale or mortgage thereof, the said sum of £10,000 for her said daughter, Alice O'Donnell, jun., to be paid to her at her age of twenty-one years, or day of marriage, whichever should first happen, with interest at the rate of five per cent. per annum, from the death of her mother until paid, and, subject to the said charge, to pay yearly during the residue of the said term, out of the issues and profits of the said lands, to the said Hugh Massy, jun., for as many years as he should live after the death of the said Alice O'Donnell, sen., the yearly sum of £1000; and as to the residue of the said rents and profits, to pay the same to such person or persons as the said Alice O'Donnell, sen., should by any deed or will limit or appoint, and for want of appointment to her right heirs. And it was thereby further agreed, that the trustees of the said term should, out of the rents and profits pay to Miss Charlotte O'Donnell therein mentioned £500, to be payable to her on her day of marriage, or upon the death of the said Alice O'Donnell, sen., whichever should first happen. And as to the residue of the said term, after the death of the said Alice O'Donnell, sen., and Hugh Massy, the same was limited to the said trustees upon the several trusts

therein mentioned; and after the expiration or other sooner determination thereof, and subject thereto, the said lands were limited to the first and other sons of the marriage in tail male, with remainders over, and an ultimate remainder to the right heirs of the said Alice O'Donnell, sen. And as to the residue of the said term of 999 years, it was declared that the same stood limited to the said trustees upon trust in case there should be issue of the said intended marriage, one or more child or children other than an eldest or only son, then that the said trustees should, by sale or mortgage of the said term of 999 years, or a competent part thereof, and by the rents and profits thereof in the meantime, and until such sale, raise £15,000 for the portions of such child and children other than and except an elder or only son; and if only one such child, then the said sum of £15,000 to be paid to such child; and in case there should be more than one such child, the said sum to be paid to such children at such time and times, in such shares, and with such yearly interest, in the meantime, as the said Alice O'Donnell, sen., should by deed or will appoint, and in default of appointment to be paid amongst such younger child or children, if more than one, equally, the portion or portions of such younger children; if a son or sons, to be paid to him or them at their respective ages of twenty-one years, and if a daughter or daughters, at their respective ages of twenty-one years or days of marriage, whichever should first happen; and should, out of the rents and profits of the said premises so limited to the said trustees for the said term of 999 years, in the meantime, and until the said portion or portions should respectively become payable, raise such yearly sum and sums of money for the maintenance and education of such younger child and children as the said Alice O'Donnell should deem meet, not exceeding interest at five per cent.; and if no appointment by the said Alice O'Donnell, then at the rate of five per cent. per annum. Provided that if any of the said children should happen to die before his, her, or their portion or portions should become payable, then that the portion or portions of him, her, or them so dying should go to and be equally divided amongst the survivor and survivors of them at such time as the original portions of such child or children should become payable. And it was thereby further declared that if the said Alice should, in her lifetime, prefer all or any of such daughter or daughters, or such younger child and children, in marriage or otherwise, advance them or any of them, by giving or paying for or to them, or any of them, any sum or sums of money, such sum and sums of money so paid and advanced by the said Alice O'Donnell in her lifetime should be taken as part of the provision thereby charged for such younger child or children, in case of the said estate, unless the said Alice should declare to the contrary. The said marriage was duly solemnised, and there was issue only two children, viz, Massy Hutchinson Massy, the appellant's father, and the respondent, Anne, who married the respondent, Eyre Lloyd. The said Alice Massy, before the birth of either of her children, made her will, dated 1806, and after reciting the settlement, appointed the residue of the rents and profits during the life of the said Hugh Massy, subject to the pay-

ment of the legacies therein mentioned, to the use of her son, in case she should have one, to be paid to him on attaining the age of twenty-one. The said Alice Massy died in June, 1806, leaving the said two children, and also Alice O'Donnell, her daughter, by a former marriage. In 1824 the respondent, Eyre Lloyd, married Anne Lloyd, then Anne Massy, and by their marriage settlement they assigned to trustees the said principal sum of £15,000 charged on the said land as aforesaid, together with the interest thereon, upon certain trusts for the respondents, Eyre and Anne Lloyd, during their lives, and after the death of the survivor for the children of the said marriage. There was issue of the said marriage, Thomas Lloyd, Hugh Lloyd, Eyre Lloyd, jun., Arthur Lloyd, and Catherine Lloyd, all of whom have attained the age of twenty-one years. In 1827 the said Massy Hutchinson Massy married Sarah Davies, and by their marriage settlement, executed after the said marriage, the said lands were put in settlement and conveyed to certain trustees upon trust for the said Massy Hutchinson Massy for life, with remainder, subject to a jointure for said Sarah Davies, and to portions for her children, to the first and other sons of said marriage in tail male. The said Massy Hutchinson Massy, in 1827, duly suffered a recovery of the fee-simple lands mentioned in said settlement of 1804 to the uses of said settlement of the 23rd June, 1827. There was issue of said last-mentioned marriage three children, viz., appellant, William Massy Hutchinson Massy, Alice Massy, and Simon Massy, who has since died, married, but without issue. The said Massy Hutchinson Massy died on or about the 22nd May, 1852, leaving appellant surviving, who thereupon entered into and still is in possession of all said lands and premises; and by deed of the 27th Dec. 1853, appellant duly barred the said estate tail in said lands. Interest on said charge of £15,000 was paid to said respondent, Eyre Lloyd, by said Massy Hutchinson Massy up to the 15th Oct. 1846, and same having then become in arrear, said respondents, Eyre Lloyd and Anne, his wife, on the 27th Aug. 1847, filed their bill in the Court of Chancery in Ireland against said Massy Hutchinson Massy and others, for the purpose of raising said charge and interest by a sale of said lands, and for a receiver in the meantime. The said Massy Hutchinson Massy filed the demurrer to the bill for want of equity; and on the said demurrer coming on to be heard in Michaelmas Term, 1847, his Honor the Master of the Rolls overruled the said demurrer, and held, that whilst the principal sum could not be raised until after the death of the said Hugh Massy, jun., interest was raisable during his life out of the surplus rents, by means of a receiver. Against this order the said Massy Hutchinson Massy appealed to the Lord Chancellor of Ireland, who, by an order dated the 13th June, 1848, allowed the said demurrer. The Lord Chancellor, on allowing the demurrer, decided that neither the principal sum nor interest were raisable during the life of the said Hugh Massy, jun.; and the grounds of his decision in substance were, that during the life of the said Hugh Massy, jun., the whole of the rents and profits of the said estates had been otherwise appropriated under the said indenture of the 15th May, 1804, and that

the Court, for the purpose of satisfying the said principal sum and interest, could neither direct a sale of a competent part of the residue of the term of 999 years, remaining after the death of the said Hugh Massy, freed from the trusts prior to the said charge of the said principal sum and interest, without injury to the persons interested under the said prior trusts, who were entitled to the benefit of the whole of the said term for their security, nor direct a sale of the whole of the said term so as to give to the purchaser the legal estate therein, which would be necessarily retained by the trustees, as a security for the said prior trusts. But his lordship expressly stated that the said principal sum did become payable upon the marriage of the respondent, Anne Lloyd, and did from that time bear interest; and that the interest as from that time was raisable out of the residue of the term; but that the interest and principal were not to be raised until the trustees were able to convey a legal estate in the said lands to the purchaser, that is, until the death of the said Hugh Massy, jun. The said Hugh Massy died on the 19th March, 1859. The respondents then filed a petition, praying a declaration that the sum of £15,000, with interest from the 15th Oct. 1846, being the day of the last payment of interest, was well charged on the estates. The Master of the Rolls made an order declaring that the sum of £15,000, with interest from the marriage of Eyre and Anne Lloyd, was well charged on the said lands. On appeal to the Court of Appeal the said order was affirmed with costs, the Lord Chancellor not, however, concurring. The present appeal was then brought.

The *Solicitor-General* (Palmer) and *Exham*, for the appellants, contended that, on the true construction of the settlement and will, interest on the said sum of £15,000 was not payable during Hugh Massy's life, but that it accrued only from his death, and not from the date of the marriage of Eyre and Anne Lloyd.

G. M. Gifford and *G. Lushington* for the respondents. The following cases were referred to:—*Codrington v. Foley* (6 Ves. 364); *Smith v. Foley* (3 Y. & C. Ex. 142); *Lord Miltown v. Trench* (4 Cl. & Fin. 321); *Lyddon v. Lyddon* (14 Ves. 558); *Ravenshill v. Dansey* (2 P. Wms. 179); *Reynolds v. Mayrick* (1 Eden. 48); *Churchman v. Harvey* (Amb. 335).

Cur. adv. vult.

THE LORD CHANCELLOR.—In this case Mr. Lloyd is the only younger child of the marriage of the late Hugh Massy with Alice his wife. On the occasion of that marriage in May, 1804, a settlement was made of large estates in Ireland belonging to Alice, then Alice O'Donnell, and by that settlement a sum of £15,000 was directed to be raised as a portion of the younger child or children of the marriage. The respondents, Mr. and Mrs. Lloyd, intermarried in 1824, and their contention in the court below was, that on that event Mrs. Lloyd, as the only younger child, became entitled to have the portion of £15,000 raised and paid to her, and consequently became entitled from the same time to interest on that principal sum until it should be raised and paid. This appears to be the construction of the settlement, which was approved

of by the Lord Justice of Appeal. It is true that in argument at the bar the respondents admitted that a younger child would not be entitled to interest during the life of Alice, the mother, but contended that even if on the true construction of the settlement the principal money would not be raised until the death of Hugh Massy, the father, yet they were entitled to have the interest accumulated from the time when the principal became vested, and to have the arrears of interest raised and paid, together with the principal, on the death of the father, and such has been the decision of the Court below. In the argument in this House and in the Court in Ireland great reliance was placed on decided cases, but I think little is to be gained from them beyond, first, the general conclusion, that the question as to the time when portions became payable depends on a correct construction of the language of the settlement, or, in the words of Lord Chancellor Talbot, on the particular penning of the trust; then, secondly, the conclusion which Lord Eldon seems to have intended to express (for there is some want of grammatical accuracy in the words imputed to him), namely, that if the interests are vested, and the contingencies have happened at which the portions must be raised, they must be raised, although the only means of raising them may be the sale or mortgage of a reversionary term. The intention is to govern, and when the period has arrived at which a portion is clearly directed to be raised and paid, you must do so, although it involves a considerable sacrifice and waste of property. The provisions of this settlement are of a singular character. The estates are devised to trustees for a term of 999 years, to commence from the solemnisation of marriage; and the provisions for the wife, the husband, and the younger children of the marriage, and other objects, are effected by means of declaring successive trusts of this term. Subject to, and after the fulfilment of these purposes, the term ceases or becomes attendant, and the estates are limited to the use of the first and other sons of the marriage in tail male. The first trust of the term after the solemnisation of the marriage is to pay all the rents and profits of the estate unto the wife Alice, for her separate use during her life. This is positive and express, exhausting so much of the term as may expire during the life of Alice, the mother. It is the duty of a judge, if possible, to construe the provisions of a settlement so as that they may be consistent and accordant with each other. But it would be difficult to show how the subsequent provision for the children could be intended to derogate from this first absolute trust in favour of the mother. It was, as I have already said, admitted by the respondent's counsel, that the trust to pay the portions did not arise until the mother's death; but as this admission could be founded on no other ground than the fact that the rents and profits are absolutely disposed of during the life of the mother, it must follow, if there be an equally absolute disposition of the rents during the life of the father, the same result would ensue, and the portions could not be treated as directed to be paid until the death of the survivor of the parents. The trust on the death of the wife, if the husband be then living, is subject to a charge of £10,000, to pay yearly during the residue of the term out of

the rents and profits of the lands unto Hugh Massy, the husband, for so many years as he shall live, the annual sum of £1000; and as to the residue of the rents and profits, to pay the same to such persons and in such manner as Alice, the wife, shall by deed or will appoint, and for want of appointment to the right heirs of the said Alice. This power was fully exercised by the will of Alice, the mother, and consequently the absolute disposition of the rents during the life of Hugh, the father, became just as complete and effectual as the antecedent trust thereof during the life of Alice, the mother. It is in that particular, namely, the power to dispose, and the consequent disposition of the surplus rents and profits during the life of the father, that the present case differs from the case of *Lyddon v. Lyddon*, decided by Sir William Grant, and on which the respondents relied on in *Lyddon v. Lyddon*. The term of raising the portions took effect immediately from the death of the husband, who was tenant for life, and therefore that term caught and included all the surplus rents and profits remaining after payment of the jointure to the widow, and they became applicable to the payment of interest on the portion secured by the term. The case would, therefore, have been an authority for the present only if the surplus rents above Hugh Massy's annuity had been undisposed of, and had therefore fallen into the hands of the trustees to be applied upon the trusts declared of the residue of the term, whereas the contrary is the case. It is probable that this power of disposition of the surplus rents was reserved to the mother for the purpose of enabling her to judge of the necessity of providing for the maintenance of the younger children. There is an additional element of difference between the two cases in the circumstance that the father to whom in this case the annuity is given is under a legal obligation to maintain his infant children. It appears therefore that the rents and profits of the estates are absolutely disposed of during so many years of the term as shall elapse during the lives of the father and mother and the life of the survivor; and, accordingly, proceeding with the language of the settlement, we find the words are that, as to the residue of the term of 999 years, after the decease of the said Alice and Hugh, the same is limited to trustees upon the trusts thereafter mentioned, that is, upon trust to raise and pay the sum of £5,000. Pansing here for a moment, it is material to observe, first, what is the subject-matter of this trust, and secondly, what is involved in the order and sequence of the directions to the trustees. The subject-matter of the trust, that is, the property available for the portion, is so much of the term as shall be existing at the death of the survivor of the father and mother, and it is by mortgage or sale of this residue that the £5,000 is directed to be raised. If, therefore, in the trust for raising the portions which commences with the words "and as for and concerning the residue of the said term of 999 years," if in the trust the words "so much of the term as shall remain on the death of the survivor of Hugh and Alice Massy" were substituted for the word "residue," there would be no possible room for mistake, for every subsequent trust becomes a trust of and concerning this residue, and the direction to pay interest in the meantime, and until the

portions become payable, out of the rents and profits of the premises, is a direction touching the rents and profits of the premises during the residue of the term; that is, after the death of the surviving parent. The same conclusion is arrived at from considering the order and sequence of the trust, which consist of a series of directions to the trustees, the first extending over the life of Alice the mother, the second over the life of Hugh the father, and the third coming into effect at the death of the survivor of the father and mother, and including all the directions touching the raising and payment of the principal and interest in the 15,000*l.* to the younger children. But it was said in the Court below, and is the foundation of the judgment of the Lord Justice of Appeal, that even if the principal money was neither raisable nor payable until the death of the surviving parent, yet, the right to interest arose immediately on the portion becoming vested by the marriage of Mrs. Lloyd, and that such interest must be accumulated and levied, together with the principal, immediately on the death of the surviving parent. The Court below does not point out what are the words of the settlement which plainly and unequivocally give this supposed right to the interest during the life of either parent, although the trust for raising and paying either principal or interest had not arisen. I concur entirely with the observations of Lord Chancellor Cottenham, in *Lord Milnour's* case, where he speaks of the absurdity of holding that the interest is to accumulate against the inheritance, to be raised when the remainderman shall be in possession. No words that reasonably admit of a different interpretation should be used for such a conclusion; but, upon examining the trusts, that is, the directions given to the trustees touching the principal and interest of the portions, remembering that these directions arise and are to be carried into effect after the death of the husband and wife, no difficulty will be found. There is first a trust to raise the 15,000*l.* by means of the residue of the term, with a direction to pay it when raised, with interest in the meantime; that is, between the death of the surviving parent, when it became raisable, and the time of payment to the younger child or children, as the mother might appoint, and in default of appointment to the younger child or children, if more than one, equally, the portion of a son at twenty-one, and of a daughter at twenty-one, or day of marriage. And then follows a direction that the trustees do and shall, out of the rents and profits of the premises, that is, as already observed, out of the rents and profits accruing after the death of the surviving parent, in the meantime, and until the portions become payable, raise such yearly sum for the maintenance and education of the younger child or children as to the mother may seem meet, not exceeding 5 per cent.; and, if no appointment by the mother, then at that rate of interest—a provision which is clearly intended to meet the event of a younger child or children being under age when the 15,000*l.* is directed to be raised. In the construction of trusts of this description, it must be remembered that the word “payable” is used in a less extended meaning when it refers to the persons to whom portions are payable, than when it is applied to trustees by whom such portions are payable. A portion

is not properly said to be payable by trustees until two things have occurred, namely, when the time appointed for raising it has arrived, when the person entitled is able to give a discharge for it. But a portion is often said to be payable to a child as soon as the event has happened which gives the child a vested interest in it. And in the latter case, the word “payable” denotes only that the child is entitled or enabled to receive such share or portion, and it is in this sense that the word “payable” is used in this settlement in the last provision affecting the 15,000*l.*, by which it is declared that, in the event of all the younger children dying before their portions should become payable, that is, before the event at which their portions are made payable, or directed to be paid, 5,000*l.*, part of 15,000*l.* should be paid to Alice, jun., and the residue of the 15,000*l.* as the mother should appoint. With this construction this provision is applicable to the event of all the younger children dying without attaining vested interests in the lifetime of both or either of the parents, and is consistent with the rest of the settlement. I have examined, my Lords, this case with the greatest anxiety, because I must admit that my first opinion was different from that at which I have now arrived; but I feel bound to move your Lordships that the order of the Court of Appeal below be reversed, and the order of the Lord Chancellor restored.

LORD CHELMSFORD.—My Lords, I agree entirely with the opinion which has been expressed, that the interest in the 15,000*l.* portion commenced only from the death of the late Hugh Massy, and not from the marriage of the respondents, Eyre and Anne Lloyd. The case is not free from difficulty, but this appears to me to have been the intention, as it is to be gathered from the scheme of the settlement. The deed may be divided into two parts: first, that which relates to the provisions which applied to the periods during the lives of the husband and wife; the second, that which relates to the provisions which are applicable after their deaths. The term of 999 years was created to serve all these purposes. During Alice O'Donnell's life, all the rents and profits of this term were to be paid to her, or as she should direct. After her decease, 10,000*l.* was to be raised for her daughter Alice, to be paid at her age of twenty-one, with interest from the death of her mother, and subject to this charge, Hugh Massy surviving his wife was to receive 1,000*l.* a-year out of the rents and profits of the term for his life, the residue of the rents and profits (by which clearly is meant the surplus rents and profits after payment of the 1,000*l.* a-year to Massy) being made subject to the appointment of Alice the wife. The application of the whole of the rents and profits during the lives of Hugh Massy and Alice is thus carefully provided for. The settlement then proceeds to dispose of the residue of the term itself, that is, that which might remain of the term after the deaths of Hugh Massy and Alice, and it deals with the residue and with the rents and profits of that residue by the mortgage or sale of the residue, and by the rents and profits. In the meantime, the 15,000*l.* portion is to be raised and paid to the younger child or to the younger children at twenty-one or marriage. The question is, out of what is the portion to be raised?

The answer must be, out of the residue of the term, and of the rents and profits of that residue; therefore, although the portion may have vested during the lives of Hugh Massy and Alice, yet it could not be raised and paid until the term of 999 years had become the residue out of which it was to be satisfied by the death of the survivor of Hugh Massy and Alice. If, then, the portion could not be raised until the death of Hugh Massy by the express provision of the settlement, it is difficult to conceive that it was intended that the interest, which could not be raised before the principal, should accumulate in the meantime to the prejudice of the inheritance. Some stress was laid, in the arguments for the respondent, upon the clause providing for the maintenance and education of the younger child or children until the portion or portions became payable. This clause appears to me, however, rather to favour the view presented by the appellants. The words introducing this clause are not, "do and shall out of the rents and profits," but "out of the said rents and profits," being the rents and profits antecedently mentioned, namely, those of the residue. The scheme of this part of the settlement seems to me to be this. The portion is to be raised out of the residue, and to be paid at twenty-one or marriage; but it was contemplated that at the time when the residue out of which the portion was to be raised should be ascertained, the child or children might not be entitled to have the same paid, from being under twenty-one or unmarried; therefore, power is reserved to the mother, out of the said rents and profits, to provide for their maintenance and education in the meantime, and, if no appointment by her, then the maintenance was to be at a certain rate. It is not contended that this provision for maintenance would attach upon the mother's life-interest. It was said that it might be paid out of the surplus rents and profits, after the payment of 1000*l.* a-year during the life of Hugh Massy. But Alice had already reserved to herself an absolute power of appointing these surplus rents and profits at her will and pleasure. It would seem, therefore, not only superfluous, but inconsistent, to have afterwards reserved to her a limited power to provide maintenance out of the same rents and profits. But, if the latter power refers to the rents and profits of the residue, as contradistinguished from the residue of the rents and profits after the payment of Hugh Massy's annuity, the reservation of the power is not unnecessary, and there is no inconsistency in the settlement. The Master of the Rolls and the Lord Chancellor agreed that the 15,000*l.* could not be raised until after the death of Hugh Massy; but the Master of the Rolls thought it was the intention that the 15,000*l.* should bear interest during the lifetime of Hugh Massy, although the principal sum was not raisable until his death. The Lord Chancellor differed in this respect; but whether his Lordship, when the case was first before him, thought, not only that the interest could not be raised before the principal, but that it could not accumulate during the lifetime of Hugh Massy, cannot be collected from the judgment. However, upon the appeal from the order of the Master of the Rolls, which, in effect, decided that interest was payable on the portion from the time of the marriage of the respondents Eyre and Anne Lloyd, his Lordship

expressed an opinion adverse to this view; but, finding that the Lord Justice of Appeal agreed with the Master of the Rolls, he affirmed the decision, though with some hesitation. After carefully considering the whole scheme of the settlement, and examining its various provisions, I cannot bring my mind to the conclusion that there can be any severance of the interest from the principal; but it appears to me to have been intended that both principal and interest should be raised and paid at the same time, and that there should be no accumulation of the interest for any period prior to the death of Hugh Massy. I think, therefore, that the decree appealed from ought to be reversed.

THE LORD CHANCELLOR.—The form I will propose to your Lordships would be to reverse the order complained of by the appeal, and to declare that the 15,000*l.* did not bear interest save from the 19th March, 1859, being the day of the death of Hugh Massy, and that, with that declaration, the cause be remitted to the Court below.

The Solicitor-General.—We shall, of course, receive back the costs we were ordered to pay by the decree of the Master of the Rolls.

THE LORD CHANCELLOR.—That always follows. I move that the order appealed from be reversed, and that it be declared that the 15,000*l.* for the younger children did not bear interest save from the 19th March, 1859, being the day of the death of Hugh Massy, the father, and, with that declaration, remit the cause to the Court below.

Decree reversed.

Appellants' solicitors—Birch, Ingram, and Whately.
Respondents' solicitors—Fininger and Wilkinson.

Court of Chancery.

MASTER BROOKE'S COURT.

[Reported by Oliver J. Burke, Esq., Barrister-at-Law.]

DALTON v. O'BIERNE.

Will—Construction of—Lapsed Legacy—Legacy to be paid at twenty-one—Word "payable"—Survivorship.

A. O'B., by will bearing date the 6th November, 182*l.*, having recited that she was possessed of £1300, British, bequeathed same in manner following: "I give and bequeath to my nephew, Av. O'B., the sum of £325, to be paid to said Av. O'B. on the day of his attaining the age of twenty-one. Item, I devise and bequeath a like sum of £325 to my nephew, J. T. O'B., to be paid in like manner as the principal and interest of Av. O'B.; and I devise and bequeath the like sum of £325 to my niece Al. O'B. on the day of her attaining twenty-one, or on the day of her marriage; and I will and desire that if either or any of my said nephews and niece shall die before their legacy shall become payable, that then the share of the person so dying shall go to the survivors or survivor; and in case the said Av. O'B., the said J. T. O'B., and the said Al. O'B., shall all die before their legacies become pay-

able," then she bequeathed the said sum of £976 among a number of legatees in small legacies, varying from £10 to £200, among which was a legacy of £50 to J. D. The remaining £325 she divided into a number of small legacies, and she then appointed "J. D. executor of this my last will and testament, and I constitute and appoint him my residuary legatee, to take to his own use the amount of any of the aforesaid legacies which may become void by the death of the respective legatees happening before my decease." Testatrix died 12th April, 1862, leaving J. T. O'B. her surviving. Aw. O'B. and Al. O'B. died in her lifetime, as also a number of the legatees of the last-mentioned £325.

Held, that the two respective shares of Aw. O'B. and Al. O'B. who died in the lifetime of A. O'B., did not lapse, but went to J. T. O'B., the nephew living at the death of testatrix.

Held also, that the word "payable" had reference to the death of testatrix.

Held also, that the word "survivor" meant surviving at the death of testatrix.

THIS was a cause petition under the 15th section of the Chancery regulation Act, presented by the petitioner, John Dalton, of Summer-hill, in the city of Dublin, esquire, barrister-at-law, who was the executor and residuary legatee of the testatrix. The petition stated "That Alicia O'Beirne, formerly of Summer-hill, in the county of the city of Dublin, deceased, was, at the respective times of making of her will, and of her death hereinafter mentioned, possessed of or entitled to government stock and other personal estate, and being so possessed, the said Alicia O'Beirne made and published her last will and testament in writing, bearing date the 6th November, 1829, duly executed and attested, as by law required, and thereby having recited that she was possessed of £1,300 British, invested in New 4 per Cent. Government Stock, she bequeathed and distributed the said sum in manner following:—I give and bequeath to my nephew, Andrew O'Bierne, the sum of £325 of said stock, to be paid to the said Andrew O'Bierne on the day of his attaining the age of *twenty-one*, and I desire the joint interest thereof shall be paid from time to time by my executor for the use of the said Andrew, but only for his education and advancement in life. Item, I devise and bequeath a like sum of £325 to my nephew, John Thomas O'Bierne, the principal and the joint interest thereof to be paid for his use in like manner as the principal and interest of his brother Andrew. I devise and bequeath the like sum of £325 to my niece, Alicia O'Bierne, on the day of her attaining *twenty-one*, or on the day of her marriage, whichever shall first happen, provided, however, that such marriage shall be with the consent of my executor, and shall not take place until she is at least 18 years of age; and I desire that the Government interest of her said legacy shall be paid to her use, but only for her education and advancement in life; and I will and desire that if either or any of my said nephews and nieces shall die before their said respective legacy or legacies become payable, that then the share of the person or persons so dying shall go to the survivors or survivor, share and share alike,

and that the principal and interest so increased shall be paid to such survivors or survivor at the same time and for the same purposes prescribed in case of the single legacy of such survivors or survivor. [And in case the said Andrew, the said John Thomas, and the said Alicia, shall all die before their said respective legacies become payable, then I bequeath and distribute the said £975, being the tot of the three before-mentioned legacies, in manner following:—I give and bequeath to Elizabeth Dalton, daughter to Counsellor Dalton of Summer-hill, the sum of £200, part of said sum of £975, and to her heirs. I give and bequeath to M. M'D. £100, also part of said sum of £975; to A. M'D. £100, also part of said sum of £975; to T. N. £120, part of said sum of £975; to G. M. £100, part of said £975; to C. M. £100, also part of said £975; to Mrs. F. £50; to the Very Rev. Dr. Blake, £100, part of £975, for the celebration of perpetual Masses for my soul. I give and bequeath to my cousin, Counsellor Dalton of Summer-hill, the sum of £50, part of said sum of £975, and to his heirs; to A. M'D. the sum of £55, being the remaining part of said sum of £975 out of the £1,300 Government Stock of which I am possessed.] I now make the following disposition of the remaining £325:—Funeral expenses, £12; [to a number of legatees the sums of £10, £150, £25, £25, £25, £15;] to my executor hereinafter named, the sum of £35, *provided* he takes upon himself the burden of proving this my last will, and not otherwise; to the payment of my debts, and other expenses to which my executor shall be put in carrying this my will into execution, £25; and I desire that any other costs and expenses to which my executor shall be put to in proving my will, shall be deducted rateably and proportionably from each of my legacies, except from the £975 bequeathed to my nephews, Andrew and John Thomas O'Bierne, and my niece, Alicia O'Bierne, which I wish to remain unbroken—and I mean by every £100 a £100 of said stock; and I do hereby name and appoint John Dalton, of Summer-hill, counsellor-at-law, the executor of this my last will and testament, and I constitute and appoint him my residuary legatee to take to his own use any money of which I may die possessed, and which is not herein-before disposed of, and also to take to his own use the amount of any of the aforesaid legacies which may become void by the death of the respective legatees happening before my decease.

ALICIA O'BIERNE.

Signed before me this 6th

November, 1829,

THOMAS KING.

The petition then stated that Alicia O'Bierne died on or about the 12th of April, 1862, and thereupon petitioner proved her said will in the Court of Probate. That said Andrew O'Bierne and Alicia O'Bierne, junior, in testatrix's will mentioned, died in the lifetime of testatrix after they had attained their respective ages of 21 years. That several of the legatees [naming them] of the last-mentioned £325 died in testatrix's lifetime. That petitioner submits he is entitled to said legacy of £35 so bequeathed to him, and also to the legacies bequeathed to said Andrew O'Bierne

and Alicia O'Bierne, and also to the sums bequeathed the other legatees who died in the life-time of testatrix." The only contention in this case was, whether the two legacies of £325 each, bequeathed to Andrew O'Bierne and Alicia O'Bierne, lapsed by reason of their deaths in the life-time of testatrix; if they lapsed then the petitioner, John Dalton, contended that he was entitled thereto under the residuary clause in the will, while respondent, J. T. O'Bierne, contended that the legacies to Andrew and Alicia did not lapse, but that he was entitled thereto under the clause of survivorship.

Robert Ferguson for the petitioner.—By the terms of the will of Alicia O'Bierne, the elder, the legacies of £325 each to her nephews, Andrew O'Bierne and John Thomas O'Bierne, and to her niece, Alicia O'Bierne, were payable to her nephews at the age of 21 years, and to her niece at that age or marriage; and in the event of any of them dying before his or her legacy becomes payable, there is a gift over to the survivor or survivors. "Payable" in this case means payable on attaining the period which gave the legatee the capacity to take, and not the time of actual distribution on the death of testatrix; and the legatees, Andrew and Alicia, having died in the life time of testatrix, after having attained the age of 21, at which the legacy in that sense was payable, the contingency on which the gift over depended did not arise, and these legacies, therefore, lapsed. In the construction of this will we have to consider the construction which has been given by a series of authorities to the word "payable," and to the word "survivor" when they occur in a will. In *Jarman on Wills*, 2nd vol., 739, 3rd edition, the result of the authorities on the construction of the word "payable" is thus stated—"A money fund is given to a person for life, and after his decease to his children, at majority or marriage, with a gift over in the event of any of the objects dying before their shares became payable. In such case it becomes a question whether the word "payable" is to be considered as referring to the age or marriage, on the arrival or happening of which the shares are made payable, or to the actual period of distribution, or, in other words, whether the shares vest absolutely at the majority or marriage of the legatees in the lifetime of the legatee for life, or whether the vesting is postponed to the period of such majority or marriage, and the death of the legatee for life. As the latter construction exposes the legatee to the risk of losing the testator's provision, in the event of their dying in the life time of the legatee for life, although they may have reached 21, or even advanced age, the Courts strongly incline to hold the word "payable" to refer to the majority or marriage of the legatees." And at page 744 he says—"Of course where there is no previous life estate, and the legacy is made payable at a particular time, with a gift over in case of death before the legacy becomes payable, the word "payable" is held to refer to the time specified, and not to the death of the testator." It is quite clear, therefore, that the text of *Jarman*, if well founded, governs the present case. In the cases he refers to for the last proposition, *Woodburne v. Woodburne* (3 De Gex & Sm., 648), *Jenkins v. Jenkins* (Bett's Suppl. to Ves., 264), the point does not appear to have been questioned. In *Darrel v. Moleworth*

(2 Vern., 378), a legacy was given in words exactly similar to those used in this will. The legatee died in testator's life time, and it was held that the legacy went over to the survivor. In the case it is not stated whether he died under 21 or not; but *Jarman*, in referring to this case, 2nd vol., p. 717, says—"D. T. died in the life time of testator (it is presumed under 21, though the fact is not stated). He applies the same observation to *Welling v. Bains* (2 Eq. Ca. Ab. 545). It was clearly, therefore, the opinion of *Jarman*, that if the legatee had attained the age of 21 in the life time of testator, there would be no gift over, and the legacy would have lapsed. *Crozier v. Crozier* (4 Russ., 378) strongly sustains this opinion. *Hughes v. Ellis* (19 Jur., 216), is to the same effect. In that case there was a gift to A., but in case he dies intestate, over. Held, to lapse if A died in testator's life time. Next as to the meaning of the word "survivor" in this will—Is it survivor of the testatrix, or survivor of the legatee, who dies before his or her legacy becomes payable? Clearly, on the authorities, it means survivor of the legatee. By the 24th General Rule of Construction it is laid down "that a testator must be presumed to calculate on his will taking effect" where, therefore, he uses the word *survivor*, he must be held to mean *survivor of some one else than himself*, as he must be presumed to suppose that all his legatees will survive him. In all the recent cases this view has been fully adopted; and in no event will the word *survivor* be held to mean survivor of the testator if there is any other event in the will to which it can be referred. In the earlier cases, commencing with *Stringer v. Phillips*, (1 Eq. Ca. Ab. 393), and down to *Perry v. Woods* (2 Ves. Jr. 634), the word *survivor* was referred to the death of testator; but Sir. P. Arden, who decided *Perry v. Woods*, came to a different construction in *Russell v. Long* (4 Ves. 551), and referred it to the death of the tenant for life, holding that it was an unnatural construction to refer it to the death of testator, and should never be adopted if there was any other event to which it could be referred. And in *Haus v. Haus* (3 Atk. 524), Lord Hardwicke says,—"It is not probable he meant survivor of himself." In that case he referred it to the contingency of death of legatee under 21. *Cripps v. Walcott* (4 Mad. 11), is the leading case in this construction, and from that to *Shaw v. Magill* (7 Ir. Jur. 208), the decisions have been uniform. In this will we have to choose between survivors of the testators and survivor of a legatee who dies under 21 or marriage. We must, on the authorities, refer it to the latter; and as no legatee died under 21 or marriage, there is no survivor in the sense intended, and the gift over fails, it must therefore lapse. *Spurrell v. Spurrell* (11 Hare, 154) is the principal case relied on for a different construction. In that case survivors was construed to mean survivors at the time of actual distribution; that is, at the death of testatrix. But that case was peculiar. There was no gift there save in the direction to distribute. After payment of a legacy of £200, she directs her executors to distribute the residue amongst her surviving brothers and sisters. On this the case appears to have turned. There is no other event to which it could be referred. In *Tribe v. Newland* (5

De Gex. & Smale, 236), a legacy of £3,000 was bequeathed—the interest to the daughter of the testatrix for her life; after her decease to her children, to be paid at 21. As to sons, at that age or marriage; as to daughters, with *benefit of survivorship*. Survivorship was construed to mean not survivorship of testatrix, not survivorship of tenant for life, but survivorship *inter se*, so as to attain 21. Here there were three events to select, and survivorship *inter se* considered the true construction. The case appears to govern the present. In the present case there was no survivorship *inter se*, as all attained 21; there was therefore no gift over. It has, however, been contended that the testatrix could not have intended to give this fund or any part of it away from the principal objects of her bounty to persons who were manifestly secondary objects. The 13th General Rule of Construction is, however clear on this point:—"The fact that a testator did not foresee all the consequences of his disposition is no reason for varying it." And again, the 15th General Rule,—"That favour or disfavour to the object ought not to influence the construction." The testator here, of course, contemplated, or must be presumed to have contemplated, that all the objects of her bounty would survive her; but a lapse is not to be prevented by a testator not having contemplated such an event. She clearly intended that the legatees should take indefeasible interests at 21 or marriage; and she did not provide for the events which have occurred, viz., that some of them took an indefeasible interest in her lifetime, and by their death a lapse has occurred.

Oliver J. Burke, for the respondent.—John Thos. O'Bierne, the only nephew surviving at the death of testatrix, is clearly entitled to the shares of his brother and sister, who died in the lifetime of testatrix, the words of the will being, "that if either or any of my nephews or nieces shall die before their legacy or legacies become payable, then that the share of the person or persons so dying shall go the survivors or survivor." Had the will stopped here, then there might be more difficulty than really exists in arriving at the true meaning of testatrix. The will in itself clearly demonstrates that survivor meant surviving at the time of distribution, for the reasons following:—The testatrix in her will declares that she is possessed of £1,300, Government Stock, which she first divides into four parts; and she gives £325 to Andrew O'Bierne, £325 to Alicia O'Bierne, and £325 to John Thomas O'Bierne, and the fourth sum of £325 she divided into a number of smaller legacies, only one of which was a sum of £35 to petitioner if he should act as her executor. The testatrix having thus divided the £1,300 proceeds, in case all three of her nephews and nieces should die before their legacies should become payable, to deal with those sums, making on the whole £975; and she then distributed this sum into a number of trifling legacies, and only bequeaths thereout the small sum of £50 to the petitioner; so that if the petitioner's construction be correct, the intention of testatrix was, that if the three legatees die before the testatrix that John Dalton would take just £50; but if the two die, then he takes £650. Can it be held that the testatrix, who was aunt to the legatees, meant to leave to Dalton

£50 in case all three died, and £650 if two died, as happened, to the prejudices of her nephew? The name of John Dalton, as specific legatee, does not occur from the beginning to the end of the will, except for this sum of £50, and not even for that sum unless said Andrew, John Thomas, and Alicia, all die before their legacies become payable, and £35 to him, and that merely if he should act as executor. True it is, that provision is made for him as residuary legatee in the last clause to take all legacies that shall become void by reason of the death of the legatees happening before her decease. But it is submitted that the legacies testatrix had so intended to dispose of in case they should lapse were the several small legacies above mentioned, and had no reference to the sums bequeathed to her nephews and niece in the will. Where words of ambiguous meaning are used, the intention must be collected from the context; and not alone from the context, but from the probability of what testator's intention was. In *Reeder v. Over* (3 Brown's C. C. 240), which was a question on the construction of a will, testator ordered the interest of the residue to be paid to his sisters for life; and in case any of them should die, leaving issue, then to transfer the principal of the residuum to the children of the sister so dying at twenty-one: one of the sisters died in the life of testator; and it was contended that the sister having died before testator that her children could take nothing, the legacy of the sister having lapsed. But the Lord Chancellor decided in the children's favour, observing that in a will so loosely drawn it was more probable that that was testator's intent than the contrary.—Here the probability is that she intended that her nephews and niece would take before the lawyer, John Dalton, who was drawing the will, and whose name, save for £50, was never mentioned, and that only in case all of them died; and a sum of £30 to him in his capacity of executor. Such, no doubt, is the probability. But words of ambiguous meaning are here used. "Payable" in many cases has been held to refer to 21; and also, in many cases, to the period of death of testator. Thus in *Darrell v. Molesworth* (2 Vern. 378), ulterior legatees are held to be entitled, and in a note thereto it is said that it may be laid down as a general principle that where the object of a testator's bounty having a vested interest in the subject dies in the lifetime of the testator, or not having a vested interest dies before the time marked out for the possession, the legacy becomes lapsed, but where there is an object of bounty ulterior the person to whom the legacy is immediately given, and who is interested therein, and who survives the testator, then the death of the immediate legatee in the lifetime of the testator will not intercept his intended bounty to such ulterior object. In that case a legacy of £50 was given to D. T. at 21 or marriage; and at the close of his will (which contained several pecuniary bequests) the testator added, that "if any legatee died before his legacy was made payable, the same should go to the brothers or sisters of such legatee. D. T. died in the lifetime of the testator (it is presumed under 21, though the fact is not stated), and it was adjudged it was no lapsed legacy, but went to the sister of the legatee. In like manner in *Willing v. Baine* (2 Eq.

Ca. Ab. 545). This is also reported in 3 P. W. 113; but an omission of the children being named is made in that report—*Walker v. Mairn* (1 Jac. & Walk. 1); *Humberston v. Staunton* (1 V. & B. 388). *Humphreys v. Howes* (1 R. & My. 639) followed *Willing v. Baine*; and there a testator bequeathed the residue of his personal estate to trustees upon trust for A. B. & C, for their lives, and to the survivor for life; and after their decease upon trust to transfer and pay the same to E. (son of B.) and F. (son of C.), share and share alike: and in case E. or F. should happen to die before his share of the trust money should become payable without having issue of his body, then his share to go to the survivor; and in case both should die before their share should become "payable," without having issue, then over. E. died in testator's lifetime without issue. It was contended that the event intended to be provided against was the death of the legatees after the decease of testator, until which event it could not be properly said to have any shares in the property. But Sir J. Leach held that *Willing v. Bain* was applicable; and accordingly the ulterior bequest took effect notwithstanding the death of the legatees in the testator's lifetime.—*Furrer v. Barker* (9 Hare, 744); The next thing to be considered is the meaning of the word "survivor." Survivor here evidently refers to survivor at testator's death, and not the survivor at 21 years of age. A clause of survivorship *prima facie* means, to use the words of Lord Cranworth in the case of *Young v. Robertson* (8 Jur. N.S. 827), "the time at which the property to be divided comes into enjoyment, that is to say, if there be no previous life estate at the death of the testator." No life estate is given here to any person, but an absolute gift to the survivor at the time the legacies should become payable, viz., at the death of testatrix. In *Cripps v. Walcott* (4 Hare, 11), the Vice-Chancellor Sir John Leach says, "I consider if a legacy be given to two or more, equally to be divided between them, or to the survivors or survivor of them, and there be no special intent found in the will, that the survivorship is to be referred to the period of division if there be no previous interest given in the legacy than the period of division on the death of testator—*Daniel v. Daniel* (6 Ves. 297); *Spurrell v. Spurrell* (11 Hare, 154.)

Ferguson replied.

Dec. 12.—MASTER BROOKE—This is a question between the petitioner, who is executor and residuary legatee, claiming two sums each of £325 stock as lapsed legacies, and respondent, John Thomas O'Bierne, who contends that they are not lapsed, but bequeathed over to him. November 6, 1829, is the date of the will of Miss Alicia O'Bierne, who lived till the present year, 1862, and so survived some of the legatees, and in particular, her nephew, Andrew, and her niece, Alicia O'Bierne. Some stress has been, in the argument, laid upon the special wording of the residuary clause, viz.:—"I appoint J. D. my executor, and also my residuary legatee, to take to his own use the amount of any of the aforesaid legacies which may become void by the death of any of the respective legatees happening before my death." But I put it entirely out of consideration, for it merely defined the word "residuary

legatee," and adds nothing to their legal import. The question must be decided by the words of the bequest by which testatrix left £325 Government 4 per Cent. Stock to her nephew, Andrew O'Bierne, "to be paid to him on attaining the age of 21, and I desire that the Government interest thereof shall be paid from time to time by my executor for the use of the said Andrew, but only for his education and advancement in life." She then left another £325 of like stock to her nephew, John Thomas O'Bierne, the respondent, "the principal and interest to be paid for his use in like manner as the principal and interest of his brother Andrew." She then left another £325 of like stock "to my niece, Alicia O'Bierne, on the day of her attaining the age of 21, or on the day of her marriage, which should first happen, provided such marriage shall be with the consent of my executor, and shall not take place before she is 18 years of age; and I desire that the Government interest of the said legacy shall be paid to her use, but only for her education or advancement in life; and I desire that, if either or any two of my said nephews and niece shall die before their said respective legacy or legacies become payable, that then the share of the person or persons so dying shall go to the survivor or survivors, share and share alike, and the principal and interest so increased shall be paid to such survivors or survivor, at the same time, and for the same purposes, prescribed in the case of the single legacy of such survivors or survivor; and, in case all three shall die before their said respective legacies become payable," then she left the said £975 in ten several sums of various amounts, one of which was to the Very Rev. Dr. Blake, £100, to be applied for masses for her soul, and the souls of her parents, friends, and relations; and, in case Dr. Blake should die before the contingency on which said £100 may be payable, then the £100 to some other clergyman for same purpose. Andrew and Alicia died before the testatrix, John Thomas survived, and now claims the whole £975; petitioner contends that £650 of it lapsed to him as residuary legatee. Suppose a legacy to A, payable at 21, and if A die before 21, then to B. If A die a minor in testator's life time, it is well settled that B will have the legacy. There is no lapse. The very event on which B's legacy was made contingent has taken place, and his title is complete: per Master of the Rolls, *Humberston v. Staunton* (1 V. & B., 388); it was so decided in *Willing v. Bayne* (3 P. Wms., 113) by Lord King, citing two prior cases in Vernon, 2 Jarman, 3rd edition, 714; but if A attained his age and died before testator, B has no title, the event on which his legacy depends has not yet come to pass: same case, and 1 Russel, 517, *Williams v. Parker*, and *Cox v. Parker* (22 Bew., 168); *Underwood v. Ewing* (4 D. M. & C., 633). To which of those two classes does this case belong? The answer depends on the meaning of the word "payable." Petitioner contends that it means at the respective ages of 21, whether those events took place before or after testator's death; he insists that these legacies were payable in Miss O'Bierne's lifetime: a very violent construction. To sustain his argument, he relies on *Hope v. Clifton* (6 Ves.), and like cases. But, in 9 Vesey, 433, Lord Eldon confines those violent decisions on

the word "payable" to cases of marriage settlements. 2 Jarman, 740, collects all those cases of marriage settlements, and says, that as to wills, the question must depend on the intention, and that cases are to be found of both constructions; in some, the vesting was held to take place at majority, and in the lifetime of the tenant for life; in others, it was suspended till the period of actual distribution (i. e., the death of the tenant for life) according as the language of the will varied. He gives, however, no example of the latter class. Not one case like this has been found in which the legacy is immediate, and the question arises (by reason of the legatee's death before the testator) between the legatee over and the residuary legatee, whether a legacy is deemed "payable" in the lifetime of the testator. It is plain that the stress put upon the word "payable" in cases of the *Hope v. Clifden* class, has arisen out of the anxiety to have the portions vested in the lifetime of the parents. But in *Farrar v. Barker* (9 Hare, 744), Sir J. Turner says, that those cases have gone far enough according to *Wartford v. Moore* (3 My. & Cr., 289), and gives three reasons for not following them in the case before him, one of which is, that it is the case of a will, not of a marriage settlement; and another, that the testator was not *in loco parentis*. Leaving, now, the cases turning on the word "payable"—a very important decision occurs on the word "surviving;" *Spurrell v. Spurrell* (11 Hare, 54), *coram* Wood, V.C. Testatrix left all her property to her mother for life, and at her death, to my surviving brothers and sisters equally. The mother died. Then four brothers died. Then the testatrix died. Two brothers survived, and claimed all; and so it was decided. The Vice-Chancellor taking a common-sense view (p. 59), considers that the testatrix meant "surviving" at the time of distribution, which could not be before the death of the survivor of herself and her mother, a point of view strikingly applicable to the case before me; for when this lady, the testatrix, Miss Alicia O'Bierne provided for an event which was to arise "when the legacies should be payable," is it not startling to insist that she meant a time antecedent to her own death? and remember that a will is to be taken as speaking at the time of the death. In the last case, the Vice-Chancellor rested much on the authority of *Daniel v. Daniel* (6 Vesey, 297), before Sir W. Grant, which is a very strong case to the same effect. I propose to apply the principle of *Spurrell v. Spurrell* and *Daniel v. Daniel* to this case. In them, as here, the question was, to ascertain the time at which the contingency was meant to occur. In them, the contingency was not expressed, as here, in a formal conditional clause, but included in the word "surviving." But that diversity makes no essential difference. In each case, the question is virtually the same, viz., at what time is the conditional and ulterior legacy to vest? *Spurrell v. Spurrell* and *Daniel v. Daniel* decide that it shall be at the time when the money is actually payable, and I think this case should be governed by them. It is argued that the word "payable" has acquired a technical meaning, inconsistent with this view. I know it has been so construed in a long line of cases, chiefly upon marriage settlements and provisions by donors

in loco parentis, but the Courts have refused to extend these cases further, and I seek in vain for any instance in which a testator is held to have meant that his legacies were to be considered payable in his own lifetime.

Feb. 17.—The case, on the application of the counsel for the petitioner, was re-argued at considerable length.

Feb. 18.—MASTER BROOKE.—This case was very fully re-argued yesterday. Counsel for the petitioner relies much on the following passage in 2 Jarman, 3rd ed. 744: "Of course, where there is no previous life interest, and the legacy is made payable at a particular time, with a gift over in case of death before the legacy was made payable, the word "payable" is held to refer to the time specified, and not to the death of testator." *Woodbourne v. Woodbourne* (3 D. G. & S., 643) and *Jenkins v. Jenkins* (Betts' Suppl. to Vesey, 264, p. 250 of ed. 1817), are cited in proof of this position. But the two cases cited do not touch the point. In both, the testator died before the period assigned for payment. A further confirmation of my view is in *Bythesin v. Bythesin* (23 L. J. Ch. 1004), in which the decision of Vice-Chancellor Wood, was confirmed, on appeal, by Lord Chancellor Cranworth and Lord Justice Turner, and in which the doctrine of *Hope v. Clifden*, as applied to wills, was further discountenanced; and Lord Justice Turner remarked, that it never had been applied in derogation of the claim of a legatee over, or contingent remainderman, but only to displace the claim of an heir-at-law or residuary legatee in favour of a legatee. How strongly that applies! Here the contest is between the residuary legatee and a legatee over, and I am asked by the former to displace the claim of an evidently favoured legatee, by construing words contrary to their plain, grammatical meaning. Upon the whole, I hold to my former opinion.

Decretal order accordingly.

Court of Common Pleas.

[Reported by J. Field Johnston, Esq., Barrister-at-Law.]

LYSAGHT v. LEE.—Nov. 19, 1862.

Setting aside Defences.

- A defence to an action for breaking up pasture and meadow land, and cropping and sowing the same without good and sufficient manure, that the defendant did not break up or convert into tillage, or crop or sow the same without sufficiently manuring the same, and using good and sufficient manure, is embarrassing.*
- A defence to an action for use and occupation, that the defendant did not use and occupy at the time in paragraph and bill of particulars mentioned, is embarrassing.*
- A defence to an action brought to recover the rent of premises let by the plaintiff to the defendant, that the defendant paid all rent due up to, &c., in manner hereon endorsed, with an endorsement of particulars which sets out two bills of exchange, and their dates, will not be set aside as embarrassing.*

Where, upon a motion to amend or set aside defences, the Court directs some of the defences to be amended upon grounds different from those laid in the notice of the plaintiff's motion, this circumstance will go to the costs of the motion.

W. Brereton, Q.C., for the plaintiff, moved that the defences to the first, sixth and seventh counts of the summons and plaint might be set aside as embarrassing. The first paragraph charges the breach of a covenant in a lease by the defendant to use certain lands in the Co. Clare in a good and husbandlike manner in the following terms, that at the time when the defendant entered into said covenant, a large portion of said lands had been laid down in pasture and meadow land, and that the defendant broke up same, and cropped and sowed the same without good and sufficient manure. The defendant has pleaded that he did not break up or convert into tillage, or crop or sow the same, without sufficiently manuring the same, and using good and sufficient manure. The words, "without good and sufficient manure," are connected in the breach with the words "cropped and sowed," and the defence embarrassingly applies them to the whole, including the "breaking up." The sixth count of the summons and plaint is for use and occupation of other lands called Magherallen, and the defendant has pleaded that he did not use or occupy the said lands at the time in said paragraph and bill of particulars mentioned. This must mean for the time, or during the time mentioned. The seventh count is for half a year's rent of premises let by the plaintiff to the defendant, and the latter has pleaded that he paid all rent due up to, &c., in manner hereon endorsed, and the endorsement referred to sets out a bill of exchange at three months, dated 19th February, 1861, and another bill of exchange at twelve months, dated 19th November, 1861. This plea purports to be a plea of payment, but the bills are not stated to have been paid, and therefore it is insufficient. The defendant should have averred a payment in cash, and said nothing about the bills. [*Monahan, C.J.*—Whether this plea is tricky and embarrassing, will depend on the fact: if these bills have been paid, there is nothing tricky or embarrassing about it.] If the defendant had pleaded accord and satisfaction by these bills, that would be clearly bad.—*Davis v. Gyde* (2 A. & R., 623). [*Christian, J.*—A plea that certain bills were paid would not be bad. Now, here the plea is payment, and then the particulars are given. *Monahan, C.J.*—It will not be payment if it turns out at the trial that the bills were not paid.] Those bills may be outstanding against the plaintiff. [*Christian, J.*—That might be ground for a motion for further particulars. *Monahan, C.J.*—The only case in which a judge will set aside a plea, is when it is so embarrassing on reading it, that he himself or the parties do not know what the issue is.]

D. Heron, Q.C., contra.—As to the plea to the seventh count, every objection is open to the plaintiff at the trial. He does not allege that the bills were not paid.—[*Ball, J.*—The plea means that the bills were paid; it substantially says so.] The plea to the sixth count pleads the fact as required by the Common Law Procedure Act. [*Christian, J.*—You should

add, "nor for any part thereof," and change "at" into "during."] As regards the defence to the first count, we do not deny that we broke up the land. [*Christian, J.*—The plea will mean one of two things. *Monahan, C.J.*—You might show at the trial under it either that you had used sufficient manure, or that you did not break up at all. A plea was set aside a short time ago which stated, "I did not arrest maliciously, or without reasonable or probable cause."] Some of these defences are good.

MONAHAN, C. J.—Some of these defences we have ruled must be amended, but on grounds different from those relied on by the plaintiff, and under these circumstances we shall either make the costs costs in the cause, or direct the parties to abide their own costs.

Rule accordingly.

Court of Probate.

[Reported by W. R. Miller, Esq., LL.D., Barrister-at-Law.]

IN THE GOODS OF LYDIA AIREY, DECEASED.—
March, 31.

Limited Administration with a copy of the will annexed to a legatee—English Diocesan Probate.

Administration to the goods of a testatrix, with a copy of her will annexed, granted to a legatee for life in the will, limited to receiving the dividends of the legacy for her life, the legacy having been lodged in the Court of Chancery, in Ireland, by the trustees in the will, under the Trustee Relief Act, and invested, and that Court having declared the legatee entitled to the dividends; the will had been proved in an English Diocesan Court and no other assets were in this country.

Dr. Miller on behalf of Mrs. Mary Parker, a legatee for life in the will of Mrs. Lydia Airey, deceased, late of Newcastle-on-Tyne, in England, moved on affidavit for leave to apply for in the registry, and obtain a grant of letters of administration of the goods of the deceased with a copy of her will annexed, limited to receiving the dividends of the sum of £1,036 6s. 11d. Government New 3 per cent Stock, now in the Bank of Ireland Mrs. Airey by her will, made under a power, dated 26th of July, 1826, had directed a sum of £1,000 to be invested, the dividends thereof to be paid to Mrs. Parker for her life, and the principal on her death to be divided amongst her children, and she appointed her husband, Robert Airey, her executor. Mrs. Airey died in 1828; and Robert Airey, her husband, proved her will in the Diocesan Court of Durham. Robert Airey died in the year 1861, having by his will appointed Susan Emma Airey and Frances Anne Airey and William Crighton his executors, the two former of whom proved his will in the Diocesan Court of Carlisle. The trustees in Mrs. Airey's will lodged the legacy of £1,000 in the Court of Chancery, Ireland, under the Trustee Relief Act, and it was then invested and produced the above mentioned sum of stock, and Mrs. Parker petitioned that Court for the dividends. The Master of the Rolls made an order in that matter and declared her enti-

thereof, and also the churchyard, to the Bishop of Derry and his successors, with this intention, that they should be consecrated to the service of God; and further, licence is granted to the bishop to receive, enjoy, and retain the said church, or the fabric of the said church, and the ground and soil thereof, and all and singular the rest of the premises, with the appurtenances, to him and his successors for ever, "to have and to hold to the said Bishop of Derry and his successors, in free and perpetual alms, the Statute of Mortmain, or any other statute, act, or ordinance to the contrary thereof in anywise notwithstanding." A plain grant of the church and soil thereof to the Bishop and his successors, making this church the bishop's church, and therefore a cathedral church; the bishop's church being so called because it has in it his throne or cathedra. The patent, however, proceeds—"And further, we will, and by these presents, for us, our heirs and successors, determine and ordain, that the said church, or the fabric of the said church, shall be consecrated and dedicated as well for a cathedral church, for the Bishop of Derry and his successors, and the Dean and Chapter of the Cathedral Church of St. Columba of Derry, for the time being, as for a parish church, for the use of the inhabitants of the said city of Londonderry, and the parishioners of the parish of Derry. *alias* Templemore." It is said that the whole city of Derry is within the parish of Templemore; I believe this is so, but it is immaterial for this inquiry. It seems then plain that this church is both a cathedral and a parish church, and was so constituted at its original consecration. It is not within either of the statutes referred to; it is not an ancient cathedral permitted to be used as a parish church, nor a parish church permitted to be used as a cathedral, in either of which cases the church retains its original character; but it is in its original consecration made at the same time cathedral and parochial. It must then have all the privileges, and be subject to the laws relating to both species of church, so far as these laws and privileges are consistent with each other. The Bishop, the Dean, and Chapter, and the parishioners of Templemore, have each their rights and privileges, conferred on them at the same time and by the same instrument. The parishioners of Templemore have a right to attend Divine service in it; they have a right to the pews in it, and they had the duty and the burden of keeping it in repair imposed upon them until the abolition of Church rates. These rights of the parishioners in no way conflict with the rights of the Bishop, or of the Dean and Chapter. Now the law as to pews in a parish church is very well defined and settled; in the present case it has not been questioned. It cannot be more clearly or accurately expressed than it has been by Sir John Nicoll, in *Fuller v. Lane* (2 Add. 425). He says:—"By the general law and of common right all the pews in a parish church are the common property of the parish; they are for the use in common of the parishioners, who are all entitled to be seated orderly and conveniently, so as best to provide for the accommodation of all. The distribution of seats rests with the churchwardens, as the officers, and subject to the control of the ordinary. Neither the minister nor the vestry have any right whatever

to interfere with the churchwardens in seating and arranging the parishioners, as is often erroneously supposed; at the same time the advice of the minister, and even sometimes the wishes of the vestry, may be fitly invoked by the churchwardens, and to a certain extent may be reasonably deferred to in this matter. The general duty of the churchwardens is to look to the general accommodation of the parish, consulting as far as may be that of all its inhabitants. The parishioners have a claim to be seated according to their rank and station, but the churchwardens are not, in providing for this, to overlook the claims of all the parishioners to be seated, if sittings can be afforded them. Accordingly they are bound in particular not to accommodate the higher classes beyond their real wants, to the exclusion of their poorer neighbours, who are equally entitled to equal accommodation, supposing the seats to be not all equally convenient." And Lord Stowell, in *Blake v. Usborne* (3 Hag. 733) says:—"By the general law the use of all pews belongs to the parishioners; they are to be seated therein, in the first instance, by the churchwardens. The power, however, of the latter is subject to the control of the ordinary, who is to see that the churchwardens exercise their authority discreetly for the proper accommodation of the parishioners at large. This is the law, not merely as held in the ecclesiastical courts, not merely to be found in ecclesiastical authorities, but is the common law of the land, as laid down by the highest common law authorities." Now, it must be borne in mind that in these passages the learned Judges I have referred to use the word "seat," in the sense of a sitting, and not of a pew. Every parishioner, rich or poor, has an equal right to be seated, that is, to a sitting for himself individually, not to a pew, which might accommodate several persons. In seating the congregation the convenience of all is to be consulted—all, rich and poor, without money and without price. Sir John Nicholl, in the case I have referred to, after adverting to the allocation of pews to individuals by means of faculties, says:—"Some instances there are of faculties at large—that is, appropriating pews to persons and their families, without any condition annexed of residence in the parish; but such faculties are, so far at least, merely void; that no faculty is deemed, either here or at common law, good to the extent of entitling any person who is a non-parishioner to a seat even in the body of the church. As to an aisle or chancel, that, indeed, may belong to a non-parishioner; for the case of an aisle or chancel depends upon and is governed by other considerations. But whenever the occupant of a pew in the body of the church ceases to be a parishioner, his right to the pew, however founded, and how valid soever during his continuance in the parish, at once ceases and determines, though the contrary is very often supposed. So again of pews annexed by prescription to certain messuages: it is often erroneously conceived that the right to the pew may be severed from the occupancy of the messuage. It is no such thing. It cannot be severed, it passes with the messuage, the tenant of which, for the time being, has also *de jure* for the time being the prescriptive right to the pew." In *Walter v. Gunner* (1 Hag. Cons. 314), referred to by Dr. Battersby, which was a pro-

ceeding calling upon the churchwardens of Teddington to seat Mr. Walter, the churchwardens put in a return to the citation, stating that the church was small, and amongst other things that there was a custom in the parish by which certain seats appurtenant to houses were let by the owners to non-parishioners. Lord Stowell held the return bad, since it pleaded a custom which is evidently illegal, and cannot be supported, viz., that pews are appurtenant to certain houses, and let by the owners to persons who are not inhabitants of the parish. "All private rights," he says, "in pews must be held under a faculty or by prescription, which presumes a faculty, and no faculty was ever granted to that effect, for the ordinary must have exercised his discretion to depopulate the church of its own proper inhabitants if he could have granted such a faculty." This is strong language, indicating that to allocate a pew in a parish church to a non-parishioner would be a most improper exercise of the discretion of the ordinary. *Byerley v. Windus* (5 B. & C. 1) referred to by Dr. Walsh, was a case of prohibition. Staple Inn, Holborn, claimed seven pews in the parish church of St. Andrew, Holborn. The libel in the Ecclesiastical Court stated that Staple Inn was extra-parochial, and surrounded on all sides by the parish of St. Andrew; that the Inn had held these pews and repaired them from time immemorial. A prohibition was prayed, on the ground that the Ecclesiastical Court could not try a question of prescription. Judge Bayley, delivering judgment, said:—"The claim in question is by non-parishioners in respect of messuages out of the parish. These messuages are in no parish, but are extra-parochial, and surrounded on all sides by the parish of St. Andrew. But what right can the inhabitant of an extra-parochial place have in the body of a parish church, except by prescription? He contributes to none of the expenses of the church; they are borne exclusively by the parishioners. To whom does the use and enjoyment of the body of the church belong? To the parish and its inhabitants. The ordinary, indeed, has the right of disposing of seats; but can he dispose of them to a non-parishioner? I apprehend not. Is not his right confined solely to resident parishioners? I take it to be clear that it is. Why is a faculty to a man and his heirs bad? Because it proposes to give the right, whether the man and his heirs continue resident or not. Why cannot a seat be claimed, either by faculty or prescription, as appurtenant to land? Because it is in respect of inhabitancy that it is to be used. Why, if a man quits the parish, is his right to use a seat, whatever was the nature and origin of that right, at an end? Because he has ceased to be a parishioner. Why, if a seat is appurtenant to a house, cannot the owner of the fee restrain his tenant from the use of it? Because the seat is for the benefit of the house—for the inhabitant of the house; not for the benefit of the owner if he cease to inhabit it. Upon authority and principle," he says, "I am of opinion that extra-parochials cannot retain a pew in the body of a church otherwise than by prescription, if they could do so by prescription." In *Lousely v. Hayward* (1 Y. & Jer., 583)—a case which was decided about the same time as *Byerley v. Windus*, though it was not referred to either in the argument or in the judgment in that case

—Chief Baron Macdonald held that a seat in the body of a church might be prescribed for by a non-parishioner, as appurtenant to a house not in the parish, on this ground—that the house might have been at one time in the parish, and, therefore, the prescription might have had a legal origin. This case seems to conflict with *Byerley v. Windus*; but they are capable of being reconciled. In *Byerley v. Windus* the pleading stated that Staple Inn had been always extra-parochial, not belonging to any parish, and, therefore, it showed on the face of it that the prescription could never have had a legal origin. However, I am far from acquiescing in the judgment of the Chief Baron. I do not think it is good law. I think, as regards a pew in the body of a parish church, the right thereto ceases, no matter how created, or how long it had existed, the moment the occupier ceases to be a parishioner, whether by leaving the parish or the parish leaving him. He ceases to be liable to the obligations and burdens of a parishioner. Why should he enjoy the rights of one? However this may be, it is plain that a non-parishioner cannot claim a pew by any means but by prescription, if he can by that. There is no case of prescription here. The church itself was built only in 1663. It is, then, clear, both by the ecclesiastical and the common law, that a pew or sitting cannot be allocated to a person who is not a parishioner. So much is this the case that a faculty to a man and his heirs is bad, because they may become non-resident. If such a faculty is bad because, by possibility, he or his heirs may become non-parishioners, *a fortiori*, a faculty to a non-parishioner would be bad; and, if a faculty would be bad, it would be difficult to maintain that it would be either a legal or a prudent exercise of the discretion of the ordinary to allocate a pew to a non-parishioner by a less formal instrument. But it is said that some of these non-parishioners occupied seats in a gallery which had been removed during the alterations, and which gallery, it is said, had been erected by them or those under whom they claim. It is not the case that any of these persons themselves erected the gallery, and it is not shown how they claim under those who did, or what right or power those persons had to give their pews to them. But even if they had erected the gallery, I do not think that circumstance, without a faculty, to which there is no pretension, would give a non-parishioner any right or claim to a seat. An aisle and a gallery rest on totally different grounds. A gallery is an erection in the body of a church, annexed to the church, and forming part of that which the parishioners are bound to repair; an aisle is an addition to the building. It is further argued, that this is a cathedral, that the cathedral is the parish church of the whole diocese, and that the bishop can, therefore, allocate a pew or seat in it to any person within the diocese, as all are parishioners of it. It is true, that the cathedral is the parish church of the whole diocese, because it is the church of the bishop, who has the cure of souls of the whole diocese; and, though all of the diocese may receive the sacrament there, or be married there, yet they are not bound to do so; nor were they liable to repair the cathedral, except in cases where all other funds failed. They have not, therefore, in a cathe-

dral any parochial rights. As to seats in a cathedral, I can find nothing in the books of our law upon the subject. But Francis, in his work, "De Cathedralibus," cap. 5, speaking of the nave of the cathedral, where alone the laity could properly go, says:—"In which part of the church, if there should be forms or benches for the laity, and it be necessary to regulate them, the regulation of them belongs to the bishop; but seats ought not to be permitted." It would appear, then, to be the law, that seats in the nave of a cathedral ought not to be allocated at all, that the nave should be free for all person of the diocese; at all events, the inhabitants of the parish in which the cathedral is placed have no rights in a cathedral; and if the bishop were to allocate a pew in a cathedral to any person in the diocese, it is probable that no one would have a right to question it. This possibly may be so in a church that is solely a cathedral; but in this church, which, in its original consecration, was made a parochial as well as a cathedral church, in which the parishoners of Templemore have rights, I am of opinion the distribution and allocation of pews must be governed by the law applicable to parish churches, and, consequently, that seats cannot be allocated in this church to persons who are not parishoners, and that this allocation must be amended in that respect. This will affect the allocation of three pews and four half pews. The pew allotted to Miss Dogherty is not affected by this ruling, and I shall not displace her. The other objections are all to the mode in which the church wardens have exercised that discretion which the law gives them. I see no reason to believe that they have been guided or influenced by any improper or unworthy motive, or that they have not exercised a sound discretion. I shall not, therefore, interfere with this allocation, except where I think the church wardens have erred in point of law. I cannot believe that they would allocate pews to parishoners who do not attend the church, or, if they did, that the Dean and Chapter would sanction such allocation. What, then, is to be done with these pews that have been improperly allocated? I have read carefully the allegation of the opposers. I cannot find in it any statement that any of them, except Mr. Hempton, were in the habit of attending the cathedral before the alterations; that they have been prevented by this allocation of pews attending the cathedral, or either of the other churches; that they reside nearer to the cathedral than the other churches, and that attendance on the other churches would be inconvenient to them or their families. It is evident the cathedral cannot accommodate all. I can find nothing either in the allegation or in the memorial sent to me, to enable me to make a selection from these persons and allocate those pews to them; but I find it stated in the allegation, that, by the alterations in the cathedral, the number of free seats have been greatly reduced. I regret this much. What I shall do is, I shall send this allocation back to the churchwardens, or rather to the present churchwardens, directing them to allocate these pews among the existing occupiers of pews, in such a way as to increase the number of free sittings. There is but one observation further I desire to make, and it is addressed to those who shall be allotted pews. I wish them to understand that

such allocation gives them no property in the pew. All the pews in this church are the property of the bishop. All a parishoner acquires by an allocation of a pew by the churchwardens is, a right to sit in it—a mere easement; he has no right to exclude others from it, if he and his family do not occupy the entire of it. The churchwardens have a right to fill the pews, even those allocated to parishoners. A man has no right to keep a pew unoccupied. I will give no costs.

Consolidated Chamber.

[Reported by Edmund T. Bewley, Esq., Barrister-at-Law.]

[BEFORE DEASY, B.]

M'MAHON v. M'MAHON.—April 11.

Fiat—Suppression of Facts—Discharge of Prisoner.

Where important facts have been suppressed in the affidavit to ground a fiat for the arrest of a defendant, he will be discharged, notwithstanding laches on his part in applying for his discharge.

Dowse, Q. C. (C. Palles with him), on behalf of the defendant, moved that he be forthwith discharged from the custody of the Sheriff of Clare. The defendant had been arrested on the 23rd of February last, under a fiat granted by Mr. Justice Fitzgerald, marked for £20. The affidavit then made by the plaintiff stated that the defendant was justly indebted to him in the sum of £50, on foot of five promissory notes of £10 each; but, on the motion before Judge Fitzgerald, it appeared that, as to three of them, they were not then due, and he limited the fiat, accordingly, to the amount of the two which were due. It was now sworn by the defendant, and not denied, that, as to one of those two notes making up the £20, a Civil Bill process had been brought, by the same attorney as now appeared for the plaintiff, at the Quarter Sessions in Ennis, in January, 1862, and a decree, execution, and seizure for a small amount had been had thereon; and a renewal of that decree was also had in January, 1863, none of which facts were disclosed to the learned judge when he granted the fiat. The plaintiff will object that it is too late, now, to make the application, as the defendant has been in gaol since the 23rd of February last. But delay in making this application is no ground for refusing the motion, as the objection of delay or laches only applies to cases of irregularity, and not to cases of gross suppression, such as this is: *Rodovannachi v. Soderholm* (3 Ir. C. L. Rep. 531; 6 Ir. Jur. 21); 1 Archb. Pr., 785.

P. Keogh, for the plaintiff, resisted the motion as made too late, the defendant having been arrested on the 20th of February last; and, also, on the ground, that the decree referred to was out of date, and that the plaintiff was entitled to bring this action for the balance not recovered.

DEASY, B.—In this case, I feel bound to discharge the prisoner from custody. I do not enter into the question whether the Civil Bill decree is or is not in force; but upon the plain grounds of public policy,

and of palpable suppression of facts by the plaintiff and his attorney, when the motion for the fiat was made to Judge Fitzgerald, I feel it my duty to discharge the defendant. The affidavit then stated the cause of action to be a sum of 50*l.*, as due on foot of five promissory notes for 10*l.* each. Three of them, it then appeared, were not even due, and the fiat was limited to the lowest amount for which a fiat was possible—20*l.* Now, it is sworn, and not denied, that the plaintiff got a decree for one of the notes forming that amount, and made a seizure on it, by the instrumentality of the same attorney who now appears for him; and that decree has this year been renewed. The documents before me conclusively establish that a gross suppression of facts occurred on the motion before Judge Fitzgerald, and I am certain, that had those facts been mentioned to him, he never would have granted the fiat. I am sure that I would not; as parties should in such cases state, fully and candidly, every fact which may possibly influence the court. I feel that, no matter how great delay had occurred, if such a case of suppression occurs as in this case, I would feel bound to yield to the motion, even if it should cause the plaintiff the loss of the debt. I, therefore, order the discharge of the defendant, and that the plaintiff do pay the costs of the motion.

Order accordingly.

Circuit Cases.

NOTES OF CASES DECIDED UPON THE DIFFERENT CIRCUITS
AT THE SPRING ASSIZES, 1863.

HOME CIRCUIT.

KING'S COUNTY.

[Reported by Constantine Molloy, Esq., Barrister-at-law.]

[CORAM LEFROY, C.J.]

IN RE KINSELLA.

Presentment—Building wall—Stat. 6 & 7 Wm. 4, c. 116, s. 56.

Grand jury presentment to build a wall to fence a road, and enclose a fair-green, not authorised by the 6 & 7 Wm. 4, c. 116, s. 56.

AT the presentment sessions for the barony of Upper Phillipstown, a majority of the cess payers approved of an application for a presentment to the following effect:—No. 21. To build a wall 74 perches long and 3½ feet high, to fence the road and enclose the fair-green of Cloneygowan, on road from Tullamore to Portarlinton, one shilling—6 & 7 Wm. 4, c. 116, s. 56. No notice of intention to traverse this presentment had been given, and the grand jury made the presentment. At the next assizes, when the presentments were being fiatd,

Molloy, on behalf of Mr. Michael Kinsella, a cess-payer, objected to his Lordship fiatting this presentment, on the grounds that it was illegal, not authorised by any of the Grand Jury Acts, and one which the grand jury had not the power to make. The

fair-green, which it is proposed to enclose, is a very large piece of ground in the neighbourhood of the village of Cloneygowan, on which the inhabitants of that village, and amongst them the tenants of Mr. Kinsella, had a right to put their cows, sheep, and other animals, to graze and pasture. They had also rights of way across this fair-green. They enjoyed those several rights without the slightest interruption from time immemorial. It was now attempted, under colour of a presentment, to exclude them from the fair-green, and deprive them of the rights which they had enjoyed so long. There was also a patent for holding a fair on this piece of ground. This presentment, according to the application, is sought for under the 56th section, 6 & 7 Wm. 4, c. 116. Now, that section does not authorise the grand jury to present for the enclosing of a fair-green, or of any ground. There is no section in any of the Grand Jury Acts authorising a presentment for such purpose. The 56th section empowers the grand jury to present for the erection of fences for the protection of passengers, where there are dangerous precipices or holes on the sides of any public road. There are no holes of any kind, or any precipices on the side of this road. The fencing of the road was only a pretext; the real object of the presentment was to enclose the fair-green, convert it into private property, and thus deprive the villagers of their rights. The powers of the grand jury could not be perverted to such a purpose, and the presentment should not be sanctioned.

Mr. Mitchell, solicitor, supported the presentment. It was approved of by the presentment sessions. No notice of traverse was served. *Mr. Molloy* appeared before the grand jury to oppose it, and the grand jury approved of this presentment, and passed it. Under these circumstances, the course adopted by Mr. Kinsella was unusual, especially as he did not think proper to transverse the presentment. [*Lefroy, C.J.*—What will be the effect of building this wall; will it exclude those people from the fair-green?] It certainly will; they have no right to the fair-green—it belongs to the Dean of Kildare. He purchased an adjoining property 23 years ago, and was given possession of this fair green discharged of all rights of common. The 56th section authorises this presentment; but if not, he would rely on the 50th section, which authorises the grand jury to present for fencing roads, or otherwise improving them.

Molloy replied.—The reason Mr. Kinsella has not traversed the presentment is, that he was not aware till it was too late that he should have served the notice of traverse within two days after the presentment sessions. It is true that they refused to hear any evidence that the road did not require any fencing, and that the villagers and Mr. Kinsella's tenants enjoyed rights over this fair-green, of which they would be deprived if the green were enclosed. It is too late now for the Dean of Kildare to try to deprive them of these rights after he himself, according to his own account, has acquiesced in their enjoyment for 23 years. The 50th section does not authorise this presentment; it does not authorise the enclosure of any ground. If it did, this presentment cannot be supported, for the application does not rely on the 50th section. *In re Forth* (2 C. & D. C.C. 469), and *In*

re *Newton* (Ir. Cir. Rep., 554), are decisive on this point. The presentment is illegal on the face of it, and should not be sanctioned.

THE LORD CHIEF JUSTICE refused to fiat the presentment, and it was accordingly nilled.

LEINSTER CIRCUIT.

COUNTY WEXFORD.

[Ex relatione.]

[CORAM HUGHES, B.]

IN THE MATTER OF THE GOREY PRESENTMENT.

Number of grand jurors necessary to concur in presentment—Stat. 6 & 7 Wm. 4, c. 116, ss. 33 & 37.

Quære, for the affirmation of a presentment by the grand jury, must the majority consist of twelve at least?

E. Johnstone, on behalf of the applicants for a presentment for a new road, asked his Lordship to tell the grand jury that it was not necessary that the majority in favour of the presentment should consist of twelve grand jurors. Twenty-one grand jurors only had attended, and eleven approved of the presentment, while ten disapproved of it.

HIS LORDSHIP referred it back to the grand jury to re-consider their decision, adding that, in case they were not able to come to any other conclusion than their previous one, he would then tell them his opinion.

The grand jury re-considered the presentment, and finally it was affirmed by a majority consisting of twelve.

COUNTY WATERFORD.

[CORAM O'BRIEN, J.]

IN THE MATTER OF THE PRESENTMENT TO MR. JAMES SHEA.

Compensation for Malicious Injury committed near boundary of County—Certificate—St. 6 & 7 Wm. 4, c. 116, s. 140.

Form of certificate to be made by the judge of assize when compensation has been presented for malicious injury, committed near the boundary of a county.

THE following is the form of certificate given by the judge of assize in this case, which was one of compensation for malicious injury, committed within one mile of the boundary of the counties of Waterford and of Tipperary.

In the Matter of the Presentment to Mr. James J. Shea.	} County of Waterford. 6th and 7th William IV., c. 116, sec. 140.
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WHEREAS, at this present assizes for the County of Waterford, the Grand Jury of said county presented the sum of one hundred and twenty pounds, to Mr. James J. Shea, as compensation to him for the loss of one rick of hay, which was maliciously set fire to and burned on the night of Tuesday, the thirtieth of

September last, on the lands of Kilmacomma, Parish of Inishlonegthy, Barony of Glanaheiry, and County Waterford; and said Grand Jury directed that said sum of one hundred and twenty pounds should be levied off said County of Waterford at large: AND WHEREAS said burning and malicious injury was committed within one mile from the Barony of Iffa and Offa east, in the County of Tipperary, and from the boundary between the said County of Tipperary and Waterford, Now I hereby certify that, in pursuance of the power and authority to me in that behalf given, by the provisions of the statute of the sixth and seventh years of the reign of his late Majesty King William IV., cap. 116, sec. 140, I have, at this present assizes, apportioned said sum of one hundred and twenty pounds between said County of Tipperary and said County of Waterford; and I have directed that same should be apportioned in the following manner, viz.:—that the sum of eighty pounds, parcel of the said sum of one hundred and twenty pounds, shall be paid by the said County of Tipperary, and that the sum of forty pounds, residue of said sum of one hundred and twenty pounds, shall be paid by the said County of Waterford.

Given at Waterford, this 4th day of March, in the year of our Lord, one thousand eight hundred and sixty-three.

JAMES O'BRIEN,
Judge of Assize.

COUNTY WATERFORD.

[CORAM HUGHES, B.]

[Reported by George Price, Esq., Barrister-at-law.]

LANDY, APPELLANT; HOLDEN, RESPONDENT.—Mar. 2 Civil bill—Interpleader—Appeal—14 & 15 Vict., c. 57, sec. 150.

No appeal lies from the decision of the Chairman upon an interpleader process, under the Civil Bill Act 14 & 15 Vict., c. 57 s. 150.

THIS was an appeal from the decision of J. H. Richards, Esq., Chairman of Quarter Sessions for the County of Waterford, on an interpleader process under the Civil Bill Act, sec. 150, in which the now appellant was plaintiff, and the now respondent was defendant. The Chairman had dismissed the case.

Tandy for the respondent.—No appeal lies in this case. The statute (sec. 150) is express that the money is to be handed over within ten days after the sessions. The words are, "if the said claim of property shall not be substantiated to the satisfaction of the assistant-barrister, then the said sheriff shall, and he is hereby required, upon the production to him of a dismiss, in such case, or in case of the non-production of a decree for the plaintiff therein, within ten days from the termination of the sessions at which such civil bill ought to have been brought, without further order, pay over the monies so deposited to the defendant, in such last-mentioned civil bill." It has been decided in England that no appeal lies in such cases.—*Beswick v. Boffey* (3 C. C. Cas., 3; 9 Exch., 315); *Fraser v. Fothergill* (14 C. B., 298); cited *Copinger's County Courts*, p. 194.

E. T. Power, attorney for the appellant.—The

127th section of the statute gives a right of appeal to "any person who shall think himself aggrieved by any decree or dismissal made or pronounced by any assistant-barrister." These words are sufficiently comprehensive to include such cases as the present.

HUGHES, B.—The section of the statute referred to (sec. 150) seems to exclude an appeal. The language is express that the sheriff is to pay over the money within ten days from the termination of the sessions. The cases cited show that the point has been decided in England. Section 127 appears to me not to apply to the jurisdiction established by the section we are now considering, but to apply only to the jurisdiction given by the antecedent sections. As no appeal lies, I have no jurisdiction to give costs.

COUNTY TIPPERARY—SOUTH RIDING.

[CORAM HUGHES, B.]

IN THE MATTER OF A PRESENTMENT FOR THE SALARY OF THE SURVEYOR OF THE COUNTY TIPPERARY—SOUTH RIDING.

County Surveyor's Salary—St. 6 & 7 Wm. IV., cap. 116, sec. 4—St. 24 & 25 Vict., c. 63, secs. 4, 5, & 6.

Where the Grand Jury has, under st. 24 & 25 Vict., cap. 63, sec. 4, passed a resolution increasing the salary of the county surveyor, and the presentment sessions have approved of the resolution, with modification, and fixed a lower salary than that given by the resolution, the Grand Jury can only present the sum approved of by the presentment sessions, and not that given by the resolution.

Hemphill, Q. C., applied to his Lordship on behalf of the county surveyor, to direct the grand jury to present 300*l.*, as half of the county surveyor's salary, at the rate of 600*l.* per annum. The grand jury had passed a resolution at the summer assizes, 1862, pursuant to the 24 & 25 Vic., cap. 63, sec. 4, that the county surveyor's salary should be altered to 600*l.* from 300*l.* When that resolution came before the ensuing presentment sessions, the salary was cut down to 500*l.* per annum.

HUGHES, B., stated that he was of opinion that the grand jury could present only the half of the salary so fixed by the presentment sessions. The county surveyor could take that amount, and bring the resolution of the grand jury again before the presentment sessions; or he could rest content with the salary so increased; or he could fall back upon his original salary of 300*l.*

NORTH EAST CIRCUIT.

DROGHEDA.

[Ex relatione.]

[CORAM BALL, J.]

IN THE MATTER OF THE TOWN CLERK OF THE COUNTY OF THE TOWN OF DROGHEDA.

13 & 14 Vict., c. 69, s. 72—Expenses of registration of parliamentary voters—Town clerk—Presentment

for—Certificate of chairman of the county—Presentment sessions—Grand jury.

*Where the chairman of the county certified for a sum of 15*l.* for the expense of the town clerk of the county of the town of D., under 13 & 14 Vict., c. 69, s. 52, which sum the presentment session reduced to 10*l.* On application to the judge to direct the grand jury to present for the amount certified by the chairman, it was held that the grand jury could not present a larger sum than that presented at presentment sessions.*

Gernon applied to the court to direct the grand jury of the county of the town of Drogheda to present a sum of 15*l.* sterling, being the proportion of the expenses of the town clerk of the borough of Drogheda in carrying into effect the provisions of the 13th and 14th Vict., c. 69, s. 72, being an Act which regulated the qualification and registration of parliamentary voters in Ireland. The accounts of the expenses of the town clerk were, in accordance with the said 72nd sec. of the Act, laid before David Pigot, Esq., Chairman of the County of Louth, at the revision sessions, and the said Chairman gave to the town clerk a certificate that he would allow him the said sum of 15*l.* for his trouble in carrying the provisions of said Act into effect. Subsequently to said certificate being given, the presentment sessions reduced the sum certified for by the sum of 5*l.* The question for the consideration of the Court was, whether the presentment sessions had power to reduce or alter the sum certified for by the Chairman of the county, or if so, whether the grand jury was bound by the decision of the presentment sessions. The 72nd section of 13 & 14 Vict., c. 69, is as follows—"And be it enacted, that an account of all expenses incurred by the town clerk of or acting in any city, town, or borough, in carrying into effect the provisions of this Act, shall be laid before the assistant-barrister at the court at which the list of voters for such city, town, or borough, shall be revised; and the said barrister shall sign and give to such town clerk a certificate of the sum which he shall allow to be due to him in respect of such expense, and also of such sum as he shall deem it reasonable to allow to him for his trouble in carrying into effect the provisions of this Act; and thereupon it shall be lawful for the grand jury of such county, county of a city, or county of a town, at the next assizes, to present to be raised off such county, county of a city, or county of a town, the total sum in such certificate mentioned, or so much thereof as such presentment sessions or grand jury shall allow to be paid to the said town clerk." It is submitted that the policy of the section was to cast on the Chairman of the county the taxation of the expenses, and that it was never intended that the presentment sessions should be a Court of Appeal from the chairman's decision, and that the Court ought to direct the grand jury to present for the sum presented for by the chairman.

BALL, J., held that there was nothing in the section to restrain the presentment sessions varying the amount the Chairman certified for, and that the grand jury could not present for a larger sum than that presented for at the presentment sessions.

CONNAUGHT CIRCUIT.

MAYO.

[CORAM CHRISTIAN, J.]

IN THE MATTER OF A MAIL-COACH ROAD THROUGH THE
BARONY OF COSTELLO.

Reported by Oliver J. Burke, Esq., Barrister-at-Law.

*Presentment for mail-coach road—Mail-coach discontinued—6 & 7 Wm. 4, cap. 116, sec. 52.***When the grand jury have presented for the repair of a mail-coach road for a period of years, under the provisions of 6 & 7 Will. 4, c. 116, s. 52, all sums payable to the contractor must be levied half off the barony, and half off the county at large, though before the expiration of the contract the road has ceased to be a mail-coach road.*

THIS was an application to the Court on behalf of the cess-payers of the barony of Costello, in the County of Mayo, to direct the grand jury of the county to present that one-half of a sum of money payable to a road contractor, for the repairs of a road through the said barony, should be levied off the county at large, and one-half off the barony. In the year 1861, a contract for three years had been made for the repairs of the road in question (which was then a mail-coach road), under the provisions of 6 Wm. 4, c. 116, s. 52; and in pursuance of the provisions at the end of the section, the payments made to the contractor from time to time had been levied in moieties, half off the county at large, and half off the barony of Costelloe. Since the last levy, the mail-coach had been discontinued in consequence of the opening of the railway to Castlebar, and the grand jury considered that the sums to be presented should be levied wholly off the barony.

James H. Monahan for the cess-payers of the barony of Costelloe, argued in support of the application.—The application to the presentment sessions (6 & 7 Wm. 4, c. 116, s. 16) must state whether the money is to be levied off the county, or off the barony, or other denomination, and in the present case, in point of fact, the application at the presentment sessions did state that the money was to be levied half off the county, and half off the barony; and the grand jury, when they present that the contract be adopted, must present how the money is to be levied, and hav-

* Sec. 52.—And be it enacted that it shall and may be lawful for the grand jury of any county to present any public road within such county, or any part of such public road, or any foot-path upon the side of such road, to be gravelled or repaired with broken stone, or the battlements of any bridge upon such road to be kept in sufficient order and repair, by contract for any space of time not exceeding seven years, and also, from time to time, to present such sum or sums of money as shall be necessary for the execution of any of the above-mentioned works, and the payment of the person or persons with whom such contract for the execution of the same shall have been made, to be levied or raised off any barony, county of a city, or county of a town, in which such road may be locally situate, and when it passes through more than one barony, then proportionately on each barony: provided always, that in the case of any road upon which his Majesty's mails are or shall be carried in mail-carriages, one half of the expenses of such repairs shall be levied off the county, and the other half off any barony or baronies in which such road, or any part thereof, may be locally situate.

ing once done so, they have no power to alter the original presentment, 6 & 7 Wm. 4, c. 116, secs. 20 and 133. The result of holding that the money is now chargeable wholly on the barony, is to impose upon the cess payers the burthen of a presentment different from that which was before sessions.

Robinson, Q.C., for the grand jury, *contra*, argued that the road, having ceased to be a mail-coach road, the proviso at the end of section 52 had ceased to be applicable. He also referred to 7 Wm. 4, c. 2.

His LORDSHIP held that the grand jury was bound to present that the sum of money in question should be levied in moieties, half off the county at large, and half off the barony of Costelloe; that, having regard to the sections of the statute referred to, the proviso at the end of section 52 must be held to apply to all roads which are used by mail-coaches at the time of the making of the contract.

LEITRIM.

[BEFORE CHRISTIAN, J.]

EX PARTE THE CESS COLLECTORS OF THE BARONY OF
MOHILL.

Reported by Oliver J. Burke, Esq., Barrister-at-Law.

*Representment of arrears—Arrears paid by collectors out of their own monies—6 & 7 Wm. 4, c. 116, s. 145—19 & 20 Vict., c. 63, s. 6.**When the arrears could not be levied off the Barony of M. in due time, the collectors had, out of their own monies, lodged same to the credit of the treasurer of the county, it was Held, that the Grand Jury were bound to represent the arrears in order to reimburse the collectors.*

IN this case there were certain arrears of county cess, which could not be levied in due time off the barony of Mohill, and which the collectors had, out of their own monies, lodged to the credit of the treasurer of the county. The grand jury having doubted whether they could represent for the sums so paid in as arrears, in order to reimburse the collectors,

J. H. Monahan, on behalf of the cess collectors of the barony of Mohill, applied to the Court to direct the grand jury to make the representment, and referred to 6 & 7 Wm. 4, c. 116, s. 145; 19 & 20 Vict., c. 63, s. 6. He also referred to *In re Gamble* (3 Crawford & Dix., 35), where the grand jury were directed to represent monies remaining uncollected, although the collector had, out of his own monies, paid over the amount to the county treasurer.

HIS LORDSHIP directed the grand jury to represent the sums so paid by the collectors as arrears.

NOTES OF CASES DECIDED AT THE EASTER
SESSIONS, 1863.

COUNTY ANTRIM.

[BEFORE J. H. OTWAY, ESQ., Q.C., CHAIRMAN.]
BALLYMENA.

[Reported by J. H. Wrixon, Esq., Barrister-at-Law.]

O'HARA v. M'KENNERIDGE.—5th April, 1863.

Administration with will annexed—Evidence.
Administration with will annexed granted under the

circumstances stated in the case to the next of kin of the testatrix.

THIS was an application made to the chairman, under 20 & 21 Vict. c. 79 (Probate Act), to grant administration, with will annexed, of the effects of Mary O'Hara to Charles O'Hara, the principal legatee nominated in the will propounded. The chairman heard the case without the assistance of a jury, and sets out at length the facts, which were somewhat peculiar, in his judgment.

THE CHAIRMAN.—The contention in this case, the first of the kind I have had, has been narrowed to this,—was the will propounded duly attested. As to the competency of the testatrix, there has been really no controversy. Rea, the man who prepared the will from the instruction of the dying woman, says, that having written it he read it to her, and that she said it was just the thing she wanted; that he called the principal legatee, Charles O'Hara, who brought up another man, J. Magee; that the will was then, all but a small part at the end, covered with a bit of paper, which was stated, not as an answer to any question; that he called the attention of all to the attestation clause; that he put the pen into the hand of the testatrix; that she touched it, and made her mark; that Magee was present; that he then laid it on the table and wrote O'Hara's name; that he next gave the pen to John Magee, who wrote his name, and that he (Rea) wrote his; that O'Hara never touched the pen, or did anything; and that he put down O'Hara's name, expecting that he (Rea) might be going away in a short time. So far as Rea's testimony goes there is evidence of sufficient attestation. And this may be a proper place to observe that Rea appears to be a perfectly disinterested witness. He is not related to any of the parties or connected with them; and if he has committed perjury the only assumption can be a bribe or the hope of a bribe from O'Hara, and to suppose that concert between them must be assumed. However, considerable doubt has been thrown on Rea's testimony by the production of Magee. He admits that he was called as a witness; that he saw the testatrix sign a will, the bottom of which was covered with a paper, a statement which he volunteered; that he signed; that he did not sign on the same sheet to which testatrix attached her mark (thereby corroborating to some extent the document produced as a will); that he signed after Charles O'Hara's name was on it; and that O'Hara was present at the time; and that he signed, as he believes, but is not positive, after Rea; in short, he stated that he signed a will under all surrounding circumstances the same as deposed to by Rea, except in the fact of Rea having signed before him, as to which he is not positive. But then looking at the particular document propounded as a will (and on which Rea's name appears after Magee's), he swore that he did not believe the signature to be his; that all the letters were unlike his writing; but he would not swear that the signature was not his. I made him write his name, and I must say that the formation of the letters was very dissimilar indeed from those which formed what purported to be his signature to the will. O'Hara is

illiterate, and can neither read nor write. He therefore cannot speak as to a particular document he cannot understand; but as to all the surrounding circumstances he corroborates Rea, except as to part of the will having been covered with paper, and as to the signature of Rea being after that of Magee. He thought Rea signed first. I note this discrepancy in O'Hara's testimony to show absence of concert between him and Rea, which I think most important. But the question is,—did Magee sign the document propounded? if so it should be admitted to proof. That he signed as a witness a will signed by the testatrix in the presence of himself, Rea, and O'Hara, signed by Rea, and having O'Hara's name upon it is, I think, incontestable; but is the alleged will, the one he signed, Rea, if bribed or acting from any vile motive, might have suppressed the will so signed and forged Magee's name to another, that other being the document produced. If it rested on the comparison of handwriting and the swearing of Magee that he did not believe the signature shown to him to be his, I should be disposed to think that such signature was not genuine. But Magee would not swear that it was not his; and I know, and any man knows, that his signature at one time is very unlike his signature at another; unlike the formation of the principal letters, even so unlike as to make him believe it was not his own writing. Opposed to the belief (at first somewhat hesitatingly expressed) of Magee, and the dissimilarity of the handwriting as appearing here in Court and in the will, is the sworn testimony of Rea. This opposition naturally caused a painful difficulty. I had to look if in any portion of the evidence I could see anything that would tend to turn the scale. Now, it occurs to me there is in the case one of those coincidences which when undesigned are the best test of truth. Rea covered the bottom of the will, signed, as he alleged with paper. Magee said voluntarily that the bottom of the will he signed, and which was signed by the testatrix, was covered with paper. Upon what natural or plausible hypothesis can this coincidence be explained, except upon a most cunning concert between Magee and Rea, which evidently does not exist. Upon this apparently trifling but to my mind almost conclusive coincidence of testimony between Rea and Magee, and upon the inference of a want of concert between Rea and O'Hara, to which I have referred, I think the will propounded was attested by two witnesses, and by two witnesses only, Magee and Rea; that it should be admitted in a certain sense to probate; that is, it should be annexed to letters testamentary, and that such letters should be granted to Mrs. M'Cambridge as next of kin of the testatrix.

O'Rorke applied on behalf of the next of kin to have the costs of contesting the will allowed out of the estate. He submitted that the facts of the case were so singular that it was the duty and right of the next of kin to have them fully investigated.

Careweth, on behalf of Charles O'Hara, the principal legatee, requested the Chairman to declare, as part of his judgment, that O'Hara was not an attesting witness, inasmuch as he had not actually touched the pen while his mark was being made.

The Chairman granted costs to the next of kin. As for Mr. Carew's application, he could only refer him to his judgment!

Attorney for the legatee—Carew.
Attorney for the next of kin—O'Rorke.

M'CORD v. ROCK.—April 5.

Ejectment—Yearly tenancy—Execution—Assignment by sheriff.

Where a yearly tenancy is sold under an execution, no legal estate passes until an assignment by the sheriff.

THIS was an ejectment brought against the defendant, who is a yearly tenant on the estate of Mr. Young, by the plaintiff, who bought his interest as such tenant at an auction held in pursuance of a civil bill decree. The high sheriff of the county had refused to execute an assignment of the defendant's interest, on the ground that such an interest was not seizable.

H. J. Wrixon, for the defendant, submitted that the assignment by the sheriff was essential to the maintenance of the ejectment. It might be that the plaintiff had a right to get an assignment, but till it was executed, no legal estate vested.

THE CHAIRMAN.—The law is clearly so. It is expressly so stated in Furlong's Landlord and Tenant, in the chapter on covenants.

Bill dismissed.

Alexander O'Rorke for the plaintiff.
H. J. Wrixon, instructed by David McKillop, for the defendant.

BELFAST.

REG. v. HEATELTY.—Apr. 9.

Evidence of a marriage—Copy of entry in registrar's book not sealed—Stat. 7 & 8 Vict., c. 81, s. 71.

A copy of the entry of a marriage in the registrar's book, signed, but not sealed, is no evidence of the marriage under stat. 7 & 8 Vict., c. 81, s. 71.

THE prisoner was indicted for assault.

M'Lean, for the defence, proposed to prove that a woman with whom the prosecutor was found, when attacked by Heatelty, was Heatelty's wife, and for that purpose produced a copy of the entry of the marriage in the book of the registrar of Belfast. The copy was not sealed, and it was simply signed "W. M'Comb, Registrar."

THE CHAIRMAN.—This paper is of no value. It is not valid under 7 & 8 Vict., c. 81, s. 71.*

* "And be it enacted that the registrar-general shall cause to be made a seal of the said register office, and the registrar general shall cause to be sealed or stamped therewith all certified copies of entries given in the said office, and all certified copies or entries purporting to be sealed or stamped with the seal of the said register office, and which seal it shall not be necessary to prove, shall be received as evidence of the marriage to be said, relates without any further or other proof of such entry, and no certified copy purporting to be given in the said office shall be of any force or effect which is not sealed or stamped as aforesaid."

COUNTY CLARE.

[*Ex relations Robert Daniel, Esq. Barrister-at-Law.*]

[BEFORE MICHAEL O'SHAUGHNESSY, Esq., CHAIRMAN,
KILLALOE.]

MEARA v. O'BRIEN.—April, 1863.

Renewal—Debt reduced below £10.

A renewal refused where the amount of the decree which had been taken against the body of the defendant had been reduced by payments below 10l.

THIS was an application to renew the decree which had been obtained against the person of the defendant for a sum of 14l. The debt having been reduced by payments to a sum of 7l, it was objected on the part of the defendant, that the decree could not be renewed against his person. For the plaintiff it was contended, on the authority of *English v. Dunne* (8 Ir. Jur. N.S. 31), that, the original decree having been for a sum above 10l, the fact of the debt having been reduced below that sum could not prevent the decree being renewed against the person. For the defendant it was argued, that the renewal was, in fact, a fresh decree, and, therefore, could not, in the present case, be granted against the person, and that the case was distinguishable from *English v. Dunne*.

The Chairman held, that he could not grant a renewal.

ENNISTYMON.

BANNATTYNE v. O'LOUGHLIN.

Service of Process—Dismissal.

Where the copy of the civil bill served did not contain the name of the attorney, or mention any place where the civil bill was to be heard, the process was not dismissed, but nilled.

IN this case the copy of the process served upon the defendant did not contain the name of any attorney for the plaintiff, nor was any place specified in it for the hearing of the civil bill. On the hearing, the defendant, having appeared, pressed to have the civil bill dismissed.

The Chairman, however, held, that, as the service had not been regular, and the case was not properly before the Court, he could not grant a dismissal, and, accordingly, nilled the process.

Court of Appeal in Chancery.

[Reported by Edmund T. Bewley, Esq., Barrister-at-Law.]

[BEFORE THE LORD CHANCELLOR AND THE LORD JUSTICE OF APPEAL.]

IN RE COANE—Nov. 24, 1862.

Secondary evidence—Old copy of lost deed—Trust term—Statute of Limitations.

A document purporting to be an old copy of a lost deed, whereby certain charges on land were created, coming from the custody of the owner of one of

these charges is not admissible in evidence against the owner of the land without being proved. A term of 500 years was vested in trustees for the purpose of raising a charge of £3,000. No part of this charge was raised, but interest on £2,000 was paid to the parties entitled to the entire charge when raised. No interest had been paid on the remaining £1,000 for upwards of 40 years. Quære, was a claim on foot of this £1,000 barred by the Statute of Limitations?

THIS case came before the Court on an appeal from an order of Judge Dobbs. Under a settlement executed on the marriage of Anthony Coane, in 1780, a term of 500 years was vested in trustees for the purpose of raising a sum of £3,000 for the younger children of the marriage (as alleged by the appellants) to be distributed amongst them in such proportions, as Anthony Coane should by deed or will appoint; and in default of appointment equally; and subject thereto the estate was limited to the first and other sons in tail. This indenture of settlement was duly registered on the 10th of May, 1782, but the original deed had been lost long prior to the commencement of the present suit. Anthony Coane died in January, 1821, and of his marriage there were issue, Henry, the eldest son, and three younger children, Ralph, Mary and Martha. Henry, Mary and Martha, survived their father. Ralph died unmarried and intestate, and some doubt and controversy existed as to whether he had survived Anthony Coane or not. Mary married Mr. Dennis, and Martha Mr. Allingham. On the death of his father, Henry Coane entered into possession of the estate, and Mr. Coane, the present owner, claimed under the will of Henry. The £3,000 had never been raised, nor had any appointment of it been made by Anthony Coane; but interest on two several sums of £1,000 had been paid regularly to Mrs. Dennis and to Mr. Johnstone, the assignee of Mrs. Allingham's share. The owner of the estate having presented a petition for sale in the Landed Estates Court, at the hearing before Judge Dobbs, on settling the schedule of incumbrances, a claim was advanced on behalf of Mrs. Dennis to a charge of £1,333 6s. 8d. on the following grounds: In the first place it was alleged that the £3,000 had been settled by the indenture of 1780 on the younger children of Anthony Coane. The original deed, as has been already mentioned, had been lost, and the memorial of registration, which did not disclose the trusts very fully, represented this sum as being a provision for "the issue" of the marriage. Two documents, however, were produced, purporting to be ancient copies of the settlement of 1780, and in these the trusts of the £3,000 were stated to be for the younger children. These old copies had been found by Mr. Johnstone in a portmanteau which Mr. Allingham, the son of Martha Coane, otherwise Allingham, had left behind in the house of Mr. Johnstone. Mr. Johnstone was the brother-in-law of Mr. Allingham, and had purchased and obtained an assignment of the share of Mrs. Allingham in this sum of £3,000. The copies when found were along with other documents of the Coane family and deeds of both a later and earlier date. They corresponded with the memo-

rial of registration as far as it went, and one of them had endorsed on it a correct certificate of registration. It was further alleged that it had always been the reputation and belief in the family that this charge was for the younger children alone. It was then asserted that Ralph Coane had survived his father, and that upon Ralph's death the sum of £1,000, to which he was entitled as one of the younger children, had accordingly become distributable amongst his next of kin, viz.—Henry Coane, Mary Dennis, the claimant, and Martha Allingham. The two principal questions involved in the present case were the following: first, whether the old copy of the settlement of 1780 was admissible in evidence without proof; and in the next place whether, granting its admissibility, the claimant's right to recover the proportion of Ralph's share was barred by the Statute of Limitations. Judge Dobbs admitted the copy of the deed in evidence but disallowed so much of the claim as was equivalent to the proportion of Ralph's share, on the ground that it was barred by the Statute of Limitations. From this order Mr. and Mrs. Dennis now appealed.

The Solicitor General (with him *Lowry*) for the appellants.—When the owner presented his petition in the Landed Estates Court, in order to effect a sale of this property, the petition represented the estate as being subject to the incumbrances comprised in the third schedule annexed. Amongst these incumbrances is found the following: "Charge of £1,000, part of a charge of £3,000 late Irish currency, created by Anthony Coane for his younger children." In the statutable declaration of the owner, and again in the schedule of incumbrances, as set down for final settlement, this sum of £3000 is stated to be charged by the marriage articles of 1780, as a provision for the younger children of the marriage. Thus by the respondent's own admissions, independent of any further evidence, it is established that this charge was for the younger children of Anthony Coane, and *In re Power's Estate* (11 Ir. Ch. 295) is an authority that the owner is estopped from objecting to incumbrances that have been admitted by his own affidavit. In the absence of the original the copy of the deed of 1780 is admissible as secondary evidence. It was found by Johnstone, who is one of the family, and the owner of a charge on the estate, in the portmanteau of Allingham, Martha Coane's son. In *Baller's Nisi Prius*, p. 254, it is laid down that "where possession has gone along with a deed many years, the original of which is lost or destroyed, an old copy or extract may be given in evidence without being proved to be true, because in such case it may be impossible to give better evidence." As to the point in reference to the Statute of Limitations there is a subsisting trust term of 500 years, under which the trustee (who is a trustee for the entire sum of £3,000) might take possession at any time, supposing that there was no payment of interest on a portion of the charge—*Cox v. Dolman* (2 DeG. M. & G. 592; 17 Jur. 97; 22 L. J. Ch. 427); *Young v. Lord Waterpark* (13 Sim. 204; a.c., on appeal, 15 L. J. Ch. (N.S.) 63); *Hunt v. Bateman* (10 Ir. Eq. 360.) When there is a subsisting term under which the trustee can enter, the case is within the saving of the 25th section of the 3 & 4 Wm. 4, cap. 27.

Serjeant Sullivan (with him *Warren, Q.C.*) in support of the order of the court below. This alleged copy of the settlement of 1780 is not admissible. *Kerin v. Davoren* (12 Ir. Ch. 352) is a far stronger case. There the copy tendered in evidence came out of the proper custody, and had a certificate on it by the family solicitor that he had compared it with the original, and yet it was rejected—*Doe v. Wutcomb* (6 Ex. 601). Here then is no proof of its being a copy, nor of the existence at any time of the original, and the custody is not such as can be considered the proper one. It must be treated then as if it were not evidence. The £3,000 being divisible amongst all the children of Anthony Coane, it does not affect the respondent's case whether Ralph survived his father or not. If he died before him, on Anthony Coane's death, Henry, Mary, and Martha became entitled to £1,000 each. If, on the other hand, Ralph survived his father, each child would have a share amounting to £750, and when Ralph subsequently died unmarried and intestate, as his portion became distributable amongst Henry, Mary, and Martha, as his next of kin, they would each have a total share in this event also of £1,000. From the time they became so entitled, interest was paid on £2,000, but for the last 40 years no interest was ever paid on the remaining £1,000, nor would the present case have ever been put forward, but for the statement which had been made in the petition for sale by the mistake or inadvertence of the owner. It would be a startling doctrine, indeed, if an owner is to be met by this *quasi estoppel*, if he make a statement in reference to the rights of other persons contrary to the fact, whereby the rights of these parties are not affected, and by which they are not in any way influenced, *Piggott v. Stratton* (1 DeG. F. & J., 51); *Jorden v. Money* (5 H. of L. Ca. 185). Independently of the Statute of Limitations, the Court will not listen to stale demands—*Harcourt v. White* (28 Beav. 303); *Roberts v. Tunstall* (4 Hare, 257). *Warren, Q.C.*, for the same party, cited *Taylor v. Horde* (2 Smith L. Ca. 613). *Bright v. Legerton* (2 DeG. F. & J. 606).

Lovry replied.

LORD CHANCELLOR.—In support of the appellants' case there is nothing before us but this memorial of the marriage settlement of 1780. I am clearly of opinion that this copy is not admissible in evidence. When copies are found with persons who are owners of the land the case may be different, but here this document comes from the custody of parties putting forward claims adverse to the rights of the owner. The passage in Buller's *Nisi Prius* is very questionable as an authority, and even if it were good law, it is not applicable to the present case. The copies being rejected, then, nothing remains but the representations of the respondent. It would be very hard, indeed, that a party should be bound by allegations which have in no respect altered or affected the rights of others. Whether the term would be barred or not by the Statute of Limitations I do not take upon myself now to decide. My impression is this it would not be barred, but I do not mean to be bound by this expression of my opinion, as the question is one of much

difficulty and one requiring some consideration to determine.

THE LORD JUSTICE OF APPEAL concurred.

Order below affirmed.

Court of Queen's Bench.

[Reported by William Woodcock, Esq., Barrister-at-law.]

IN THE MATTER OF THE COMMISSIONERS OF PUBLIC WORKS IN IRELAND, TRUSTEES OF THE QUEEN'S COLLEGE IN THE BOROUGH OF CORK.—Jan. 26, 27, 30, 1863.

Malicious injury—Compensation—Posting of notice of intention to apply—St. 5 & 6 Wm. 4, c. 116; st. 15 & 16 Vict. c. cxliii. (local and personal).

The posting of notice of intention to apply for compensation for a malicious injury, under the provisions of the Grand Jury Act, st. 5 & 6 Wm. 4, c. 116, is a condition precedent to obtaining the compensation; and the provisions of the Grand Jury Act in this respect are incorporated with the Cork Improvement Act, st. 15 & 16 Vict. c. cxliii. (local and personal).

Observations upon the policy of the Legislature in requiring the service and posting of notices in cases of malicious injury.

THIS was an application on behalf of the Commissioners of Public Works as trustees of the Queen's College, Cork, to make absolute a conditional order that a writ of *certiorari* should issue, directed to the Mayor, Aldermen, and Burgesses of the borough of Cork, and to Thomas Forsayth, Esq., Recorder of the said borough of Cork, and each and every of them, to remove into their Court all and singular applications, notices, depositions, affidavits, orders, adjudications, records, and other proceedings of and concerning the matter of an application for compensation for the malicious burning of a certain building called the Queen's College, made before the council of the said borough of Cork by the Commissioners of Public Works in Ireland, and of and concerning a certain application made by the said commissioners before the said recorder in the matter of the said hereinbefore mentioned application for compensation as aforesaid. The facts, which appeared from the affidavits of the town clerk of the borough of Cork, and of Mr. Stuart, the solicitor to the Board of Public Works, were as follows:—On the morning of the 15th May, 1862, a large portion of the building of the Queen's College at Cork was destroyed by fire. On the same day a deposition was made before magistrates by Sir Robert Kane, the president of the College, stating the fact, and that he did not know by whom the fire had been caused. On the 20th May the Commissioners of Public Works caused a notice, bearing date the 19th May, of their intention to apply for a presentment for compensation as in the case of a malicious burning, to be served upon the churchwardens of the parish of St. Finbar, in the borough of Cork, upon the high constable of the barony of Cork, upon the town clerk, upon the collector, and

at the two police stations nearest to the College. This notice was directed to the churchwardens, the high constable, the police at Great George's-street station, the town clerk, and all persons concerned. It was not posted anywhere. On the 25th of May an application to the town council for 5,000*l.* for compensation for loss and damage for malicious burning was lodged with the town clerk. On the 9th September the case came before the council, who rejected the application; and on the same day the Commissioners gave the town clerk notice of their intention to bring the matter of the application for compensation for damage occasioned by malicious burning of the Queen's College, Cork, before the recorder of Cork, on Monday, the 15th day of September, at the time of fiatting orders made by the council, or at such other time as he should appoint for that purpose. This application to the recorder was made under s. 43 of the Cork Improvement Act, in order that he might cause the claim to be added to the schedule of applications lodged by the town clerk with the clerk of the crown for the borough. It came on on the 1st October, 1862. Upon its so coming on, counsel on behalf of the rate-payers required proof that notice of the application for compensation, or of the intention to apply for it, had been given by postings upon the police barracks or on the court-house. No such proof having been given the recorder dismissed the application, holding that the posting of the notice of intention to apply was a condition precedent to the application being entertained, that that condition had not been complied with, and therefore that he could not direct the council to take the application into consideration, or take any course implying that they were wrong in rejecting it. Counsel for the Commissioners requested him to state on the face of his ruling or adjudication the precise point decided by him, and the ground of his decision; but he declined to do so, stating, however, that if called on by the Court to do so on *certiorari* he would return all the documents in the matter, and would state to the Court upon what precise ground he had rejected the claim and application. Since the rejection of the application by the recorder, and before the present motion, a rate had been assessed and levied in the borough of Cork for the applications, which actually appeared upon the schedule.

The Solicitor-General (with him *Serjeant Sullivan, De Moleyns, Q.C., and May*), for the Commissioners of Public Works.—Three questions are raised in this case: 1st,—as to the non-posting of the notice of intention to apply for compensation; 2ndly,—as to whether a building like the Queen's College comes at all within the provisions of the Grand Jury Act; and 3rdly,—whether Sir Robert Kane was the person to make the deposition. The fiscal powers of the grand jury of the city of Cork were transferred to the town council by st. 16 & 16 Vict. c. cxliii. (local and personal), of which ss. 1, 3, 35, 36, 37, 38, 39, 40, 42, 43, 45, and 47, are important in the present argument. S. 35 is that which transfers the powers of the grand jury to the town council, and 43 is that which gives the recorder power to entertain applications which the council have rejected. In no part of the Act is there any incorporation of the provisions of the Grand Jury Act, 6 & 7 Wm. 4, c. 116; there is

no direction that the form of procedure which is made necessary under that Act shall also be necessary in the one now before us. It was argued before the recorder that all the proceedings necessary to be taken before an application to a grand jury were also necessary before an application to the town council. If it was necessary we might argue that it is unnecessary to do more than make the application. Sec. 135 of the Grand Jury Act, 6 & 7 Wm. 4, c. 116 is that which before the Improvement Act would have governed cases of this kind in the borough of Cork. It directs the service and posting of certain notices. Sec. 136 further regulates the mode of procedure; but on reading the two sections it becomes evident that that procedure cannot now apply to a case arising within the borough, as the sections in question speak of presentment sessions which do not exist under the Improvement Act. Neither of these sections can be said to be in force now so far as relates to the borough of Cork. The 157th section requiring an examination on oath of the person injured, or of his servant, has been complied with by the deposition made by Sir Robert Kane. [*Fitzgerald, J.*—Is there anything in the Grand Jury Act extending the meaning of the word "person" to a corporation?] No. The Court will be legislating if they hold that the 135th section is in force within the borough of Cork. Sections 15, 18, 133, and 134 of the Grand Jury Act afford instances of notices being required to be served only, which it would be absurd to require to be posted at police barracks. The following are the earlier enactments on this subject:—7 Wm. 3, c. 21, ss. 2, 4, 5; 15 & 16 G. 3, c. 21, s. 10; 19 & 20 G. 3, c. 37; 3 & 4 Wm. 4, c. 78, s. 70. Then, damages have been held in England to have been properly given against the hundred for the demolition of a house of correction—*Onslow v. Smith* (3 Dougl. 348). With reference to the question put by Mr. Justice Fitzgerald, in point of law a corporation is a person in the strictest sense of the term—1 Black. Com. 468; *Croft v. Howell* (Plowd. 538); *The Corporation of Newcastle v. The Attorney-General* (12 Cl. & Fin. 482); *Lowe v. Bristows* (3 B. & Ad. 550).

Whiteside, Q.C., and C. Barry, Q.C. (with them *Waters*), for the Town Council of Cork, to resist the application.—This is not a case in which the Court ought to grant a writ of *certiorari*. "A *certiorari* does not issue to correct the exercise of a lawful jurisdiction, but to correct what has been done under a want of jurisdiction, or in excess of jurisdiction"—*The Queen v. The Justices of Armagh* (6 Ir. Jur. N. S. at p. 224). There is nothing bad on the face of the order of the recorder. No precedent has been produced on the other side where the refusal of a judge to fiat a presentment has been made the subject of a *certiorari*. Presentments have been removed, because there is matter of record bad on the face of it; but a presentment has never been interfered with so long as it was good on the face of it, on the ground that the judge was wrong on the legal grounds on which he fiat it—*Re Quinn* (9 Ir. L. Rep. 160); *Ex parte Henn* (6 Ir. C. L. 244); *The Queen v. The Manchester and Leeds Railway Co.* (8 Ad. & Ell. 413. *In re Codd* (4 Ir. Jur. 243) shews that the

posting of notices is as essential as the service of them. So, too, *In re Black* (1 Cr. & Dix. C. C. 363) shews how essential is the strict observance of the preliminaries directed by the Grand Jury Act in cases of applications for compensation for malicious injuries. It cannot be contended that that Act is impliedly repealed by the Cork Improvement Act—Dwarris on the Statutes, 533; *Forster's case* (11 Rep. 63). Is it meant to be argued on the other side that the Grand Jury Act is so entirely repealed that there is in the borough of Cork no limit to the time for making a presentment? By what process are they now to have the presentment put on the schedule which has passed, and on which a rate has been levied? The Dublin Improvement Act, st. 12 & 13 Vict. c. 97, is very similar to that under consideration; and it has never been contended that under it the notices required by the old statutes must not be both served and posted. The st. 7 Wm. 3, c. 21, is the first Act providing compensation for malicious injuries; it was followed by several others, in all of which the provisions ensuring that notice shall be given to the public are carried on and even made more stringent. The intention of the Legislature in those Acts was not so much to give compensation to individuals as to punish the locality where the offence was committed. The argument that the Grand Jury Act must be looked upon as repealed by reason of its repugnancy with the Cork Improvement Act, would go to the extent of altogether doing away with applications for compensation for malicious injury in the city of Cork. All the argument on the other side comes to this,—that inasmuch as there are no presentment sessions in the city of Cork the notice cannot be delivered ten days before the presentment sessions, within s. 11 of the Grand Jury Act, and therefore that all the provisions with respect to notices must be looked on as repealed. But there may be a *cy près* performance of the requisites in the statutes. Even under the old grand jury law there were things which could not be done. Wherever notice of an application is given it must be posted also. Sir Robert Kane was not the servant of the commissioners, or the proper person to make the deposition. It should have been made by the Secretary to the Board of Works. They cited st. 16 & 17 Vict. c. 38—*The Duke of Somerset v. The Inhabitants of the Hundred of Mere* (4 B. & Cr. 167); *Nesham v. Armstrong* (1 B. & Ad. 146) upon the English Black Act; *Quin v. O'Keeffe* (10 Ir. C. L. Rep. 303); and *Sawyer v. Norris* (4 Ir. Jur. N.S. 103) upon the question of implied repeal of a statute.

Serjeant Sullivan, in reply, referred to *The Mayor of Rochester v. The Queen* (4 Jur. N. S. 1227); *S. C.* (7 Ell. & Bl. 910); to *The Queen v. Solomons* (4 Exch. 559), upon the *cy. près* performance of statutes. The question here was not how much of the Grand Jury Act was repealed, but how much of it had been imported into the Cork Improvement Act.

LEFFROY, C.J.—This case comes before the court on motion to make absolute a conditional order for a writ of certiorari, to be directed to the Mayor, Aldermen, and Burgesses of Cork, and to Mr. Forsayth, the recorder, the jurisdiction which was vested in the grand jury under the Act of 6 & 7 Wm. 4, c. 116,

of providing compensation for malicious injuries having been, by the Cork Improvement Act, stat. 16 & 17 Vict., c. cxliii. transferred to the Mayor and Corporation of the city of Cork, to be thenceforward exercised by them. The property in this case was the Queen's College in Cork, which appears to have been burned; and an application was made upon the ground that the burning was malicious, done or occasioned for some malicious purpose, and therefore it was contended that the Commissioners of Public Works were entitled to have such redress as they would have been entitled to claim under the Act of Wm. 4. The question, therefore, is whether they would have been entitled under the Act of Wm. 4 to compensation for this injury, supposing it to have been a malicious burning. Several questions were made, upon which a good deal of discussion took place during the argument, and upon which it is not necessary for us now to express any opinion. The case is narrowed to a single question of law, and with respect to one question, namely, whether a certiorari was applicable to a case of this sort, although, for one, I have an opinion on the subject, it is not necessary to express any opinion upon it, for we have come to an unanimous resolution on the case so to decide it as if we had all the proceedings before us with all the solemnity of a return upon the face of a certiorari. The consent of the parties to produce the original record of the proceedings, and their admission as to the matters of fact bring the case before us to the narrow question whether, in order to entitle the applicants to the compensation which they sought, it was necessary to have proved the service and posting of all the notices which, under the Act of 6 & 7 Wm. 4, would have been necessary to be proved in the case of an application under that Act to the grand jury, the presentment sessions, and the judge at the assizes. Now, it is plain that some of the provisions with respect to these notices, under the Act 6 & 7 Wm. 4, have, either by subsequent legislation, or by subsequent alteration either in law or in fact of the state of things since that Act was passed, become impossible. But the question is, though some of the provisions as to the service of these notices have become impossible to be complied with *modo et forma*, whether the service of these notices had not an object quite beyond that for which it was contended they were appointed, and whether they had not an ulterior object in respect of which a substantial compliance with them may still be insisted on. That leads us to consider what was the substantial object with which these notices were appointed to be served and posted, as they were in the Grand Jury Act, and whether that object does not still exist, and the reason for the service and posting them so far as possible does not operate now as strongly as at the time when they were originally appointed. We shall best arrive at a conclusion on that question by considering this jurisdiction of giving compensation for malicious injuries, and considering what were the objects to be attained by giving that jurisdiction. I think there were three objects to be attained, and which the Legislature designed to be attained by the provisions which they made by the Act of Parliament which first gave compensation for malicious injuries. The first was to give compensa-

tion to the party whose property was so maliciously injured; the second, to facilitate and ensure, as far as might be, the discovery of the offender who committed the injury; and thirdly, provisions were intended to guard the public against the substitution of a feigned and pretended malicious injury, and, under that cloak, the raising of an assessment on the county by a party whose property was not maliciously injured, but who might have been the injurer himself with a view to get in the way of compensation a value for his property which he could not in any other way obtain. Now, that these three objects were designed by the Legislature to be attained, and that with the view of attaining them the provisions of the statute were made, we have clearly from the provisions of the statute itself, and also from the decisions which have taken place on it. And with respect to these three objects, nothing that has occurred in the transfer of the jurisdiction from the grand jury and presentment sessions, and the judge, to the Mayor and Corporation of Cork, has operated to annul or to abrogate the provisions made for the purpose of securing the protection of the rate-payers, and the discovery of the offender, and for securing that the compensation should be given only to parties who comply with the provisions of the Act, which were inserted for the purpose of obtaining substantially the several three objects to which I have adverted. Now, what were the provisions of the Act with respect to notices? Notices were to be given of the intention to apply. Notices were to be given to certain persons, as for instance the churchwardens, representing the rate-payers of that district where the injury occurred. Notice was to be given to the barony-constable. It is said that there is now no barony-constable. Be it so; and, therefore, if the case stood upon the non service of the barony-constable, it might be insisted in strictness that that condition could not be complied with; at the same time, if necessary, I think a solid argument might be maintained to prove that where a person is substituted for the constable, the service on that person would be a compliance with the Act. But it is not necessary to go into that matter, because it does not follow that because you cannot comply with all the provisions of an Act, you may dispense with the compliance with such of them as you may and can comply with. What are those? They might have complied with the provision directing a service upon the churchwardens, and upon the police. They might have posted their notice at the police-barracks, as directed by s. 11 of the Grand Jury Act. These provisions could have been complied with, and there is not only a peremptory mandatory direction that every applicant for orders of this sort shall serve and post this notice which I have adverted to in the manner prescribed, but there is, in a subsequent section, a proviso that no compensation shall be granted unless that direction as to these notices has been complied with, and it is a special direction to the presentment sessions in the first instance, to ascertain whether these provisions of the Act have been complied with, and to make a report upon that matter. Well, it is said that the presentment sessions no longer exist, and, therefore, that the application is not to go before them, and, therefore, that it is not necessary to serve or post these notices, because they

are not to go before the presentment sessions. But after the application has gone through the presentment sessions, after it has been presented by the grand jury and fixed by the judge, there may be a traverse of the presentment by any rate-payer, and the first fact necessary to be proved upon the hearing of the traverse, would be the service and the posting of the several notices required. That traverse is not taken away by the Act for the administration of this law in the city of Cork, but still subsists. Are we to be told, when that traverse exists now as it existed formerly, that under that traverse, if taken under the Grand Jury Act, it would be sufficient to produce the presentment passed by the presentment sessions, to have it fixed by the judge? No; the party applying must shew on the traverse that the provisions of the Act have been complied with *in omnibus* as to the notices. I admit that the provision requiring the party to go before the presentment sessions does not exist; but he must go before the Mayor and Corporation of the city to decide upon the question of compensation, and the decision of that body may be traversed. The sophism by which it was attempted to be argued that these notices were not legally necessary, because to a certain extent they could not be complied with, took for granted that the only object of these notices was in reference to particular matters. They did not, and could not say that the notices were intended not for the purpose merely of being served in a particular manner, of being posted. That was not the reason. The ultimate and sound substantial reason was, that the rate-payers who were interested in saying that it was a *bona fide* case, should have an opportunity of doing so, nay more, that there might be the facility of taking, finding out, and discovering the offender by giving publicity to the offence, and obtaining a statement of all the circumstances required to be stated in an information on oath, either by the party, or those of his servants most competent to do so. That information was lodged in the office where everybody had access, and thus had not only the facility of discovering the offender, if the offence was committed in an adjoining place, but also of being able to ascertain by inquiry whether the injury was *bona fide* a malicious one. That was the real object for which these notices were appointed, and the ground upon which, under the proviso in the subsequent part of the section, it was made beyond all question a matter of law, a *sine qua non* for the exercise of the jurisdiction given in these proceedings for malicious injuries, that these conditions should be complied with, and that upon non-compliance with them there was an end of the jurisdiction, or of the right to charge the county, however malicious the injury might have been; for the Legislature qualified the right to ask for compensation with these cautious provisions to enable a facility for the discovery of the offender, and for the ascertainment by public inquiry whether the default was occasioned by a really malicious injury to property, or the act of the party who thus, under a cover of getting compensation, sought to get good value where otherwise he could not. Now, looking, therefore, to the peremptory nature of these directions, of what was to be done by the applicant under these sections, it is evident that the non-compliance with these con-

ditions as far as possible would altogether take away the jurisdiction of granting compensation. It is clearly established that these provisions are in the nature of conditions precedent, and a jurisdiction qualified by conditions precedent falls to the ground the moment you shew a default in complying with those conditions. I wish to refer to the joint opinion, which is entitled to the greatest weight, the opinion of Bushe, C. J., and Doherty, C. J., which is given upon this subject, upon the necessity of the service and posting of these notices to entitle the party to compensation, however he may establish the fact of a malicious injury to his property. The case to which I refer is that of *In re Black* (1st Cr. & Dix., 363), where judgment is given by Doherty, C. J., after consultation with Bushe, C. J., and the joint opinion, as I may term it, of those two judges is in terms that the non-compliance with the provisions of the Act as to the service and posting of these notices was a disqualification for obtaining compensation for a malicious injury. Well, then, what was there in the transfer of the jurisdiction to make that less important now than it was then? If there were only this one reason in the case—namely, that under the transferred jurisdiction any rate-payer may traverse, and that everything that was formerly required to be proved upon a traverse, must still be proved, and accordingly that the rate payer may rely upon the non-compliance with the conditions of the Grand Jury Act as a bar to compensation, that one reason would be most powerful. The validity of the argument, therefore, that because some of these provisions could not be complied with, therefore the party was dispensed from complying with any of them, depends on the objects which the Legislature had in view when it required these conditions, and those objects were not merely in reference to the jurisdiction precisely as it existed then; it had much wider objects. The provisions in question were inserted not merely to be made use of in the earlier stages of the proceeding; they were maintained to the very latest stage, as I have said, and may be insisted on by the rate payer in a traverse after the exercise of the jurisdiction by every antecedent stage of it, after the application has passed the presentment sessions, after it has been found by the grand jury, and even after it has been fixed by the judge. So, here, the traverse is preserved, and must not every right that belongs to the traverse be preserved to the rate-payers, in this as under the former law? Upon these grounds it appears to us that the recorder, in refusing to put this demand upon the schedule of rates, exercised a sound judgment, and that therefore, if we had the case before us in the fullest and most solemn manner on the face of a return to a certiorari, we should come to the same conclusion; and it is unnecessary to go through the mere form of granting the certiorari, when we have everything before us now that the return to it could give; and on these facts we are of opinion that the transfer of jurisdiction did not annihilate the statute so far as its provisions could be complied with; we, therefore, discharge the order.

O'BRIEN, J.—I concur in the judgment of the Court, and shall follow the rule adopted by my Lord Chief Justice, of not expressing any opinion upon several important questions raised in the case, which in

the view we have all taken it is unnecessary to consider. The ground of refusing the writ is, that the applicant has not complied with the requisites of the Act of Parliament by posting the notice as required, and I have come to the conclusion that the recorder was right in the view which he took. The main ground of the argument pressed by the Solicitor-General and by Serjeant Sullivan is, that the Cork Improvement Act clothes the town council of Cork with the powers of the grand jury. That is done by a 37 of the Cork Improvement Act, and the 35th section of the same Act declares that the powers of the grand jury shall cease as to appointing presentment sessions; that that power, therefore, was at an end; and the argument is, that every provision of the Grand Jury Act which involved or supposed the existence of the presentment sessions should be construed as absolutely at an end, so far as concerns the borough of Cork. I concur with the Lord Chief Justice in thinking that that is a construction we cannot agree with. There are certainly provisions in the Grand Jury Act, which, according to that construction, should be considered as at an end. I shall refer to one, the 136th section. It provides—and for obvious purposes, as has been said by my Lord Chief Justice—"that every application under this Act for compensation for loss and damage occasioned by any malicious injury as aforesaid, shall be made at the next presentment sessions which shall be holden after the commission of such offence for the barony, county of a city, or county of a town, where the same shall have been committed, unless any such malicious injury shall have been done after the day appointed for holding the first presentment sessions after the assizes for the county in which such injury shall have been done, or so near the day of holding the same that such application for compensation cannot be duly lodged as heretofore directed, in either of which cases the person or persons so injured shall make such application at the presentment sessions which shall be holden next but one after the time of the commission of such offence for the barony, county of a city, or county of a town where the same shall have been committed, and the notices of such application shall be posted accordingly; and it shall not be lawful for any grand jury to make any presentment for compensation for malicious injury under the provisions of this Act, except at the assizes next ensuing the sessions where application shall have been made therefor." If that was done away with, what would be the consequence? There would be no limit to the time at which the application could be made. But the sound way of construing the Act is by looking to the safeguards provided by the Legislature. They may still be required, with this alteration, that the limitation in point of time cannot be complied with; but in cases in which it was held that the service and posting of the notice was a condition precedent, we should not hold that that safeguard was abolished because the service and posting could no longer be done in the precise time pointed out in the former Act. But with regard to one of the class of notices required, I can see no ground for saying that the provisions of the Act with regard to the posting of that notice is dependent on the existence of the presentment sessions, and that it

the very first notice mentioned in s. 135 of the Act, the notice which it admitted here was served, but not posted, namely, the notice of intention to apply for compensation. The 135th section provides, in the first part it, that the notice of intention to apply for compensation shall be served upon "the high-constable of the barony, and the churchwardens of the parish, and at the nearest police-station, or if there be no churchwarden upon two of the principal inhabitants of the parish wherein such offence shall have been committed within six days at least after the commission of the same, and shall lodge with the high constable or secretary of the grand jury, in like manner and time as applications for presentments for public works are hereinbefore directed to be lodged, an application setting forth the loss or damage occasioned by such offence, and stating the time and place when and where such injury was done, the particular property consumed, injured, or destroyed, and the amount of damage thereby sustained, and by what number of persons, and whom, by name and description, such injury was done, if such offender or offenders shall be known, and if not, stating such particulars respecting such offender or offenders as may be known; and like notices shall be posted of such application as hereinbefore prescribed in cases of other applications to presentment sessions? That notice is wholly irrespective of the time of the presentment sessions? Then the 11th section of the same Act consists of two parts. It says in the beginning "that all notices required by this Act shall be promulgated by advertisements affixed on, or immediately adjacent to, the doors of every police station or barrack, and at the places (if any) appointed by the grand jury for posting notices within each parish," and the obvious reason is, that a notice given to two principal inhabitants of a place may be valueless, unless the notice is promulgated in some manner that would make it matter of notoriety, and give parties an opportunity of resisting the application. But it is said that the first provisions of s. 11 must be considered as dependent on the existence of the presentment sessions. Now, it does not appear to me that the argument of the Solicitor-General and of Serjeant Sullivan, is well founded. The 11th section, having provided in the first instance for the promulgation of the notices, goes on to say, that "a copy thereof shall be delivered to the clerk of the petty sessions of the district off which it is proposed that the larger portion of the expense of such work is to be raised, and to the county surveyor and secretary of the grand jury; and such notice shall be delivered ten days previous to the first day appointed for holding the presentment sessions at which the application for the work is to be made." Why, that applies to the delivery of the notice, which should be delivered to the clerk of petty sessions, and to the county surveyor, and secretary of the grand jury, and it provides that the delivery of that notice shall be ten days before the presentment sessions; but it in no way qualifies the previous part of the section, which speaks of promulgating the notices. In my opinion, therefore, even granting that there was a foundation for the argument that we were to consider the provisions of the Grand Jury Act as an end, what we have here to deal with is a notice

wholly independent of the time for holding sessions; and here is the 11th section, which provides that every notice shall be promulgated as therein stated. If the objection was that the copy of the notice was not delivered in proper time to the clerk of the peace, or the county surveyor, or secretary to the grand jury, I could understand that the subsequent provisions should be relied on as shewing that the necessity for serving those officials within the time specified no longer existed; but in express terms the 11th section uses the two different words, "promulgate" and "deliver," and the provisions as to the time before the presentment sessions apply only to the delivery of the notice to the clerk of petty sessions. It appears to me, therefore, that on that ground alone it is impossible to contend that the original notice should not have been posted as required by the Act. That being so, of course under the authority cited by my Lord Chief Justice, and on the manifest construction of the Act, the applicants not having served or posted the notices in the manner required, I am of opinion that the serving and posting was a condition precedent to the application, and that the recorder was right in the decision to which he came. It is unnecessary to shew other inconveniences which would arise from holding that the provisions of the Grand Jury Act was altogether gone in cases in the borough of Cork. The difficulty of the Solicitor-General and of Serjeant Sullivan was this:—the Cork Act gave the town council such powers as the grand jury theretofore had. The grand jury could not have made the presentment without the service and posting of the notices. It, therefore, lay on them to shew that the Cork Act has taken away these provisions. They cannot say that it has done so expressly, and then comes the question whether it has done so by implication. I think, looking through the Act, that it will be very difficult to carry out the provisions of the Cork Improvement Act, if we hold that nothing except what was expressly brought from the Grand Jury Act into it was incorporated with it. The sound way is to view the two Acts and their provisions together. So many of the provisions of the Grand Jury Act as are inconsistent with the Cork Improvement Act are at an end. The provisions in question we cannot look upon as so inconsistent, and, therefore, we cannot, consistently with the rules of sound policy, consider them at an end.

HAYES, J.—I concur in the judgment of the Court, and I adopt the arguments as stated by my Lord Chief Justice and my brother O'Brien, and I feel that to go again over the same ground would be only wearying.

LEFROY, C.J., stated that he had authority from Fitzgerald, J., to say that he entirely concurred in the judgment of the court.

JACKSON v. BARTON.—April 22.

Summary procedure on Bills of Exchange Act—Security for costs.

A defendant in an action brought under the Summary Procedure on Bills of Exchange Act must have obtained liberty to appear and defend before applying for security for costs.

Martin v. Wilson (7 Ir. Jur. N. S. 335) followed.

Purcell, for the plaintiff, moved by way of appeal from an order made by Keogh, J., on the 24th March, directing the plaintiff to give security for costs. The action was one under the Summary Bills of Exchange Act. The defendant had, before obtaining liberty to appear and defend, applied to have the plaintiff, who resided out of the jurisdiction, compelled to give security for costs, and Keogh, J., had made the order. The case below is reported 8th Ir. Jur., N. S., p. 94. Counsel cited *Martin v. Wilson* (7 Ir. Jur. N.S. 335).

There was no appearance for the defendant.

The Court allowed the appeal, setting aside the order made below.

Court of Common Pleas.

[Reported by J. Field Johnston, Esq., Barrister-at-Law.]

SLATOR V. SLATOR.—Jan. 27.

Slander.—Statement of Occasions.

An application by the defendant, that the plaintiff's attorney might be required to furnish to him a statement of the occasions on which words were uttered for which an action of slander had been brought was granted; following Early v. Smith (12 Ir. C. L. R. app. xxxv.)

Brooks Q.C. for the defendant applied to the Court that the plaintiff's attorney might be required to furnish to the defendant a statement of the occasions on which he was charged with uttering and publishing the words in the summons and plaint alleged. The action was for oral slander and contained four counts the first two of which charged the uttering of the following words "Is not that Willie a shocking character? I do not know what will become of him. I discovered he attempted to rob my safe and attempted to make a false key by an impression in dough and has repeatedly stolen my wine." The third and fourth counts complained that the defendant had said that the plaintiff had attempted to entrap the daughter of the next friend by whom he was now suing. The defendant's attorney served a notice requiring particulars of the dates, to which it was replied that particulars were being inquired into. The defendant's attorney had sent a fresh letter to which no answer was returned. The defendant had made an affidavit stating "That the only occurrences which at all gave any color for the imputation of having uttered the words charged, were in conversation between the deponent and his own solicitor when consulting with him as to what steps were to be taken in reference to certain matters, that the words alleged were entirely different from what was said, and deponent was advised he could not plead without particulars."—*Early v. Smith* (12 Ir. C. L. R. app. xxxv.)

D. McCausland Q.C. contra.—The Common Law Procedure Act 1853, enumerates in what cases further particulars are to be furnished, but this is not an application for additional particulars but for particulars. The defendant may either plead a denial of the words or a justification, as on the face of his affidavit both are open. I admit that *Early v. Smith* is an authority for the motion, but in that case the defendant denied

that he ever used the words at all, which this defendant does not deny, and in that case Lefroy C.J. differed from the other three judges. The case was well considered; the Court took time to consider their judgment. [*Christian, J.*—As I understand the application, it is not in order to plead, but in order to know what the defendant may have to meet. If the truth was that the defendant had so often abused his nephew, that he did not know what occasion was referred to, I could understand the application; but it seems to me that, consistently with the affidavit, the defences must be a denial of the words spoken, and a plea of confession and avoidance pleading privilege. *Monahan, C.J.*—I cannot see any objection to the motion, unless it be that an exact precedent cannot be found. I think this is both for evidence and for pleading. In nine cases out of ten the parties know right well the case made and to be met. The plaintiff must know what the action is brought for. It is in furtherance of justice that a party, before he is called to answer, should know what he is to answer. *Christian, J.*—Is there any case in England where this was either granted or refused? No; we have searched from Croke, James, downwards. [*Monahan, C.J.*—If this were to embarrass the plaintiff, or for delay, or if the plaintiff made a case in reply which showed any difficulty, it would be different. *Christian, J.*—It seems to me this is more like a bill of discovery than an application for particulars.]

MONAHAN, C.J.—We must follow the precedent in the Court of Queen's Bench.

CHRISTIAN, J.—If it were not for that precedent, I would not make the precedent without a good deal of consideration. What strikes me is the absence of any case for so long a time where it was done. It seems, however, in furtherance of justice.

Application granted.

CURLY V. CLARKE—Jan. 29.

Setting aside Defences—Particulars of Payment—Common Law Procedure Act, 1853, s. 41.

A plea of payment to an action for the price of goods sold and delivered from time to time in such a manner that the items constituting the plaintiff's claim are, many of them, infinitesimal, and an indorsement of particulars alleging the impossibility of furnishing the dates and amounts of the payments so pleaded, from the nature of the transactions between the plaintiff and defendant, will not be set aside, upon the ground that by the same the plaintiff is exposed to the risk of being taken by surprise at the trial, and this, though the plea in question does not purport to be pleaded to the whole cause of action, and there be other pleas pleaded, the plea of payment being supported by an affidavit.

THE summons and plaint claimed £27 5s. 5¹/₂d. for goods sold and delivered and money due on an account stated, the particulars of which were indorsed thereon, and the indorsement was as follows, "Amount of goods bargained, sold, and delivered by plaintiff to defendant at his request, the particulars of which have been heretofore furnished, and will, if required, be

again supplied, £27 5s. 5½d." The defendant pleaded, with other pleas, as a defence to said action, save as to a sum of £4 3s. 6d., parcel of the monies claimed by the summons and plaint, that before action brought he paid and satisfied so much of the plaintiff's claim as is herein pleaded to, and save as aforesaid in manner hereon indorsed. The indorsement referred to was as follows: "From the nature of the dealings between plaintiff and defendant, the defendant is unable to give in detail the dates and amounts of the various payments made by him to plaintiff on foot of plaintiff's claim, as he kept no vouchers or accounts thereof, and frequently paid cash on delivery for some of the goods sold by plaintiff to defendant, and at other times he made small cash payments on account of goods previously sold and delivered, but he kept no vouchers or records of such payments, and he cannot, from memory or recollection, give any particulars thereof, having dealt with said transactions as cash transactions." A second plea alleged a set-off to a sum of £9, portion of the monies claimed, and a third plea pleaded that defendant had been discharged as an insolvent.

Michael Morris, for the plaintiff, moved that the plea of payment might be set aside, because the particulars of the payments were not given.—Common Law Procedure Act, 1853, s. 41. The plaintiff's previous bill of particulars contained three hundred or four hundred items, from threepence upwards. The defendant does not swear he paid the amount. [*Monahan, C.J.*—A defendant might be furnished with a bill for butcher's meat which had been supplied twelve months before; he might be quite certain he had paid it, and justified in saying he had paid it, though he did not know when he paid it.]

W. J. Sidney, contra.—The defendant would not swear more in his affidavit than he would in the witness-box at the trial, but he has made an affidavit stating "that he is wholly unable to state in what sums or at what times he paid plaintiff for the items of his claim; that the most of said items are the ordinary items supplied by plaintiff for the use of deponent and his family, and that the goods got from plaintiff were generally purchased by deponent's servant or his wife, who sometimes would pay cash therefor at the time of the sale and delivery thereof, and very often would pay for same some days after delivery; that he has made all possible inquiries from his wife and otherwise, as to whether she could inform him of the times and manner in which she made such payments to plaintiff, and that neither deponent nor his said wife is able to state the particulars of the payments so made, and that he believes that the plaintiff's said claim is a grossly exaggerated claim; that he has a set-off against plaintiff to the amount of £9, and that he was discharged as an insolvent on the 30th June, 1862, at which time he believed that the balance due to plaintiff amounted to about £4." It would be impossible to swear to sixpenny and fourpenny items.—*Dixon v. Toole* (4 Ir. C. L. Rep., 261); *Roche v. Colclough* (5 Ir. C. L. Rep., 538). [*Monahan, C.J.*—The plaintiff does not come within the rule at all, because he cannot be taken by surprise at the trial. *Christian, J.*—It seems to me that it is a fitter case for the defendant to ask the plaintiff for particulars, than the plaintiff the defendant. *Monahan,*

C.J.—The plea may be false, but it is not embarrassing. Suppose a man sued for £20 for goods sold and delivered, and that he knows there is only £10 due, but does not know to what portion of the demand that £10 applies, what should he plead? Payment as to so much. [*Monahan, C.J.*—When unable to apportion it, it is usual to plead payment to the whole, and a set-off to the whole, and at the trial to prove payment of half, and a set-off of half.]

MONAHAN, C.J.—We think there is a non-compliance with the section of the Act of Parliament requiring that with every plea of payment there should be given particulars; but we have been referred to authority to show that if the defendant be unable to comply with the Act of Parliament, he is not, therefore, to be deprived of the plea of payment, but is to put an indorsement such as is here given. There was a case somewhat similar before us, where acts required by Acts of Parliament were done, but the times of doing them were impossible to tell. It would be hard upon suitors to criticize their affidavits too minutely. The substance of the defendant's affidavit is this:—I am sued for so much money; I believe the claim is exaggerated; I believe that a portion of the payments pleaded were made by my wife and servant. It does not occur to us that this is to set up a case which may take the plaintiff by surprise. In point of fact it may have that result, but we are not to deprive the defendant of his right because he cannot satisfy us as to the particulars of these payments. But as the plaintiff could not have been aware of the affidavit made to support this indorsement, we shall make

No rule on the motion.

HICKMAN v. FORDE.—April 21.

Practice—Security for Costs.

It will make no exception to the general rule, which requires a plaintiff residing out of the jurisdiction of the court to give security for costs, that he is possessed of considerable property within the jurisdiction.

The practice of the Court of Common Pleas differs from that of the Court of Exchequer in respect to the affidavit necessary to ground a motion to compel the plaintiff in an action to give security for costs, the former court being satisfied with a general affidavit of merits.

In an action for rent by an absentee landlord against his tenant, an affidavit by the defendant's attorney, which contained the following, was held sufficient for the above purpose:—"This deponent saith the said defendant has a just and legal defence upon the merits, as deponent believes, to the said action of the plaintiff, and deponent saith he makes this affidavit in consequence of the defendant having been obliged to go to England on business, where he is at present, as deponent has been informed."

Concannon, for the defendant in this case, moved that the proceedings be stayed until the plaintiff give security for costs. The action is brought by an absentee landlord, who resides in Mincing-lane, London, against his tenant, for £6, being a quarter's rent of

premises in Dublin, and £1 arrears of said rent. The rent accrued due on the 1st of April, and the summons and plaint was served on the day following. The defendant's attorney has made an affidavit, stating where the plaintiff's residence is, and that "the defendant has a just and legal defence upon the merits, as deponent believes, to the said action of the plaintiff, and that he makes this affidavit in consequence of the defendant having been obliged to go to England on business, where he is at present, as deponent has been informed." The plaintiff's agent has made an affidavit stating that the defendant has paid the rent of the premises to him ever since they were let to him (from which it appears he was a good tenant up to the present), and stating that the plaintiff is possessed of property in Dublin of the value of about five hundred pounds per annum. We have the agent's receipt for the rent due up to the 1st January, 1863, which includes the £1, and the defence to the rest of the claim is a tender of the money before action brought. The application is *ex debito justitiæ*, irrespective of the oppressive character of the action.—*Fennell v. Fitzgerald* (4 Ir. Law Rec., 170). The same has been held in equity—*Lord Lucan v. La Touche* (1 Hogan's Rep., 448), and is stated as a mere matter of practice in *Ferguson's Practice*, 904. *Eyre v. Sparks* (3 Ir. C. L. Rep., 542) shows that it is not necessary that the affidavit should set out the nature of the defence. In *Spencer v. Campion* (3 Ir. C. L. Rep. 231), an affidavit that the defendant "is advised, and believes, that he has a good and legal defence on the merits," was held sufficient. So *Fitzpatrick v. Dooley* (1 Ir. Jur., N.S., 333), in this court. [*Ball, J.*—The practice is different in the Court of Exchequer.] Yes; but it is the same in this Court and the Court of Queen's Bench.

Walter Boyd, contra.—The authorities cited are old; since the Common Law Procedure Act, 1853, was passed, the law is quite different. The tenant obtained the receipt by a misrepresentation. [*Monahan, C.J.*—It is clear that, independently of the receipt, the case comes within the ordinary rule. *Christian, J.*—It is well settled that there is a different practice in this Court and the Court of Exchequer. We are satisfied with a general affidavit.] This affidavit is insufficient; it only states that the deponent has been informed, &c. In *Higgins v. Bourke* (7 Ir. Jur., 80), the affidavit was stronger; it set out the defence, yet was not held sufficient. [*Christian, J.*—We have here the statement in the affidavit corroborated in part by the receipt produced. *Ball, J.*—What are the merits of your case?] A quarter's rent due. [*Monahan, C.J.*—Why did you not sue in the Civil Bill Court?] The plaintiff would not get costs. There was no tender. A mistake of £1 was discovered, and the plaintiff's agent refused to give a receipt in full unless that £1 were paid, and then the defendant refused to pay any of the rent.

MONAHAN, C.J.—Let proceedings be stayed until security for costs is given. We say nothing of the costs of the motion.

Rule accordingly.

Court of Probate.

[Reported by W. R. Miller, Esq., LL.D., Barrister-at-Law.]

MALONEY v. CASEY.—April 24.

Practice—Setting down cause—Final judgment—85th Rule.

Where the hearing of a cause was commenced in Vacation and concluded in Term, in order to get final judgment, it is requisite for the party who got a verdict to apply to the judge to limit a time within which the other party shall, if he thinks fit, move to set aside the verdict, pursuant to the power reserved in the 85th Rule, contentious.

Dr. Townsend applied on behalf of the defendant for liberty to set down the cause for final hearing. The cause was at hearing before the term began, and was concluded during the term. If it was to be considered as heard in vacation the plaintiff would have, under the 85th Rule (contentious), the first four days of term to move to set aside the verdict; if it was, on the other hand, considered as heard in term, then he should move within the first four sitting days after the trial. In either case the time had elapsed, and the defendant was entitled to set down the cause for final judgment.

KEATINGE, J.—This appears to be just the case in which the power reserved by the last clause of the rule referred to should be exercised, as, in fact, the cause was heard partly in vacation and partly in term. I will therefore, by my order, direct that the time for applying to set aside the verdict be limited to two days.

NOTE.—The following is the Rule referred to:—"85. Every application to set aside a verdict or nonsuit shall be made within the first four days of the term next after the trial, if had before a judge of the Court, or any of the judges of the Superior Courts of Law, either in the sittings after term or at the assizes, or within the first four sitting days after the trial if had within the term, or within such other period as the Court shall in any particular case think fit to order."

IN THE GOODS OF ALEXANDER OAG.—April 24.

Probate—Scotch confirmation.

Where a confirmation was made in Scotland of testamentary papers executed by a person who was domiciled there, but died before the 21 & 22 Vic. c. 56 (the Probate and Confirmation Act) came into operation, there being assets in this country, the Court will allow such documents to be proved here, the clause about resealing the confirmation not applying to the case.

Dr. Gibbon, for Alexander Stuart, moved for liberty to take probate of several documents executed in Scotland as the will of the deceased. A deed of settlement, bearing date the 24th December, 1850, had been executed by the deceased, assigning all his property and all his moveable estate to trustees: and also appointing executors, one of them being Alexander Stuart. And on the same day a deed of instruction or declaration of trust was also executed. A holograph codicil was made and signed by the deceased,

and dated the 13th October, 1854; no attestation by witnesses was to it, but in Scotland that was not essential. The deceased died in the year 1854, and on 29th September, 1856, a probate or confirmation was had, and a *testament testamentar* was granted to Alexander Stuart, the executor of those documents, in the Scotch Court. The inventory filed there did not include the property in Ireland. The oath was the same as is used here. The Act, 21 & 22 Vict. c. 56, s. 9, provided for resealing Scotch grants, but did not apply to cases where parties died before that Act, and the registrars, had declined to reseat the Scotch grant—*Goods of Gordon* (29 L. J. Prob. 67). The deceased, as was sworn by affidavit, had been domiciled in Scotland. The original papers were here, having been registered in Scotland.

KEATINGE, J.—I think that you are entitled to probate of the several documents referred to as together containing the last will of the deceased. I therefore give you leave to apply in the registry for and obtain such a grant.

Order accordingly.

TERNAN v. TERNAN.—May 4.

Habeas corpus ad testificandum—Prisoner.

Parties referred to a Law Court for a writ of habeas corpus to bring up a prisoner to give evidence in the Probate Court.

Dr. Townsend, for the plaintiff, moved for a *habeas corpus* to bring up a person who was in custody under law process to give evidence. He referred to the 30th section of the Probate Act of 1857, which gives the Court all the powers possessed by the Court of Chancery to enforce the attendance of witnesses.

KEATINGE, J.—I am not aware that the Court of Chancery can issue such a writ. You had better apply to one of the judges of the Law Courts, as the sheriff might be involved in some difficulty if I ordered such a writ.

NOTE.—But it appears from the case of *Buckeridge v. Whalley* (6 W. R. 180), that the Court of Chancery does possess the power of issuing such a writ, as Vice-Chancellor Kindersley in that case ordered it to issue to bring up a person in custody under legal process to attend in Chambers *de die in diem*; and several other cases are there referred to where the matter was considered and the writ ordered.

BRADLEY v. REILLY.—May 8.

Practice—Several wills not pleaded.

Unless by consent, several earlier wills of the deceased, not propounded by any party, cannot be put in issue in a suit by an executor to establish a later will, nor can the next of kin, by a citation on the persons interested, oblige them to litigate them in that suit.

Martin moved to fix the mode of trial in this case.

Dr. Ball, Q.C., for the defendant mentioned that

this suit was by an executor, in a will of the deceased, to prove the same as against the next of kin. There were besides the will now in dispute, several former wills of the same deceased, to which the same plea of want of capacity filed in this suit would equally apply; and it would be desirable and a great saving of expense to have their validity tried in the same suit with that of the one before the Court. In *Custiss v. Dun* (4 Ir. Jur. N.S. 248) a similar course was adopted, but it was by consent; and in *O'Connor v. Herbert* (7 Ir. Jur. N.S. 125) two wills were put in issue by different parties in the suit. It occurred to me that a citation might be issued by the next of kin on the several parties interested under the prior wills requiring them to propound or see proceedings in this suit; but on looking at the cases of *Tully v. Dalton* (Milw. 462) and *Little v. Comyn* (Ib. 467), it would appear that such a course would be impossible, and that there must be separate suits as to each will.

KEATINGE, J.—Unless some distinct party propounds each will separately, or unless every one interested consents, I do not see how you can put those earlier wills in issue in this suit.

FORSTER v. MURPHY, AND IN THE GOODS OF MURPHY.

Administration—Creditor—Next of kin—Costs—Delay.

Administration refused to a creditor who had cited next of kin to accept and refuse, though the estate was insolvent, and considerable delay on the part of next of kin in applying for a grant had occurred; but in such case the creditor was allowed his costs out of the estate.

Dr. Miller, on behalf of the plaintiff, moved for liberty to apply for and obtain letters of administration of the goods of the deceased, or if that should not be granted, then that the defendant should be ordered before he extracted a grant to pay the costs incurred by the plaintiff in the proceedings he had taken in order to get such grant, or in default that the plaintiff might get the grant. It appeared from the affidavit of the plaintiff that the deceased had died in the beginning of November, 1862, in France, intestate, leaving a widow and four children him surviving, one of whom is the defendant, who was permanently resident in England. The deceased died greatly embarrassed, far beyond any assets he left. There were, however, assets amounting to £100 in Ireland. The plaintiff had in 1852 recovered against the deceased in the Queen's Bench a judgment for £18 11s. 6d., but having been driven to take proceedings on his judgment, it now amounted to £55 17s. 11d. On the 3rd of March, 1863, the defendant and the other next of kin and the widow of the deceased were duly served with a citation on behalf of the plaintiff to accept or refuse letters of administration of the goods, &c., of the deceased, otherwise to show cause why the same should not be granted to the plaintiff; and on the 2nd of May, 1863, the defendant appeared and consented to accept the grant. As to the first part

of the motion, it was laid down by Sir John Nichol in *West v. Withy* (3 Phil. 374) that a next of kin when he has no interest and where the estate is insolvent, may be excluded. Several cases are cited in that case, pp. 380, and 381, exactly in point, where the widow and next of kin were passed over in favour of creditors, and where the debts exceeded the assets; and in *Withy v. Mangles* (10 Ch. & F. 248) those cases were approved of by Lord Cottenham. The right of the next of kin is not a legal but a beneficial right, having regard to their interest, different from that of an executor who cannot be passed over. With respect to the second branch of the motion, if the Court should not think the plaintiff entitled to the grant, he is clearly entitled to his costs. The next of kin delayed so long that he was bound to issue the citation, and six months has been held such delay, as entitled the creditor issuing a citation to his costs. *Cole v. Rea* (3 Phill. 428), it is not said there that the costs were given out of the estate, on the contrary it would appear from Sir John Nichol's language, viz.—"It was the duty of the next of kin to have taken out this representation earlier—the creditor has been compelled to take these steps to recover his debt, he is I think entitled to his expenses," as if the next of kin was ordered to pay them. In the goods of *Spitty*, (16 Jur. 92), they were also in a similar case ordered by Dr. Lushington, but as the learned advocate who applied on behalf of the creditors only asked for them out of the estate, perhaps they were so given there. No other creditor has applied, as it is understood that the most of them are protected by policies of insurance.

Dr. Ball, Q.C., for the defendant, resisted the motion.—The next of kin had a right to the grant, unless excluded by settlement or the like, but there might be many duties for the administrator in this case to discharge, though the estate of the deceased appeared insolvent, and it was not desirable that a stranger should be mixed up in his family transactions.

KEATINGE, J.—There may be a good deal to do respecting the policies of insurance, and I do not consider that I can pass over the right of the next-of-kin in this case; but as regards the plaintiff's costs, I think he is entitled to them, but only out of the estate. I will therefore order that the defendant be at liberty to apply for administration, and that he do extract within fourteen days from this date, and in default, that without further order the plaintiff be at liberty to extract, and that he be paid out of the estate the sum of £12 as and for his costs.

Order accordingly.

NOTE.—In this case, probably, the form of the citation had some weight on the court, it being to accept or refuse, &c., which, in *Neve v. Neve* (Milw. 569) was held an admission of the right of the party cited, and an estoppel; but for that, the authorities cited would appear conclusive, that if the estate is clearly, as it was in this case, insolvent, a creditor would be preferred to a next-of kin. Perhaps in similar cases the citation should be only "to show cause why administration should not be committed to A. B."

GOODS OF URE.

Felo de se, will of—Practice.

Administration of the goods, &c. of a felo de se granted to the nominees of the Crown, though there was a will appointing executors.

G. Waters, on behalf of T. Mostyn, the solicitor for the treasury, moved for letters of administration of the goods and chattels of the deceased. It appeared from the affidavit on which he moved, that a coroner's inquisition of the 3rd of March last, held at Armagh on the deceased's body, had found a verdict that he had died a *felo de se*; and an inventory had been made of his personal chattels; amongst these there was a deposit receipt for £1,600 lodged in a Branch Bank. The Attorney-General had consented to the grant to the solicitor for the Treasury, as the nominee, and for the use of the crown. The deceased had made a will, dated the 3rd day of February, 1863, duly attested, giving his property amongst his relatives, who were now in America. The title of the Crown to the goods of the deceased is ascertained by the inquisition, and that is in law a revocation of the will—1 Wms.'s Ex. 56. The grant must, however, be subject to the debts, according to *Megitt v. Johnson* (2 Dougl. 539), but the solicitor of the treasury is exempt from giving security (20 & 21 Vict. c. 79, s. 86).

KEATINGE, J.—If your title is under the inquisition you don't require the administration; but if you take it, you must take it *cum onere*. I therefore decree letters of administration to you without being required to give security.

NOTE.—See, however, *The Goods of Eliza Bailey* (2 S. & T. 156), where the distinction was made and acted on by Sir C. Cresswell between the title of a will of a *felo de se* to probate and its operative effect; and in that case the executor in the will of a *felo de se* was held entitled to probate of it irrespective of the Queen's warrant, which he had. Indeed, whatever before the 1 V. c. 26, may have been considered the law on this subject it is clear that since that Act no will can be revoked except in one of the modes there pointed out, one of which is marriage, but none of them is suicide; but by the inquisition all the goods of the *felo de se* do undoubtedly vest in the Crown.

CROSSLEY v. ANDREWS.

Practice—Notice of trial.

In future it will be necessary for parties going to trial to give regular notice of trial under the 44th Rule (contentious), besides the eight days' notice heretofore given under the 40th Rule, and which was considered sufficient notice of trial.

Dr. Ball, Q.C., moved in this case to fix the mode of trial.

KEATINGE, J.—I wish the solicitors practising in this Court to know that in future I shall require a regular and formal notice of trial to be given pursuant to the 44th Rule (contentious), as when the copy of it is lodged in the office I will be able at once to see the state of the business, and regulate much more readily the list of causes for hearing. Heretofore we considered the eight day notice to fix the mode of trial as sufficient notice of trial, but it will be more satisfactory to have a formal notice of trial lodged in the office.

NOTE.—The 44th Rule is:—"The plaintiff shall, eight clear days at least before he intends going to trial, give notice to each party in the cause for whom an appearance has been entered, of his intention to do so; and if he delay giving such notice for the space of one month after the Court has directed the mode in which the question at issue shall be tried, the defendant may give a similar notice to the plaintiff and the aforesaid other parties. A copy of every such notice, which shall be according to the form No. 16, shall be filed in the Registry; and the cause, except in cases where a jury is summoned, or where the judge shall otherwise direct, shall come on in its turn."

KELLY v. KELLY.

Administration—Widow—Joint grant.

It is no ground for passing over the widow in the choice of an administrator that the assets consist principally of a farm, which would require the superintendence of an active and intelligent farmer—the widow being advanced in life:—a joint grant never forced by the Court.

Dr. Townsend, for Anne Kelly, the widow of the deceased, intestate, moved for liberty to apply for and obtain a grant of letters of administration of the goods, &c. of the deceased. The deceased was a farmer possessing 80 acres of land, and left a widow, but no children. The defendant is a brother of the deceased, and one of his next of kin; and there were several minors, the children of a deceased sister. No ground for passing over the widow was made, as though advanced in life she was quite competent to direct the farm to be sold and to divide the produce, and would give ample security.

Dr. Ball, Q.C.—It would be more for the advantage of all parties that the farm should be cultivated and not sold yet, as there was a depreciation at present in the value of land; and therefore it would be more desirable that the defendant, who represented all the next of kin, and was a competent farmer, should have the grant, or, at all events, that he should be joined in the grant with the widow, who was advanced in life and not competent to manage the farm.

KELTINGER, J.—The defendant wants to coerce the plaintiff to give up her own judgment as to the propriety of selling the farm or not; and unless on consent the Court never forces a joint grant. I will therefore give the plaintiff leave to apply for and obtain in the Registry letters of administration of the goods, &c. of the deceased; and as each party represents a moiety of the assets, let each party have their costs out of the estate.

Order accordingly.

Court of Bankruptcy & Insolvency.

[Reported by John Levey, Esq., Barrister-at-law.]

[BEFORE BERWICK, J.]

RE CHARLES M'CAETHY.

Vexatious litigation—Recovering a less sum than an action is brought for—bringing a cross action.

Where an action is brought for the recovery of a debt and false pleas are put in; and then a cross-action is brought, and both are referred to arbitration,

when the plaintiff recovers a less sum than the action is brought for, the ground of vexatious defence fails. Although bringing an unfounded action will always receive the censure of the Court, yet where both actions are made the subject of one verdict the insolvent will only be remanded on a final hearing within the limits of the discretionary cause.

THE insolvent had been a shopkeeper in Tralee. He was opposed by Mr. James M'Enery, brewer in Limerick, on the ground of having vexatiously defended an action brought against him for the recovery of a debt, and for bringing an unfounded action against M'Enery. It appeared that M'Enery was in the habit of supplying the insolvent with goods in the way of his business, and that he was also employed by him in selling ale and porter on commission. The insolvent having passed bills on account of the debt to the amount of 155*l.*, M'Enery sued him on foot of them; and the insolvent pleaded that they had been passed for his accommodation, and without any consideration. He at the same time brought a cross-action against M'Enery, claiming a sum of 257*l.* for work, labour, commission, cash paid for his use, &c., to which he pleaded a denial, and set off to the amount of 155*l.* claimed by him. The first action came to trial, and when it was being proceeded with, it, as well as the cross-action by the insolvent against M'Enery, were referred to arbitration, when a verdict on the two cases was found for the plaintiff for 100*l.*, with 100*l.* 6*s.* 4*d.* costs; and for the sum of 200*l.* 6*s.* 4*d.* a *ca. sa.* was issued against him, under which he was arrested, and from which he now sought to be discharged under the Act.

Kernan, Q.C., opposed and contended that it was a case of great fraud, and one of peculiar hardship on the opposing creditor, who had been wantonly put to great cost; first, in prosecuting an action to which a false defence had been pleaded; and secondly, in defending an action that turned out to be wholly unfounded. Pleading that the bills were for the accommodation of Mr. M'Enery was not only false, but was calculated to do injury to Mr. M'Enery as a mercantile man; the idea that he was obliged to resort to such a person as the insolvent to accept bills for his accommodation originated in malice, and was utterly false; and on that ground the case came clearly under the 221st section of the Act, denominated one of the penal clauses. The insolvent ought to get a very long remand.

Heron, Q.C., contended that the debt as returned on the schedule was one for which the Court had not power to remand the insolvent at all. [**Lynch, J.**—Why so?] Two grounds of opposition were opened against him:—first, vexatious litigation in defending an action; that opposition was at an end, inasmuch as the verdict for a less sum than the action was brought for—*Re Stacey* (Cox & M'Crea's Rep. 83); *Levy on Insolvency*, 313. As to the second ground, namely, bringing an unfounded action, there was nothing whatever about that on the schedule or in the verdict; so that for the debt as returned in the schedule *qua* debt, or the mode of contracting it, there was no ground whatever for remanding the insolvent at all; so that, instead of getting the very long re-

mand that was called for, the Court would be bound to give the insolvent a free discharge.

JUDGE LYNCH said he would take time to the next morning to consider what judgment he would give; the point raised was somewhat embarrassing, but there was authority for it. He might, no doubt, have recourse to the discretionary clause; but he thought, on the whole, it was a case where there ought not to be a free discharge.

On the following morning Judge Lynch said he had no difficulty in the case; the insolvent was opposed on two grounds,—1st, vexatious defence, by pleading that the bills of exchange on which the action was brought were for the accommodation of Mr. Henry, the opposing creditor. Now, that was not only untrue but in a great degree prejudicial to the creditor. Secondly, for having fraudulently contracted a debt by bringing an unfounded action when he was utterly insolvent, and thus putting his creditor to costs in defending himself. No doubt, both actions were referred to arbitration, and a general verdict found for the plaintiff for 100*l.*, with costs, and that verdict was for 50*l.* less than the action was brought for. It was contended for the insolvent that in the first action he had succeeded in reducing the plaintiff's claim, and therefore upon decided cases the opposition had failed. It was contended in the second place that in the debt as returned on the schedule and by the verdict there was nothing about the costs of the cross-action said to have been unfounded, and therefore opposition on that ground had also failed. It was enough to know that the action was brought to show that the insolvent had acted most improperly; and he never could give countenance in any way to a man utterly insolvent in circumstances bringing an action to recover a demand that had no valid foundation, and thus use the forms of the law to harass and oppress his creditor, well knowing that if he failed in his suit the only means he had of meeting his creditors' demand was by going through the Insolvent Court. If the insolvent had not succeeded in reducing the plaintiff's claim to a considerable amount there was no doubt that he would give him a very long remand. As to the other ground, there was no doubt that he brought an unfounded action; but, under the circumstances of the case, he thought it was not necessary to deal with it under the penal clauses, and he thought the ends of justice would be satisfied by remanding him for four months from the date of his arrest, which would leave him another month in prison.

[BEFORE LYNCH, J.]

RE DIGAN AND HIRD.—April, 1863.

Final examination of bankrupt—Reckless trading—Misrepresentation as to the state of his affairs—False entries.

Where a bankrupt has traded recklessly, made false representations as to the state of his affairs, and made false or fictitious entries, or introduced fictitious figures into his books, for the purpose of bringing out a balance in his favour; but it appears upon a full investigation of his case by the assignees

that there has been no suppression or concealment; the examination will be passed, but the certificate will be suspended for three years. Cases may occur of so fraudulent a character that, although the bankrupt may make a full disclosure, still the Court will not be bound to pass the examination.

THE bankrupts were extensive millers at O'Brien's Bridge, and after several adjournments they came up for final examination. It appeared that the books were principally kept and the business managed by Digan; and that Hird, who had recently come into the concern with a capital of £5,000, which appeared to have been lost, knew nothing of the affairs of the partnership. The books were very badly kept, and would bear any construction that a clever accountant might choose to put on them. Great losses had been incurred, and very serious misrepresentations had been made to one of the creditors, particularly the Messrs. Adams, the eminent corn merchants of Cork; but the official assignee had reported that the schedule had been tolerably well vouched, and that there was no suppression of property or concealment.

O'Reardon appeared for the Messrs. Adams to oppose the passing of the examination; Kernan, Q.C., was for the bankrupt, Digan; and Devitt was for J. Hird.

O'Reardon contended that it was a case where, even if the schedule were vouched—which he thought was impossible—the examination ought not to be passed, as he believed. If the examination were passed the bankrupt would, under the circumstances, be entitled ultimately to get his certificate. [Judge Lynch.—I do not admit that to be the law.] But whether so entitled or not, there was quite enough in the case to warrant the Court in saying that property must have been suppressed, or was unaccounted for somewhere. Upwards of £15,000 had disappeared within two years; and his books were kept in such a way that no one could understand or unravel them; and it was impossible for the Court to come to the conclusion that that large sum was accounted for. Then as to conduct he totally misrepresented the state of his affairs to those from whom he obtained credit. He committed a heartless fraud upon his partner, Hird, by representing that he was solvent when he got his £5,000, which were wholly lost; and although counsel for Hird announced that he withdrew opposition, still the Court could not overlook the transaction. It was clearly a case where the examination ought not to pass, and where the bankrupt should never be permitted to get into trade again. As to Hird, there was, of course, no opposition to his passing and getting an immediate certificate.

Kernan, Q.C., for the bankrupt, admitted that proper or regular books had not been kept, but he denied that there was any concealment or suppression of property, or that any property had been unaccounted for; he relied on the report of the official assignee. The trade in which the bankrupts were engaged was not disastrous during the period it was carried on; anyhow their losses were enormous. He admitted that there might be some suspension of the certificate, but there was no reason why the examination should not pass.

JUDGE LYNCH said there was no doubt that the case was a very bad one; and there was no doubt that as regarded Hird, he was entitled to the sympathy of all who heard his case. He put his £5,000 into the partnership on representations made by Digan that the concern was solvent when he must have known that that representation was untrue; but as Hird, with an amount of good feeling and forgiveness rarely manifested on such occasions, had withdrawn his opposition, the Court would not take his conduct, in dealing with Hird, into consideration with a view to any punishment with regard to that part of the case, still it was impossible to wholly shut it out of view in regarding the general conduct of Digan. The losses for three years were set down at £15,000, and there was no doubt that all these losses had not been satisfactorily accounted for; and it was equally true that it would be impossible to account for them from the way the books were kept. The books of a trader, particularly a trader engaged in extensive transactions like Digan, ought to be a true and full record of all his affairs; but such was not the case in the present instance. And although it might be that Digan had originally no fraudulent intentions in the manner in which he kept his accounts, still it was in evidence that he charged himself with items of £800 and £1,500 merely to make out a balance that would bear a semblance of truth, but which was totally fallacious, in fact a fabrication; and his excuse for doing that was in consequence of the totting being wrong. Now, these entries were fictitious; they were false statements; and what reliance could be placed on books kept in that way. The fact that books were not properly kept did not of itself furnish a ground for refusing to pass the examination, for there were various other ways, by invoices, checks, receipts, and other documents by which a man might satisfactorily prove the truth of his case; but there was nothing so satisfactory as books regularly kept. But if, besides not having kept books regularly, there was any evidence of suppression or concealment of property, then the case would assume a totally different aspect; but here the official assignee expressed his belief after investigating everything the estate had been substantially disclosed. The Court, relying on that statement, would not be justified in refusing to pass the examination. Something had been said to the effect that no matter how fraudulent a case might be, still if there was a full and true disclosure of the bankrupt's estate and effects, he would be bound to pass the examination, and consequently that the bankrupt would be entitled at the end of three years, at the most, to go into trade again, and that there was some decision to that effect. Now he (Judge Lynch) did not believe that to be the law, and unless he was coerced by some superior tribunal, he would not adopt it. The true ground of complaint against Mr. Digan was, that being engaged in a sinking trade yearly, losing largely, he did not look minutely into his affairs, but became reckless and unmercantile in the manner in which he tried to raise funds to get himself over his difficulties. Whilst in that sinking condition, he made a gross mis-statement of his affairs to induce Hird to become his partner, by which the unfortunate young man lost his £5,000. Instead of Digan having at that time,

as he represented, a capital of £4,000, he was actually deficient to the extent of £2,300, and in coming before the court, Digan had actually to vouch his accounts on the basis of that deficiency, which existed in the month of September, 1860, thus falsifying the statement under his own hand that he had a capital of £4,000, which induced Hird to invest his £5,000, which had been totally lost. Then as to the mode of his contracting the debts with Messrs. Adams and with Mr. Spaight, his conduct was highly reprehensible. He misrepresented the state of his affairs, and the solvency of his brother, whose security for £2,000 he gave to each of these creditors, stating to each that his brother had not been security to any one else, and enjoined secrecy on each. On the whole, it was a case disclosing the most reckless and unmercantile conduct that ever marked any case; but still there was some evidence in the case to show that although Digan was gradually sinking, yet he entertained a belief that in the end some change would come that would enable him to extricate himself, and finally meet his engagements. He would pass his final examination; but in the interests of trade, and for the protection of creditors from being in future made the victims of such a system as was disclosed in the present case, he would suspend Digan's certificate for the longest period the law would permit, namely for three years. Hird would, of course, be entitled to an immediate certificate.

Agent to the bankruptcy—Mr. Julian.

Agent to the bankrupt, Digan—Mr. Perry.

Agent for the bankrupt, Hird—Mr. Kearney.

RE PATRICK HENNESSY.

Final examination—Removal of property—Deficiency unaccounted for—Contradictory evidence given by bankrupt—Want of books—False entries.

Where property has been removed, although it has been sworn that it has all been brought back, and the creditors are unable to trace any other property, or give evidence of its removal, still where a deficiency is unaccounted for, the presumption is that all the property concealed has not been restored. Where the evidence of the bankrupt is contradicted, and his only explanation is that he does not recollect, the court cannot believe that he has made a full disclosure. In such case the examination will be adjourned sine die, but liberty will be reserved to re-open it when the bankrupt can make a better case, and satisfy the creditors that all the property has been restored.

THE bankrupt was a draper in Macroom, and had been several times before the Court for the purpose of having his examination passed. It was alleged against him that he had concealed or suppressed property to a considerable amount, and that a farm, which was in the possession of his father-in-law, a Mr. Holland, was believed to be his, and that it was purchased with four hundred pounds of his creditor's money. Holland was examined, and denied positively that there was any of the bankrupt's money invested in the purchase of the farm. Some of the persons

who did business for the bankrupt were examined, who deposed that stock had been taken in July, 1862, when there appeared to have been 1,200 pounds worth of goods on hands. In about three weeks afterwards, stock was taken by a person in the employment of Sir John Arnott, of Cork, who was the largest creditor the bankrupt had, and in that second stock-taking there was deficiency, or difference, between it and the first stock of upwards of three hundred pounds. Sir John Arnott's clerk then remained in charge of the property, making sales in the usual way, and assisted by the bankrupt and his family. It appeared from the examination of some of the witnesses that the bankrupt's wife had concealed a parcel of goods on a garret, and that she directed some of the persons making sales in the shop to enter a smaller sum than was actually received in many instances, she taking the difference for her own use, but that the sums so taken by her did not in the whole amount to five pounds. The bankrupt, however, swore that he had nothing to do with those false entries or the removal of the goods. Upon a full investigation of the whole case before the official assignees, there appeared a deficiency, or sum unaccounted for, to the amount of one hundred pounds at least. Under those circumstances, the bankrupt came up to have his final examination passed.

Kernan, Q.C., opposed, for the assignees and creditors.—He read the several depositions made by the witnesses, and contended that the bankrupt was perfectly aware both of the false entries and the removal of goods by his wife; that there was clearly a concealment of property, although the assignees were unable to trace it; but the deficiency that existed was ample proof that property was suppressed. The creditors, too, were convinced that the farm that he alleged belonged to his father-in-law was his own, but for the present they had not sufficient evidence to warrant them in instituting proceedings to recover it for the creditors. On the whole, it was a case where the interests of trade required that the examination should be adjourned *sine die*, and the bankrupt be thus prevented from getting a certificate, or going into trade again.

Levy addressed the Court for the bankrupt.—There was no evidence that a particle of property had been removed from the bankrupt's house. What the wife removed was concealed in the house, and she had sworn positively that it had all been brought back. As to the false entries, the bankrupt had nothing to do with them, and they amounted to no more than an effort on the part of the bankrupt's wife to get a few shillings for the support of her family whilst the creditors were in possession of the property.

JUDGE LYNCH said he considered the case a very bad one; and in his opinion it was an important one, and could not be allowed to pass without incurring the strongest condemnation the Court could pronounce. In the first place there were no books containing a record of the bankrupt's transactions, but there were documents that proved beyond dispute that property must have been suppressed or made away with. It was contended by bankrupt's counsel that because no goods had been traced or discovered but what the bankrupt's wife had concealed, there was no other

concealment or suppression, and that all she had removed had been brought back. The nondiscovery of property was not proof that there had been no suppression, and there was no proof that all the wife had concealed had been brought back; and then there was a deficiency to a considerable amount wholly unaccounted for, which was evidence that property had been made away with in some way. It was also urged that the bankrupt had nothing to do with the removal of the property by his wife. But there was distinct evidence that he must have known of it, for one of his shopboys swore that upon one occasion when he came into the shop he said that the shelves looked naked, and some of the goods should be brought back. It was also sworn in his presence that he gave directions about making the false entries; and when called back and asked if he had given such directions, or if he had made the observations about the empty shelves or bringing back the goods, his answer was that he did not recollect. It appeared too that he had given a false account about the stock taking; he swore that he had given directions to value the stock as high as possible,—evidently with a view to have a deficiency accounted for, by having it believed that the stock was overvalued. In almost everything he had sworn he was contradicted by other evidence, and by undisputed facts in the case. He (Judge Lynch) thought he would do an injury to trade if he were to pass the examination in such a case without at least further and more satisfactory evidence that all the property concealed had been brought back. He would adjourn the examination *sine die*, with liberty to apply to reopen it, when he was prepared to make a better one, and satisfy his creditors that the property had been all restored.

LONGFORD APRIL SESSIONS, 1863.

[BEFORE LOFTUS BLAND, ESQ., Q.C., CHAIRMAN.]

DOWD, CROW, AND WILSON v. O'BRIEN.

Bill of exchange accepted by a third party, and given to a creditor to induce him to forbear opposing an insolvent.

Where a bill of exchange is given by a third party to a creditor to induce him to forbear opposing E. an insolvent, and the creditor endorses it for valuable consideration to the plaintiffs, who have no notice whatever of the insolvency of E., who is no party to the bill, and who are bona fide holders, still they cannot recover against the acceptor, the bill being void, ab initio, but must look to the party from whom they received the bill.

THIS was a civil bill process brought by the plaintiffs, who are merchants in Dublin, against the defendant, a farmer, residing near Longford, under the following circumstances:—It appeared that a person named Evers had petitioned the Insolvent Court to be discharged as an insolvent; and on the day his case was to be heard a creditor of his named Skelly threatened to oppose his discharge unless he got some security for his debt. He said he was informed that Evers's own security would be of no value, but suggested that

he should get the security of a third party. Evers then induced O'Brien to give Skelly his acceptance for fourteen pounds, being the amount due by him to Skelly, Evers' name not appearing at all in the transaction. This bill was endorsed by Skelly to the plaintiffs for value, and there was no evidence that they ever heard of the insolvency of Evers.

Wilson, solicitor, said his clients were clearly entitled to a decree. He apprehended that no authority could be found to shew that such a bill was in the hands of a party to whom it was endorsed before due, and who gave value for it, and who never heard of the insolvency was not a perfect and valid security, even supposing that it was given originally to buy off opposition.

Levy, for the defendant, examined Skelly, who admitted that the note was given to him to stop opposition against Evers. He endorsed it the day after he got it to the plaintiffs in payment of a debt he owed them; they knew nothing whatever of the insolvency of Evers.

The CHAIRMAN said he thought the plaintiffs, under these circumstances, were entitled to recover unless they were fixed with notice of the insolvency. It would be a hardship that innocent parties who had given full value for a bill of exchange, and who knew nothing whatever of the circumstances under which it was originally made, should not recover upon a security that appeared to be perfectly valid as far as they were concerned.

Levy said he went the full length of saying that the bill was *void ab initio* and could not be recovered, even in the hands of innocent parties. There were late decisions to the very point: *Reeves and another v. Hawkes* (6 L. T. 63); *Goldsmid v. Hampden* (5 C. B., N.S., 94). There were old cases to be found in all the works on insolvency to the effect that an agreement by a third party to pay a sum of money for withdrawing opposition to an insolvent was void, and could not be enforced—*Murray v. Reeves* (8 B. & C. 241). The defence was, that the bill was void as regarded the defendant, and he had only to prove the illegality of the consideration, and the endorsee was left to recover from his immediate endorser.

The CHAIRMAN said, upon looking into some authorities, he found that in cases where the Legislature declared that the illegality of the consideration shall make the contract void, the defendant may insist on such illegality, though the plaintiff or some party between him and the defendant took the bill *bona fide* and gave valuable consideration for it; and the innocent holder can only in such cases resort to the party from whom he received. He thought it the safer course to dismiss the process.

Court of Chancery.

[Reported by Edmund T. Bewley, Esq., Barrister-at-Law.]

DALY v. ALDWORTH.—Jan. 24; Feb. 18, 1863.

Will—Construction—Joint tenancy—Tenancy in common with benefit of survivorship.

A testator devised to his three illegitimate children, A.,

B. and C., a yearly rent-charge, chargeable on the lands of X., to be equally divided between them, share and share alike, to hold to the said A., B. C. and to their heirs, as joint tenants; and in default of such heirs, the testator directed that the rent-charge should merge in his estate in the lands of X. A., on her marriage, put her share in the rent-charge in settlement; B. and C. died subsequently intestate, and without ever having married. In a suit instituted against the owners of the lands of X. by A., claiming to be paid the entire of the rent-charge, Held, that by the true construction of the above devise, A., B., and C. took estates in joint tenancy, and that as A. had severed this joint tenancy by her marriage settlement, she was entitled to only one-third of the rent-charge.

A devise to an illegitimate child and his heirs gives an estate in fee-simple.

CHRISTOPHER ALDWORTH, of the city of Cork, was, at the time of his death, seised in fee-simple of the town and lands of Ballybrack, in the County of Cork, and being so seised, by his will, bearing date the 20th of January, 1796, he made, amongst others, the following bequest—"I give, devise, and bequeath unto my friend Elizabeth Scott, one annuity, yearly rent-charge, or sum of one hundred guineas sterling, to be charged and chargeable on and payable out of All That and Those the town and lands of Ballybrack, in the County of Cork, to hold to the said Elizabeth Scott and her assigns during her natural life.....and from and after the death of the said Elizabeth Scott, then I give, devise, and bequeath the said annuity, yearly rent-charge, or yearly sum of one hundred guineas, payable as aforesaid, unto and amongst Maria Aldworth, Anne Aldworth, and William Christopher Aldworth, the children of the said Elizabeth Scott and me, to be equally divided between them, share and share alike, to hold to the said Maria Aldworth, Anne Aldworth, and William Christopher Aldworth, and to their heirs for ever, as joint tenants, but in default of such heirs, then I order and direct, and my will is, that the said annuity, or yearly rent-charge, should merge and sink in my said estate in the said lands of Ballybrack. And I hereby give, grant, and devise unto the said Elizabeth Scott, during her life, and unto the said Maria Aldworth, Anne Aldworth, and William Christopher Aldworth, and unto their heirs, as they shall after her decease become entitled to the said annuity, or any part thereof, full power and lawful authority, as often as the said annuity, yearly rent-charge, or any part thereof, shall be unpaid by the space of twenty-one days after any or either of the days of payment on which the same ought to be paid as aforesaid, to enter upon all or any part of the said town and lands of Ballybrack, and to distrain for the same, and for so much thereof as shall be then in arrear." After certain other legacies, which were unimportant as far as regards the question involved in this suit, the testator devised the residue of all his real, freehold, and personal estate to Martha Aldworth, his mother, and his brothers, St. Leger Aldworth and Robert Rogers Aldworth, their heirs and assigns, for ever, share and share alike, "to hold to them, their heirs and assigns, as tenants in com-

more, and not as joint tenants." Shortly after making his will, the testator died, leaving him surviving, Elizabeth Scott, and his and her three illegitimate children, viz., Maria Aldworth, Anne Aldworth, and William Christopher Aldworth. In May, 1815, Maria Aldworth, the petitioner in the present case, married Denis Daly, and, by a deed of settlement, dated the 10th of May, 1815, duly executed by Maria Aldworth in contemplation of the marriage afterwards duly solemnized, after reciting that Maria Aldworth was entitled, under the will of her father, Christopher Aldworth, to the reversion expectant upon the death of her mother, of and in one undivided third part or share of a perpetual annuity of £113 15s. per annum, charged and chargeable upon, and issuing and payable out of the lands of Ballybrack, and reciting the said intended marriage between Maria Aldworth and Denis Daly, it was witnessed that, in consideration of the said marriage, and of ten shillings sterling, Maria Aldworth, by and with the approbation of Denis Daly testified as therein, granted and assigned unto certain trustees therein named, the said undivided third part or share of the said perpetual annuity of £113 15s. per annum, and all her estate, right, title, and interest therein, to hold to the said trustees, and the survivor of them, her heirs, executors, and assigns, from and immediately after the death of her mother, upon trust, for the sole use and benefit of Maria Aldworth for her life, and from and after her death, to and for such uses, and to such person, and for such estate as she should, by her will duly executed, appoint. This rent-charge was paid by the owner of the lands of Ballybrack for the time being to Elizabeth Scott, up to the date of her death, which took place in the year 1858. Anne Aldworth and William Christopher Aldworth, two of the children named in the will, died in the year 1824, intestate, and without ever having been married. Denis Daly, husband of Maria Daly, otherwise Aldworth, the petitioner, died in the year 1856, leaving several children him surviving. The Rev. John Aldworth, the respondent, was at the time of the present suit, and previously, seised in fee of the lands of Ballybrack, and from time to time the petitioner caused various applications to be made to him for the payment of the entire of the annuity of one hundred guineas per annum from the date of the death of her mother, Elizabeth Scott. He, however, refused to do so, but offered to pay the petitioner one-third of the annuity, contending that by the true construction of Christopher Aldworth's will, the petitioner, Anne Aldworth, and William Christopher Aldworth, took estates in joint tenancy in the annuity, and that the effect of the deed of settlement executed on the petitioner's marriage was to sever the joint tenancy as to her share, and that inasmuch as Anne Aldworth and William Christopher Aldworth had died intestate, and being without children and illegitimate, had not left any lawful heir or heirs, two-thirds of the annuity had merged. It was also contended that the same result would follow if the petitioner, Anne Aldworth, and William Christopher Aldworth, had taken estates under the will as tenants in common. On the other hand it was urged on behalf of the petitioner that by the true construction of the will the petitioner,

Anne Aldworth, and William Christopher Aldworth, were tenants in common of the annuity with benefit of survivorship, and that in the events that had happened, the petitioner was entitled on the death of Elizabeth Scott to the entire of the annuity, and that no part of it had merged. It was then mutually agreed between the parties to submit a special case to the Court of Chancery under the provisions of the 11th section of the Chancery Regulation Act (Ireland), and the questions for the opinion of the Court were the following:—First, what estate the petitioner, Anne Aldworth, and William Christopher Aldworth, took in the rent-charge under the devise? Second, whether the petitioner's marriage had any, and, if so, what effect or operation on the estate of the petitioner under the will in the whole or any part of the rent-charge? Third, was the petitioner entitled, in the events that had happened, to the entire of the annuity, or rent-charge?

The Solicitor-General (with him *Serjeant Sullivan* and *Escham*) for the petitioner.—From the terms of the will of Christopher Aldworth, it is evident that he intended that this rent-charge should subsist as a whole, and should merge only when all the objects intended to be benefited by it had ceased to exist. When the testator says that the annuity shall merge in default of heirs, he merely expresses the rule of law, for any gift over in such a case would be void. A rent merges and does not escheat.—*Coke Litt.*, 298, a, vol. 2. According to the true construction, the devise is neither a tenancy in common, nor a joint tenancy, but a tenancy in common with benefit of survivorship, i.e., a tenancy in common for life with remainder to the survivor in fee. The words, "to be equally divided between them, share and share alike," plainly indicate a tenancy in common.—*Stones v. Hewitly* (1 Ves. sen., 165) *Jolliffe v. East* (3 Br. Ch. C., 25)—and the subsequent clause points to the benefit of survivorship. It is the duty of the Court to give effect to this latter portion of the devise, without making it inconsistent with the preceding, but the construction contended for on the other side must render some of the words wholly inoperative. This estate is one well known to the law.—*Doe d. Borwell v. Abey* (1 M. & S. 428). At page 435, Bayley, J., observes—"A tenancy in common with benefit of survivorship, is a case which may exist without being a joint tenancy; because survivorship is not the only characteristic of a joint tenancy. There is one view in which it might be important to the testator to create a tenancy in common with survivorship, and yet not a joint tenancy. It might be important in this view, because if it were a joint tenancy, one joint tenant might, by means of a lease made during her life, convey to the lessee a title paramount to that of the survivors. It might, therefore, be the object of the testator to obviate such a consequence, which would in effect defeat his intention."—*Haddelsey v. Adams* (22 Beav., 266). *Barker v. Giles* (2 P. W. 279,) is a case the converse of the present one, but the true principle of construction is laid down there in the judgment of the Lord Chancellor. He says—"It is a certain rule, in the exposition of wills especially, that every word shall have its effect, and not be rejected, if any construction can possibly be put upon

it." The reasoning in this case is precisely analogous to that in *Barker v. Giles*, and, by our construction, every word in the devise will have its proper effect.—2 Jarm., 672. It appears to me that if the Court will not adopt this construction, it must incline to a tenancy in common.—*Booth v. Alington* (3 Jur., N. S., 835). The following view is then worthy of consideration. The children are described in the will as being illegitimate, and therefore the expression, "in default of such heirs," may be deemed equivalent to a failure of the only heirs that illegitimate children could have, viz., heirs of the body. Thus, the estates given would be estates tail with cross-remainders over.

Brewster, Q.C., (with him *Warren, Q.C.*, and *Greene*).—In the first place it is plain that the testator thought one third of this annuity of one hundred guineas a proper and sufficient provision for each of these three illegitimate children. There was no antecedent existing rent-charge; it was a rent-charge created *de novo*, and therefore the Court should construe it so as to permit it to operate the estate for as short a time as possible. As to the last point put forward by the Solicitor-General, there is an express decision on the question. In the case of *Idle v. Cook* (1 P. W., 78), it is laid down that if lands are given to a bastard and his heirs, it is a gift in fee-simple. With regard to the other view of the case, contended for by the petitioner, I am willing to admit that the testator could have given such estates, if he employed some words similar to those found in the case of *Doe v. Abey*. There the word "survivor" was expressly used, and nothing could be clearer and more precise than the intention of the testator. In *Haddelsey v. Adams*, also, the devise was "to hold as tenants in common with benefit of survivorship." But will the Court, in the absence of any expressed wish of the testator, give to this devise such a construction as might have deprived the children of either Maria, Anne, or William Christopher Aldworth of any share in the rent-charge by the taking effect of the remainder over? *Doe d. Littlewood v. Green* (4 M. & W., 229), if held to be an authority, decides this case at once. There, in a devise to A. and B., "equally between them, to take as joint tenants, and their several and respective heirs and assigns for ever," it was held that they took as joint tenants for life, with several inheritances on the death of the survivor.—*Cookson v. Bingham* (17 Beav., 262). The language of the power of distress in the will would seem to shew that the heirs of each of the children were to take on the death of their parent, and therefore the soundest construction, perhaps, would be to consider it a devise of absolute estates as tenants in common in fee.

The following authorities were also cited:—*Enchin v. Wyllie* (31 L. J., N. S., Ch., 410); *Fleming v. Fleming* (5 Ir. Ch., 129); *Ridgeway v. Munkittrick* (1 Dr. & War., 84); 1 Inst., 183, b; 6 Com. Dig., tit. "Devise."

Cur. adv. vult.

Feb. 18.—THE LORD CHANCELLOR.—This was a petition for the payment of a rent-charge or annuity devised by the will of Christopher Aldworth. The petitioner, Maria Aldworth, otherwise Daly, claimed

to be entitled to the entire of the yearly rent charge, under the following circumstances:—The petition, which is a very short one, sets out the will of Christopher Aldworth, whereby he bequeaths a rent-charge of one hundred guineas per annum to Elizabeth Scott for life, and from and after the death of the said Elizabeth Scott, the testator bequeaths this rent-charge unto and amongst Maria Aldworth, Anne Aldworth, and William Christopher Aldworth, "to be equally divided between them, share and share alike, to hold to the said Maria Aldworth, Anne Aldworth, and William Christopher Aldworth, and to their heirs for ever, as joint tenants; but in default of such heirs, then I order and direct, and my will is, that the said annuity or yearly rent-charge should merge and sink in my said estate in the said lands of Ballvbrack." These three persons were the illegitimate children of Christopher Aldworth and Elizabeth Scott. If the Court could interpret "heirs" as "heirs of the body," the case could give rise to various questions, which, however, it is now unnecessary to advert to. The case of *Idle v. Cook* (1 P. W., 78,) is perfectly conclusive on this point. That being so, we must consider whether any construction can be given to this devise, which, in the events that have happened, would entitle the petitioner to make this claim to the entire of the rent-charge. By the settlement made on her marriage with Mr. Daly, she has put her share in this rent-charge in settlement, the consequence of which is, that if the estate were one in joint tenancy, she has severed it by this act of hers. If, on the other hand, the estate was a tenancy in common, the result is the same, for the two other children, having died without heirs, their shares in the rent-charge have merged in the estate. A peculiar construction, however, is sometimes adopted, by which certain devises have been held to give an estate in tenancy in common for life, with remainder over to the survivor by way of contingent remainder. This construction might answer the case of the petitioner, if the language of the will can be brought within the authorities. The first of the cases referred to was *Doe d. Borwell v. Abey* (ubi supra). That was a devise to three sisters of the testator, for and during their joint natural lives, and the life of the survivor, to take as tenants in common, and not as joint tenants, remainder to trustees during the respective lives of the sisters, and the life of the survivor, to preserve contingent remainders, and from and after their respective deceases, and the decease of the survivor, remainder over. There the word "survivor" was expressly stated, and the remainder to the survivor was given by necessary implication. So also in *Haddelsey v. Adams* (ubi supra) the words "benefit of survivorship" were introduced. In the case of *Doe v. Green*, and in *Barker v. Giles*, analogous considerations led to the decisions of the Court. But here I have nothing to lead me to the belief that the testator had any such intention as that contended for by the petitioner. The expression "to be equally divided," in a deed, would not in itself necessarily create a tenancy in common, and it is only of late that it is been held to have such an effect even in a will. In *Armstrong v. Elridge* (3 Br. Ch. C., 215), the Lord Chancellor lays down that, "though the words 'equally to be

divided,' and 'share and share alike,' were in general construed in a will to create a tenancy in common; yet when the context shews a joint tenancy, the words should be construed accordingly." The language of the *habendum* here is, "to hold to them, and their heirs, as joint tenants," and in my mind there is nothing to control its plain and legitimate meaning. If these words had occurred in a deed, there is no doubt but that an estate in joint tenancy would have been created. Here I have legal phraseology employed, and I must give the legal meaning to the legal words as long as a different construction is not clearly known to have been contemplated by the testator. I must, therefore, dismiss this petition, without costs, however, as the respondent does not ask for them.

MASTER LITTON'S COURT.

Reported by Oliver J. Burke, Esq., Barrister-at-Law.

ARMSTRONG v. WEST AND OTHERS.

Will—Legacy—Accumulation—Remoteness.

N. B., by will bearing date 4th May, 1861, devised his real and personal property to trustees upon trust, to pay all debts and legacies, and the residue thereof "shall be allowed to accumulate for as long a period as the law will allow, and the proceeds as they accrue are to be invested in the Govt. funds, and if my nephew J. B. have a son, who shall attain the age of 25 years, such son shall be entitled at 25 to all said rent and residue of my real and personal estate, and to the said accumulation thereof, and in case the eldest son of J. B. die before 25, then the second son shall be so entitled, and so on according to priority of birth; and in case my said nephew shall not have any son who shall attain 25 years of age, then I declare my will to be, that any son of A. B. who shall attain 25 years of age shall be entitled thereto, and if A. B. shall not have any son who shall attain 25, then my will is that W. J. S. shall be entitled thereto after the lapse of 21 years after my death, and in case of the death of W. J. S. before the lapse of 21 years after my death, then the eldest and each successive son of my nephew R. B. (if he shall have a son or sons) shall at 25 years become entitled thereto; and in case R. B. shall not have a son who shall attain 25, then that the eldest son of A. B. shall be entitled, and in case A. B. shall not have a son who shall attain 25, then that H. W. at present an infant, shall be entitled after 21 years after my death. Held, that the bequests to the unborn sons of J. B. and A. B. were void, as they did not vest within 21 years after the death of the testatrix.

Held, also, that the limitations over to W. J. S. and H. W., although within 21 years, were void, depending as they did on a void gift.

THIS was a cause petition presented by the executor, R. Armstrong, under the 15th section of the Chancery Regulation Act, to carry into execution the trusts of the will of the late Hannah Busby, who died in April, 1862, possessed of considerable personal property,

amounting to about £18000, and seised of the house and demesne of Churchtown House, near Dundrum, in the County of Dublin. The material portions of the will upon which the questions of construction arose were as follows:—"I give and bequeath all the property I may die possessed of, of what nature soever, to trustees and their executors" (naming them), "but only upon the trusts following; in the first place, out of my personal estate to pay the legacies and annuities hereinafter mentioned; and as to all the rest and residue of my estate, real and personal, after paying my debts (if any) and funeral and testamentary expenses, and providing for said legacies and annuities, my will is that the said rest and residue, and the rents, dividends, bonuses, interest, issues, profits, and proceeds thereof shall be allowed to accumulate for as long a period as the law will allow, the proceeds as they accrue and are receiving to be invested in Government funds or on real landed security; and it is my will, if my nephew John Busby have a son who shall attain the age of 25 years, and who shall have been educated at Eton, Harrow, Rugby, or Sandhurst, and who shall have been brought up to any gentlemanly profession or walk in life, such son shall, at his age of 25 years, be entitled to all said rent and residue of my said real and personal estate, and to the said accumulation thereof; and I empower the said trustees, out of the rents, issues, and profits of the said rest and residue, to apply and advance funds to educate the son of the said John Busby (or others the sons of John Busby or Alphonso Busby hereinafter named, who shall be presumptively entitled under the limitations of this my will) at Eton, Harrow, Rugby, or Sandhurst, if it shall not be convenient to the said John Busby and Alphonso Busby as the case may be, to advance funds for that purpose." Testatrix then gave a power to trustees to advance money to promote the son of John Busby or Alphonso Busby in their professions, "and it is my will that the eldest son of said John Busby shall be first entitled under this my will, and in case he die before 25 years of age, that then the second son of John Busby shall be so entitled, and so on according to priority of birth; and in case my said nephew shall not have any son who shall attain the age of 25 years, I declare, and my will is that any son or sons of my nephew, Alphonso Busby, who shall attain the age of 25 years, shall be so entitled at that age to the estate, benefit, and advantages hereinbefore mentioned in respect of the son and sons of the said John Busby, but only on the like terms as to education and profession, the eldest son of said Alphonso to be first entitled, and if he shall not attain the age of 25 years, the second son to be so entitled, and so on according to the priority of the births of the several sons of the said Alphonso Busby, and in case the said Alphonso Busby shall not have a son who shall attain the age of 25 years, then my will is, and I declare that Wilfred James Stirling, the son of James Stirling, Esq. of Ballinby Park, Dundrum, in the County of Dublin, shall become and be entitled, as is hereinbefore declared, in regard to a son of the said John Busby, after the lapse of 21 years after my death, to all the rest and residue of my real and personal estate, and the said accumulation thereof,

and in case of the death of said Wilfred James Stirling before the lapse of 21 years after my death, then my will is, and I declare that the eldest and each successive son, according to priority of birth of my nephew Robert Billing (if he shall have a son or sons) shall, at his age of 25 years become and be entitled, as is hereinbefore declared and entitled with regard to the son of John Busby, and in case the said Robert Billing shall not have a son who shall attain his age of 25 years, then I declare, and my will is, that the eldest and each successive son (according to priority of birth) of my nephew, Alfred Billing, shall, at his age of 25 years become and be entitled, as is hereinbefore declared and intended in regard to the son of the said John Busby; and in case the said Alfred Billing shall not have a son who shall attain his age of 25 years, then my will is, and I declare that Hercules West, at present the youngest son of Archdeacon West, and now between four and five years old, shall become entitled, as is hereinbefore declared and intended in regard to a son of John Busby, after the lapse of 21 years after my death, to all the rest and residue of my real and personal estate, and said accumulation thereof; and it is my will, and I direct that if any members of my family, who is, or may become entitled under this my will, shall dispute same wholly or in part, or institute any suit at law or in equity in reference to any disposition thereof, such person shall forfeit all interest, and every right under this will as if they were not mentioned therein, and the estate and interest of such person shall go over to the person next in remainder, under the limitations aforesaid."

H. Lover appeared for the petitioner.

H. Law, Q.C., for John Busby, the heir-at-law, submitted that the limitations in the will were void, that the two first limitations were beyond the time allowed by law for property to accumulate, namely, that the will provided for the accumulation of 25 years instead of 21 years, and that the subsequent limitations to Stirling and West were also void, because they were dependent upon the prior limitations, and as the first failed, the subsequent limitation fell to the ground. Neither John Busby nor Alphonso Busby had children at the time of the death of testatrix.

F. Walsh, Q.C., and *F. Whyte* for W. J. Stirling, a minor, who claimed to be entitled at 21 years of age under the limitations of the will.

J. E. Walsh, Q.C., for Mr. Hercules West, one of the minors.—On the part of the minors it was contended that the limitations were quite independent limitations and that even though the two first were void as being beyond the legal period of limitation, the others were valid and ought to take effect. It was also argued that as the limitations were preceded by the claim which stated that the said rest residue, &c., should be allowed to accumulate for as long a period as the law will allow, that was equivalent to a declaration by testatrix that if any child of her nephew attained 25 years within 21 years after her death, then the property was to vest in that person, or in other words saying 21 years, that as the will would speak from the death, and as she might have lived for years after, it was possible for either of her

nephews to have children who would attain 25 years within 21 years after her death. The cases relied on are fully set forth in the judgment of the Master.

Dec. 12.—*MASTER LITTON.*—This is a cause petition of great importance to the parties, and involving an important question of law. I have arrived at the opinion that the bequests to the unborn sons of John Busby and Alphonso Busby are void, having reference to the established rules of law, as they cannot vest within the prescribed period after the death of the testatrix. If either of these gentlemen were now to have a son or sons, he could not claim to be entitled until he had arrived at the age of 25 years which must *ex necessitate* be at a period considerably exceeding 21 years from the death of the testatrix. It is not necessary to dwell upon the further conditions imposed as regards their education, nor is the present case open to the observation that the condition imposed might by possibility be fulfilled within the time required by law, for such is not possible, nor in my view, even if such a possibility did exist, could it render the gift less invalid. It may be stated then as a point well settled that the time from which the period affected by the rule against perpetuities is to be computed is in the case of a will from the death of the testator, and it is also not to be questioned that when lives in being do not form part of the time of suspension, or postponement, the only period allowed under the rule is 21 years absolutely. See *Lewis on Perpetuities*, 171 & 172, and the cases there collected; also *Crooke v. De Vandes* (9 Vesey 197); and *Palmer v. Huford* (4 Russ. 403). Now applying these rules with the principle which is clearly laid down in the same book, p. 164, it appears to me that the above mentioned limitations are void. The author there defines a perpetuity "as a future limitation, whether executory, or by way of remainder, and of either real and personal property which is not to vest until after the expiration of or will not necessarily vest within the period fixed and prescribed by law," and he adds that "it is not sufficient in order to test the legality of a limitation to inquire whether it be capable of taking effect within the period fixed and prescribed by law;" and he adds "that it is not sufficient in order to test the legality of a limitation to inquire whether it be capable of taking effect within the period prescribed by the rule." It must be so framed as *ex necessitate* to take effect, if at all, within that period, and at page 170 he adds, "a possibility that the event upon the happening of which the estate is to vest may not be within the proper time is sufficient to avoid the whole limitations." The above limitations, applying these principles to them, must be considered and held in my opinion to be void. The question, however, as regards the gift to Mrs. Stirling's son, and the son of Archdeacon West is of great nicety, but I am of opinion that the principles of law above stated will be found to bear on the validity of the gift to them also. I have not been enabled to bring myself to regard the gifts to them as independent bequests. On the contrary the words of the will and the intention of the testatrix, as I gather it from the whole will, lead me to believe that she never meant either Mr. Stirling's son or Archdeacon West's son to take, unless in a certain event, that event being in case a son of John Busby

or Alphonso Busby should not attain the age of 25 years. Now it is quite possible that John Busby or Alphonso Busby may yet have a son who may live to attain 25 years of age. Such a son living to attain that age would not be entitled to take according to the rule of laws as I have viewed it in this case. Could it then be said that Mr. Stirling's son or Archdeacon West's son should now take according to the intention of the testatrix (even if there were no other objection which I shall presently notice) when the primary object of the testatrix's bounty may be in existence, and yet take nothing by reason of the rule and requirement of the law? I think not. The event upon which Mr. Stirling's son, or Archdeacon West's son, are to take is expressed to be in case there shall be no son of John Busby or Alphonso Busby who shall attain to 25 years, but each of those gentlemen may have sons who shall attain that age. How then can I declare Stirling or West now entitled, as if the event prescribed in the former portion of the will had either now taken place, or had not been made a condition. If such event shall take place, viz., the birth of a son of John Busby, or Alphonso Busby, who should live to attain 25 years, it would be contrary to the intention that either Stirling or West should take. The intention was not that if, by reason of the rules of law, the sons of John Busby and Alphonso Busby could not take, then the others were to take, but the taking of the latter is made to depend upon an event still uncertain, and which cannot become a certainty within the prescribed time; their taking is made to depend on an event in fact, and not on an event in law. Therefore, firstly, the rules of law are against the claims urged by West and Stirling, the limitations over to them depending on a void gift; and secondly, the intention of the testatrix was, that they should not take if John or Alphonso Busby should have a son who would attain the age of 25 years, *Montgomery v. Deering* (2 M. & G., 182), *vide* also Jarman on Wills, 231. Lord St. Leonards, in commenting on the case of *Beard v. Westcott* (5 Taunt., 393), decided by Lord Eldon, in accordance with the judgment of the Court of King's Bench upon a case sent to that Court for its decision, says, "It was decided, not because it was within the law of perpetuity, but expressly on the ground that the limitation over was never intended by the testator to take effect, unless the persons whom he intended to take under the previous limitations, would, if they had been alive, been capable of enjoying the estate, and that he did not intend that the estate should wait for persons to take in a given event, when the persons to take (*id est*, to take in the interim) was actually in existence, but could not take." This shews, that where there are gifts over, which are void for perpetuity, and there is a subsequent and independent clause or gift over, which is within the line of perpetuities, effect cannot be given to such a claim unless it will dovetail in and accord with previous limitations which are valid, and 1 Jarman, 231, remarks upon this case, "The reasoning is clearly applicable, as well to an executory gift as to a remainder." This doctrine, it appears to me, is applicable to the present case; there is no possibility of the limitations over taking effect independently of the first devise—it is limited

upon the demise of John Busby and Alphonso Busby having no son who should live to be twenty-five. The event must necessarily be contingent during the lives of John and Alphonso, and perhaps even after their deaths, if they should leave sons surviving. The gift over is wholly dependent on the fact of such sons not attaining the age of twenty-five. It might have been otherwise if the gift over had been in the event of John and Alphonso having no son at the death of the testatrix, or no son living at the time of their own death. No help can be derived from the words, "so far as the rules of law and equity permit." In the first place they are confined to the accumulation, but *Cumby v. Jones* (2 Mer., 756), decides that, although these words shew an intention not to contravene legal limits, yet if the limitation be complete in itself, it must be either wholly good or wholly void, as it originally stands, and I am of opinion that the trust for accumulation is so far connected with the void limitation, as to be inoperative against those who shall take the residue. I think, therefore, that the residue must be taken in trust for the heir-at-law and next of kin. As to the inference to be drawn from the residuary clause, *vide Hockley v. Mauckey* 1 Ves. Jun., 150), a residuary clause is a mark of intention, but not sufficient to say it was absolutely the intent that there should be something to satisfy it.

Decretal order accordingly.

Exchequer Chamber.

Reported by William Woodlock, Esq., Barrister-at-Law.]

[BEFORE LEFROY, C.J., MONAHAN, C.J., AND BALL, CHRISTIAN, O'BRIEN, HAYES, AND FITZGERALD, JJ.]

SPAIGHT v. BEYERLIKE.—April 29.

Charter party—Authority of ship-broker to bind ship-owner—General and particular agency.

A ship-broker, employed by a ship-owner, has no such general authority as will enable him to charter the ship for a voyage in a manner contrary to instructions expressly given to him by the owner, although such instructions have not been communicated to the parties dealing with him.

THIS was an appeal, on the part of the plaintiff, against an order of the Court of Exchequer, bearing date the 13th May, 1862, whereby that Court disallowed the cause shown against a conditional order dated the 22nd January, 1862, granting a new trial. The action was brought upon a charter party, and the summons and plaint complained that the defendant was indebted to the plaintiffs in the sum of £200 for that, whereas by a certain memorandum of charter party or contract of affreightment made by and between the said plaintiffs of the one part, and the said defendant of the other part, and bearing date the 12th day of February, in the year 1861, it was mutually agreed that the ship or vessel of the defendant called the *Eos*, therein described as of the measurement of 295 tons, or thereabouts, and then in London, being light, staunch, and strong, and every way fitted for the voyage, should, with all convenient speed, sail and

proceed to Miramichi, that is to say, the port of Miramichi, in North America, or as near thereto as she might safely get, and should there load from the factors of the plaintiffs a full and complete cargo of dry deal, with deal ends, or sawn laths or lathwood, for broken stowage not exceeding what she could reasonably stow and carry over and above tackle, apparel, provisions, and furniture, and, being so loaded, should therewith proceed to Limerick, or as near thereto as she might safely get, and should deliver the same, being paid the freight in said memorandum of agreement specified (that is to say), for timbers, per load of 50 customs Calliper Measure, deals, and battens, per Petersburg standard hundred, £4 15s. deal ends per the same measure, £3 3s. 4d., lathwood, per fathom of four feet, £1 11s. 8d., the cargo to be brought and taken from alongside, according to the custom of the port of loading and discharging, ship to proceed with deck load at full freight, if allowed to take it, (the act of God, the Queen's enemies, fire, and every other damage or accident of the sea, rivers, and navigation, of whatever nature and kind soever, during the said voyage always excepted,) one-third of the freight to be paid in cash on the arrival at the port of discharge, and the remainder on the right delivery of the cargo by good and approved bills, payable in London at four months following; thirty running days are to be allowed the merchant (if the ship should not be sooner despatched) for loading and unloading, and ten days on demurrage over and above the said lying days at £5 per day; and it was thereby further agreed that the penalty for non-performance of said agreement should be £600, the said vessel to be reported by Mullock, or their agents, at the port of discharge; and it was further agreed that sufficient cash for ship's use should be advanced at the port of loading on customary terms of interest, insurance, and commission; and the plaintiffs said that they were always ready, and tendered and offered to perform their part of the said agreement in all respects, and that they called upon and requested the said defendant to perform the same, but although the said ship or vessel of the said defendant was not prevented from proceeding on said voyage with convenient speed, or from sailing from the port of London to Miramichi, and then performing said voyage, by the act of God, the Queen's enemies, or damage or accidents of the seas, river, or navigation of any sort, he, the said defendant, though thereunto requested as aforesaid, did not cause his said ship or vessel to proceed with convenient speed upon the said voyage to Miramichi, or as near thereto as the said ship or vessel could safely get, and to carry out said agreement with convenient speed as aforesaid, but on the contrary thereof the defendant, instead of proceeding on said voyage from London to Miramichi with convenient speed, proceeded on another and different intermediate voyage, to wit, on a voyage from London to Newcastle-on-Tyne in England, and from thence to Lisbon, and was thereby guilty of great and unnecessary delay; and the plaintiffs averred in fact that if the said ship or vessel had so proceeded according to the said charter-party, she would have arrived in Miramichi in sufficient time to load her cargo, and to arrive with the same in Limerick aforesaid in the month of June, 1861, whereas, in truth

and in fact, and by reason of the said deviation from the said direct voyage to Miramichi, because of the said intermediate voyage, and the delay arising therefrom, the said ship or vessel did not arrive at Limerick aforesaid until the 18th day of August in the year aforesaid, and by reason of the said delay, and of the lateness of the arrival of the said ship or vessel at Limerick aforesaid, and which delay and lateness of arrival were not caused by the act of God, the Queen's enemies, or fire, or any damage of seas, rivers, or navigation, the said plaintiffs were deprived of certain gains and profits which would have accrued to them from the same voyage, had same been duly carried out according to the said agreement, and in conformity with the said agreement and contract of affreightment; and the plaintiffs in fact said that, by the said delay, they were deprived of the benefit of a market of the said deals, which they otherwise would have had, if the said voyage was carried out by defendant in performance of, and in conformity with, the said memorandum of agreement or contract; and the plaintiffs said that, by reason of the breach of the said agreement, they had sustained damage to the extent of £200. To this defendant pleaded—first, that he did not contract or agree with the plaintiffs in manner and form as in plaint alleged; secondly, that he, in all respects, kept, performed, and fulfilled said contract and agreement, and did cause his said ship to proceed with all convenient speed from said port of London to said port of Miramichi, and did carry out said agreement with convenient speed according to the terms of the charter-party, or contract of affreightment made by and between plaintiffs and defendant; thirdly, that the contract or charter party of affreightment made by and between the plaintiffs and defendant, in reference to the said ship or vessel, and in reference to the sailing thereof, and the bringing home a cargo for plaintiffs by said vessel from Miramichi aforesaid, and which bore date the 13th February, 1861, and not the 12th February, 1861, as in said plaint erroneously stated, contained, and was subject to certain terms and provisions not set forth in plaint, and, among others, to the term or provision following, that is to say, "that defendant should be at liberty to take a cargo out or on the way for owner's benefit;" and defendant said that under and by virtue of said term or provision, and, in pursuance thereof, he did, as he lawfully might, take and carry out cargo from Newcastle to Lisbon, as in plaint stated; and defendant averred that same, and no other was the alleged breach of contract in plaint complained of, and that defendant, in all respects, kept, performed, and fulfilled said contract and agreement according to the true intent and meaning thereof, and the terms and provisions thereof, as in his defence above set forth. The issues were, first, whether the defendant contracted and agreed with the plaintiffs in manner and form as in the plaint alleged; secondly, whether the defendant kept, performed, and fulfilled his contract, and agreement with plaintiffs in all respects; thirdly, whether the defendant caused the ship in said plaint mentioned to proceed with all convenient speed from the port of London to the port of Miramichi, and whether he carried out his agreement with plaintiffs with convenient speed according to the terms of the charter-party and

contract of affreightment made by and between plaintiffs and defendant; fourthly, whether the third defence was true in substance and in fact. On the trial before Deasy, B., on the 17th January, 1862, it was proved that a Mr. Mullock, a ship-broker in Limerick, acting for the Messrs. Spaight, on the 12th of February, 1861, forwarded to the Messrs. Pilkington, shipbrokers, in London, a charter-party in the terms set out in the summons and plaint for signature by the defendant. This charter-party was received back by Mr. Mullock on the 14th of February, signed as follows:—"By authority of Captain Beyerlieb, p.p. Pilkington, Brcthrs. J. A. Taleen." J. A. Taleen was a clerk in the employment of Pilkington, Brothers, the brokers employed by Captain Beyerlieb, to hire out the ship "Eos." The charter-party was subsequently signed by one of the plaintiffs. The case stated by counsel on behalf of the defendant was, that the Messrs. Pilkington, or Taleen on their behalf, had exceeded their authority by executing the charter party of the 12th Feb.; that a document lodged with them, but not shewn to the plaintiffs, had stipulated for leave to take an outward cargo; that the Messrs. Pilkington had delivered to defendant a charter-party dated the 18th Feb., containing such stipulation, but which was not signed by the plaintiffs, and that defendant was ignorant, until he arrived at the port of Limerick, of the charter-party of the 12th February, having always acted on the supposition that the stipulation as to taking out cargo was contained in the charter under which he was sailing. The defendant was examined in support of the case thus stated. He proved that he had employed Messrs. Pilkington, the ship-brokers, as his agents, and had placed his ship in their hands, and he produced the documents referred to in the statement of his counsel, but these documents were objected to and rejected by the learned judge as not having been communicated to the plaintiffs; and a verdict was found for the plaintiffs for £110 damages, but liberty was reserved to the defendant to move to change this into a verdict for defendant, or to enter a nonsuit in case he ought to have received the evidence, shewing Pilkington's or Taleen's authority to have been limited, or to have ruled that the contract alleged by the plaintiffs had not been proved, or that the third defence had been sustained. On the 22nd January, 1862, a conditional order was made by the Court of Exchequer that the verdict had for the plaintiffs should be set aside, and a non-suit or verdict for the plaintiff entered instead thereof, or that the verdict for the plaintiffs should be set aside, and a new trial had, on the ground of the misdirection of the learned judge, and of the reception of the evidence that ought to have been rejected at the trial. In the ensuing Easter Term, the Court of Exchequer made absolute this conditional order, so far as it directed that the verdict had for the plaintiff should be set aside, and that a new trial should be had. Against this order the present appeal was brought, on the grounds—first, that the charter-party of the 12th February was duly executed by Messrs. Pilkington & Co., through their clerk, Mr. Taleen, and that the said Pilkingtons, as agents and ship-brokers for the defendant, had full power and authority to sign the said charter-party, and thereby to enter into a con-

tract with plaintiffs binding on defendant; secondly, that the authority so vested in the said Messrs. Pilkington could not be controlled by any second letter of instructions given by defendant to the said Messrs. Pilkington, or their clerk, Mr. Taleen, and not in any way communicated to the plaintiffs, or to their agent.

Serjeant Armstrong and Jellatt for the plaintiffs.—The only question in the case is whether the Messrs. Pilkington had authority to bind the defendant by the charter-party of the 12th February. We say they had implied and full authority to do so. A merchant is not bound to inquire into a broker's authority. The position of the broker is sufficient to entitle the merchant to act upon it. We contend that a man may be made a general agent in two ways, either by being employed to do business of a particular kind for a person, or by his being employed in a particular instance within the scope of his known trade and business. We say then that it being clearly within the business of ship-brokers to charter, and that being the business by which they live, and that being the only business which they had with the ship, that very fact constitutes the ship-broker a general agent, and that as between the person who employs him and the world no private instructions can affect the broker's general authority. When the employment is within the scope of his known business he becomes a general agent though employed only in one single transaction. *Russell on Factors*, 75, *Nickson v. Brohan* (10 Mod. 110); *Chitty on Contracts*, p. 199 (5th Ed.) referring to *Smethurst v. Taylor* (12 M. & W. 545); *Pothier on Obligations*, translated by Evans, ss. 79 to 83; *Story on Agency*, ss. 58 & 59. The authority to charter the ship having been in the first instance given by the defendant to the Messrs. Pilkington, everything necessary to the chartering flowed from that; then the question is, were they general or special agents? We say they were general agents.—*Smith v. Maguire* (3 H. & N. 554); *Alexander v. Gibson* (2 Campb. 555); *Ringquist v. Ditchell* (3 Esp. 64). [*Fitzgerald, J.*—According to your view a broker getting a ship to charter to Miramichi, might send her to the East Indies]. So we say. *Pickering v. Busk* (15 East, 38) and *Whitehead v. Tuckett* (15 East, 400), also bear out our view. [*Hayes, J.*—Your contention is that an authority of the kind cannot be qualified, although it may be revoked. *Monahan, C. J.*—And does a man who employs a broker to hire out a ship, authorise him also to sign the charter-party on his behalf, or must it not be signed by the captain?]—*Daniel v. Adams* (Ambl. 495.) According to the best text-writers a broker in respect of contracts entered into within the scope of his usual business is a general agent.—*Smith, Merc. Law*, p. 184; *Chitty on Contracts*, p. 199; *Russell on Factors*, *ib. sup.* [*Christian, J.*—But is it the ordinary employment of a ship-broker to charter a ship to any part of the globe that he may think proper, or only to charter her to the place which he is instructed to charter her for? *Lefroy, C. J.*—One can understand that brokers should have authority as incident to their employment to direct that ships should stop at particular places or deviate in a particular way, but not that they should have power to act in the very teeth of instructions and directions given to them.]

John E. Walshe, Q.C. and *James Murphy* for the defendant.—The difficulty on the other side is to shew that a ship-broker is a general agent. We deny that he is so. The very definition of a ship-broker negatives the existence of any such authority in him as has been contended for.—*Story on Agency*, s. 31, *Pitts v. Beckett* (13 M. & W. 743, 747; and *Parke B.'s* observations at p. 750). If a house-agent is employed to let a house for the summer, and he lets it for forty years, can it be said that the owner is bound by the contract? *The East India Company v. Hensley* (1 Esp. 111) shews what the authority of a broker really is. The authority of a ship's master is an *a fortiori* case, and yet even that authority is limited.—*Sickens v. Irving* (7 C. B., N.S., 165); *Grant v. Norway* (10 C. B. 665). The broker's authority is to make the contract which his employer directs him to make, and no other. [*Christian, J.*—Your proposition is that the authority of the agent is only to bring the parties together, and that for every thing else the party dealing with him must look to his authority.] Yea. *Brady v. Todd* (9 C. B. N.S., 592) on the doctrine of warranty is important here. The present contract is not even one signed by the captain. Wherever a contract is on the face of it signed by procuration, that is notice to the person taking it that it is signed under a specific authority which he is bound to look to. *Attwood v. Mannings* (7 B. & Cr. 278); *Alexander v. Mackenzie* (6 C. B. 766); *Snagg v. Elliott* (12 C. B. N.S., 273); *Domat's Civil Law*, book I, title 17, gives the nature of a broker's authority.

Serjeant Armstrong in reply.—The other side forget that the Messrs. Pilkington were agents for the defendant alone, and not for both parties; and *Story* and *Domat* both speak of a broker who is an agent for both parties. *Pitts v. Beckett* has no reference to the present case. [*Monahan, C. J.*—Is there any case to shew that a person employing a ship-broker authorises him to enter into a contract, and does not rather employ him for the purpose of looking out for another person who will enter into a contract?] *Ringuist v. Ditchell* is a settled authority in our favour. There is no case shewing that the words "by authority of" have the same meaning and the same technical force as the words "*per pro.*" The words "by authority" are rather a declaration on the face of the document that the party using them has a general authority.

LEFROY, C. J.—We are all of opinion that the judgment of the Court of Exchequer ought to be affirmed, and we were all of opinion from the beginning that the notion that a broker has such a general authority as to enable him to act contrary to special directions,—that a broker employed to charter a ship has such a general authority as that,—is quite unfounded.

MONAHAN, C. J.—And I may add that I am of opinion that even if he had in ordinary cases such a general authority, yet when he enters into a contract in terms "by procuration,"—and I consider that the words "by authority" amount to the same thing—then if it should turn out that though he might have had the general authority in ordinary cases, in this particular case he had a specific authority only, the

party dealing with him ought to have looked to the specific authority.

Appeal dismissed with costs.

Court of Queen's Bench.

[Reported by William Woodcock, Esq., Barrister-at-law.]

[CORAM O'BRIEN, HAYES, AND FITZGERALD, JJ.]

ALLEN v. CARVER.—Feb. 3.

Timber—Covenant to keep in repair—Exception—Damages.

Where a lease contained a covenant on the tenant's part to keep the demised premises, and all improvements thereon, in repair, and also an exception by the landlord of all timber-trees growing on the premises, and a reservation of a right of ingress on the premises, and the tenant suffered the timber to be cut down—Held, that the landlord could not recover damages against the tenant for the cutting down of the timber, in an action on the covenant to keep the premises in repair.

THIS was a motion to shew cause against a conditional order obtained by the defendant, that the verdict had for the plaintiff at the Kerry Summer Assizes for 1862, before Keogh J., should be reduced from the sum of £70 to the sum of £10, pursuant to leave reserved. The action was brought to recover damages for breach of covenants to repair contained in two leases. As the covenants in both leases were precisely similar, it is necessary only to state the pleadings and facts with respect to one of them. The summons and plaint complained that William Allen, the grandfather of the plaintiff, being seised in fee of part of the lands of Liscongill, containing 60 acres, let the same by deed to the defendant, to hold for twenty-one years, from the 25th March, 1855, and defendant entered, and defendant by said deed covenanted with the said William Allen and his heirs, that he, the said defendant, should and would, during the continuance of the said demise, preserve, uphold, support, maintain, and keep the demised premises, and every part thereof, and all improvements made and to be made thereon in good and sufficient order, repair, and condition, and at the end of the said term, or other sooner determination of said demise, should and would so leave and yield up the same unto the said William Allen, his heirs, executors, administrators, or assigns, and afterwards, during the said term, the said William Allen died, and thereupon the reversion in fee of the said demised lands became vested in William Allen, the father of plaintiff, as heir of the plaintiff's grandfather, and afterwards the said William Allen, the plaintiff's father, died, and the reversion descended to, and became vested in the plaintiff, and afterwards during the said term, while the defendant was in possession under said deed, the defendant did not preserve, uphold, support, maintain, and keep the said demised premises and every part thereof, and all improvements made thereon, in good or sufficient order, repair or condition, but, on the contrary, did suffer and permit said premises, and the fences there-

on, and the houses thereon, to be out of repair, and in a ruinous condition, and did cause many of said fences to be thrown down and levelled, and did cut down, and allow to be cut down, and did take and carry away, and allow to be taken and carried away, from off said premises a great number of large and valuable trees growing thereon, and which, while growing thereon, greatly added to the value and appearance of said premises, and did also cut down, take, and carry away, and did permit others to cut down, take, and carry away from off said premises a great quantity of valuable and ornamental shrubs and holly-trees that were growing and standing thereon, and did cut away, and take away, and materially injure, a great quantity of oak and other trees growing thereon, and did injury to, and allow injury to be done to same, by taking and cutting off the bark from off same, to the damage and injury of plaintiff, and of plaintiff's estate and reversion in said premises, to the amount of £200. The defendant pleaded that he, during all the time in said paragraph mentioned, did preserve, uphold, support, maintain, and keep the said demised premises, and every part thereof, in good and sufficient order, repair, and condition, and did not commit any of the breaches in said paragraph stated, and did not suffer or permit said premises, or the fences or houses thereon, to be out of repair or in a ruinous condition, or did not cause any of said fences to be thrown down or levelled, or did not cut down, or allow to be cut down, or take or carry away, or allow to be taken or carried away, from off said premises any large or valuable trees growing thereon, or did not cut down, take or carry away, or permit others to cut, take, or carry away, from said premises any valuable or ornamental shrubs or holly-trees that were growing thereon, or did not cut or take away, or materially injure, any oaken or other trees growing thereon, or do injury to, or allow injury to be done to same by taking or cutting off the bark of same. Issue was taken on this defence, and on the trial the lease of the premises was produced, which contained a clause, "saving and excepting, and always reserving out of this demise unto the said William Allen, his heirs, executors, administrators, and assigns, all timber and timber-like trees now standing or growing on said demised premises, or at any time hereafter to be found standing or growing thereon, with full liberty of ingress and egress for the said William Allen, his heirs, executors, administrators, and assigns, or any other person or persons authorised by him or them to enter into and upon said demised premises, and the same to cut, fell, and carry away, with horses, men, and carriages, at his and their will and pleasure, without the hindrance or interruption of the said Timothy Carver, his heirs or assigns." The jury found for the plaintiff, assessing the damages at £70, of which £10 were for the injury to the plaintiff's reversion, by not keeping the demised premises in repair, £50 were the value of the timber which had been growing on the said premises at the time defendant became tenant to them, and which was cut during his tenancy, and £10 were the value of the timber on the premises demised by the other lease, which contained an exception similar to that given above. The judge reserved liberty for the defendant to move to reduce the da-

mages to £10, if the Court above should be of opinion that, in consequence of the exceptions contained in the leases, evidence of the cutting down, &c., of the timber trees ought not to have been admitted, and that the value of such timber could not have been recovered in this action. The defendant having obtained a conditional order accordingly, cause was now shewn against it by

Barry, Q.C. (with him *James Murphy*) for the plaintiff.—We contend first, that the nature of the exception is such as to leave the destruction of the trees to be still a breach of the covenant; and, secondly, that supposing we were not entitled to recover for them as upon a breach of the covenant, the objection was not taken upon the pleadings, and we are now entitled to recover. *Furlong's Landlord and Tenant*, p. 400, shews the effect of an exception of trees out of a lease.—*Whistler v. Paslow* (Cro. Jac. 487); *Liford's Case* (11 Co. Rep. 50); *Legh v. Heald* (1 B. & Ad. 622). We contend that all the soil passes by the lease, with the qualification that the tenant is bound to afford nutriment to the trees, and that under the covenant in this case the cutting down of the trees is a breach of the covenant. The cutting down of the timber is an injury to the premises, though there is a reservation of a property to the lessor which would entitle the lessor to go in and cut them down himself.—*Hine v. Whistler* (Poph. 146.) We submit then first that there being no exception of the soil, the trees were improvements on the premises, that the tenant was bound to take care of them, that the covenant has been broken, and the value of the trees is recoverable. Secondly, it was open to the defendant to have demurred to so much of the summons and plaint as related to the trees: it would be open to him even now to move in arrest of judgment, but having gone to trial, he could not ask the judge to withdraw the question from the jury.

Clarke, Q.C. and *James Green* for the defendant.—By the mere exception of the trees, without any reservation of the right of ingress, the landlord can go in and cut the trees. The effect of the exception is that the trees form no part of the subject matter of the demise, and no breach of covenant can be committed by any injury being done to them, and therefore the value of the trees could not be taken into consideration in estimating the damages. A thing expressly excepted from the demise cannot be considered as an improvement on the demised premises. An ejectment cannot be brought for waste committed upon demised premises by cutting down trees where trees are excepted out of the demise.—*Goodright v. Vivian* (8th East. 190.) The action of covenant is a substitute for the old action of waste. *Doe dem. Douglas v. Lock* (4 Nev. & Man. 807); *Furlong's Landlord and Tenant*, p. 663; *Evans v. Evans* (2 Campb. 491); *Jenney v. Brook* (6 Q. B. 323).

James Murphy in reply.—We do not say that the trees formed part of the demised premises, but that they were growing thereon. The old action of waste could only be for destruction of the thing demised. If a tenant covenants not to cut down trees on the premises demised, he will be liable in an action of covenant, although the lease contains an exception of trees.—*Doe dem. Rogers v. Price* (8 C. B. 894).

O'BRIEN, J.—We are all of opinion that the damages should be reduced, in the manner sought for, to £10. It is manifest that £60 of the damages were given as the value of the timber growing on the premises. Now the case so much relied on of *Legh v. Heald* certainly appeared to establish that the exception in the lease did not except the soil, but excepted the trees only; and, adopting the ruling in the case in 11th Coke, that all that was excepted out of the soil was a right of nutriment; but still here the trees themselves were excepted, and then we come to construe the covenant, and see whether it, being a covenant to keep the premises in repair, includes within it a covenant against cutting, or allowing to be cut, trees standing on the demised premises at the time of the demise. Now the trees being excepted, we do not think that it was a breach of that covenant to cut trees or allow them to be cut. The point we think is fairly open to the defendant on the pleadings, and it would be attended with inconsistency to hold that, the landlord having chosen to make his lease in the form of excepting the trees, and to reserve a right to go in on the premises and examine the trees, the tenant on this covenant is liable to the same degree as he otherwise would be. There would be a great many liabilities cast on him if the trees were not excepted that are not cast on him where they are excepted. As to the last case which was cited of *Rogers v. Price* it is enough to look at the lease there to see that it does not apply, because that lease did not merely except all timber trees, but went on to give a covenant on the part of the tenant himself, not to commit any waste by cutting down timber trees; therefore the obligation of the tenant in that case arose from a positive covenant on his part not to cut down any timber trees.

HAYES, J.—I concur; I go with the plaintiff's counsel in thinking that according to the true construction of this lease, the trees were the property of the landlord, and that all the particles of earth on which they grew were the property of the tenant, and that things being so there was reserved a right to the landlord of taking nutriment from the soil for the trees. All that being so, and the trees being the landlord's, and the soil the property of the tenant, I do not find on the reading of this covenant that it was intended to cast on the tenant the duty of nursing the landlord's trees. The landlord seems to have reserved that to himself, and I do think, therefore, that the trees, being excepted, cannot be considered as part of the demised premises. Nor do I think that growing trees come within the meaning of the word improvements, and, therefore, on the fair construction of the lease, I think that the value of the timber trees ought not to be visited on the defendant.

FITZGERALD, J.—I also am of opinion that the tenant has not covenanted to keep in repair the landlord's trees, which are expressly excepted out of the demise, and as to which the landlord has reserved a right to himself to visit them.

Rule absolute to reduce the verdict to a sum of £10.

THE DUKE OF BEDFORD AND OTHERS v. LORD ORANMORE.—April 16.

Reported by Oliver J. Burke, Esq., Barrister-at-Law.

Pleading—Embarrassing defence—Payment of money into Court on a contract alleged by defendant to be different from that set out in plaint—Common Law Procedure Act, secs. 75, 76, and 78.

The defendant to a writ of summons and plaint for £83 7s. 6d., for arrears of rent out of the lands of K., pleaded a denial of the contract in plaint mentioned—that as to a moiety of the lands of K., he holds them as tenant from year to year from the plaintiff, and in respect to such moiety the sum of £83 7s. 6d. is due and owing to the plaintiff, and brings same into Court. Defence set aside, on the ground that money cannot be paid into Court on foot of a contract different from that in plaint set forth.

Serjeant Sullivan, Q.C., (with Crozier) applied to set aside the fifth, sixth, seventh, and eighth defences as embarrassing, inasmuch as the money paid into Court was not paid upon a contract alleged in plaintiffs' summons and plaint, and further that plaintiffs be at liberty to draw out the sum of £83 7s. 6d. lodged in Court by the defendant in discharge of the plaintiffs' demand, as if the same had been lodged on the contract as alleged in summons and plaint. The action was brought to recover the sum of £83 7s. 6d., being for three years' rent of certain lands called Killeen, otherwise Kilmacnally, in the County of Mayo. The summons and plaint contained five counts—first count, that Sir Robert Lynch Blosse, Bart., and E. Kirwan, being seised as tenants in common in fee of certain messuages in the County of Mayo, let the same to one Dominick Browne for 99 years; from the 1st November, 1763, at the yearly rent of £27 15s. 10d., payable half-yearly, as by said deed which has been lost, or by the counter part thereof in the possession of the defendant, may appear—averment, that during the continuance of said term, all the estate, interest, and reversion of Sir R. L. Blosse and E. Kirwan vested in the plaintiff by deed, and all the estate, interest, and title of said Dominick Browne vested in the defendant; that during the continuance of said term a large sum of money, six and a half years' arrear, to wit, £83 7s. 6d., was due and owing to the plaintiffs; 2nd count, varying the cause of action, that one Patrick Kirwan, being seised in fee of certain lands, let the same to Dominick Browne, late Lord Oranmore, as tenant from year to year, to hold from 1st May, 1829, at the yearly rent of £27 15s. 10d.; that the estate of P. Kirwan vested in plaintiff, and that of Lord Oranmore in defendant; that during the continuance of the said term, six half-years' rent were owing from the defendant to the plaintiff;—third count, that plaintiff let the lands of K. to the late Lord Oranmore as tenant from year to year, from 1st March, 1844, at the yearly rent of £27 15s. 10d.; that all the estate of the late Lord Oranmore vested in defendant; that six half-years' rent, to wit, £83 7s. 6d., became due, and was unpaid by the defendant to the plaintiff;—4th count, same as last, save that the letting was made to the defendant himself;—5th count, for like sum, use, and occupation. Eight defences

were pleaded to this plaint—1st defence to first count traversing Blossie's and Kirwan's seisin;—2nd defence to first paragraph, traverse that Blossie and Kirwan let the lands to D. Browne; 3rd defence to first paragraph, traverse that the reversion was in the plaintiff; 4th defence to first paragraph, traverse of Dominick Brown's interest being in defendant; 5th defence, being the first to second count, which, with the sixth, seventh, and eighth, were sought to be set aside; that Patrick Kirwan and the late Lord Oranmore were tenants in common in fee, and by assignment in 1824, it was agreed that Lord Oranmore should hold a moiety as tenant from year to year, and should retain the other moiety in his possession without paying any rent for same; that as to the last moiety, the defendant is entitled thereto as the eldest son and heir-at-law of the late Lord Oranmore, and that he is entitled to hold the same without paying any rent therefor; that he admits that he is tenant from year to year of the other moiety, and further admits that the sum of £83 7s. 6d. is due and payable in respect thereof, and brings the same into Court accordingly; sixth defence to third count, that plaintiff and Lord Oranmore are tenants in common in fee of a moiety of the lands, and as to the other moiety, that defendant is tenant from year to year thereof, and in respect of which the sum of £83 7s. 6d. is due and owing, and defendant brings same into Court; and as to the other moiety, that he does not, and did not, hold same as tenant from year to year, but is seised of same as owner in fee; 8th defence to fifth count for use and occupation, that he holds one moiety of said lands as tenant from year to year to plaintiffs, and brings the sum of £83 7s. 6d. in respect thereof into Court. By these several defences, it appears that the exact sum claimed by the plaintiff was admitted to be due by the defendant; but the contracts set forth in the plaint differed from that in the defence, the plaint claiming the sum of £83 7s. 6d. for the whole of the lands in plaint mentioned, while the defence admits the same sum to be due in respect of a moiety only. The plea of payment into Court admits the contract as stated, and the breach of it—*Fischer v. Aide* (3 M. & W., 494)—which contract is at the same time denied by the defence, and a totally different one alleged. The only question properly to be tried upon pleas of tender under the 75th, 76th, and 78th sections of the Common Law Procedure Act, 1853, is whether the payment into Court was sufficient to meet the plaintiff's demand. Here the entire demand of the plaintiff was paid into Court, and by drawing out the money on the plea as pleaded plaintiff would thereby admit the truth of the plea—namely, that defendant was owner of a moiety of the lands, which plaintiff denies.

E. Johnstone (with him *J. E. Walsh, Q.C.*), in support of the defence.—The defendant's case cannot be pleaded in any other shape; the sum claimed is admitted and paid into Court, but only for a moiety, which is pleaded. Had it been paid upon the contract, such payment would be an admission that the plaintiff was owner of the whole of the lands in plaint mentioned, which defendant denies, and in an action of ejectment thereafter brought such admission would be prejudicial to the defendant's interests.

PER CURIAM.—The plea ought to be set aside on the ground that money cannot be paid into Court on a contract set forth in the defence different from that stated in the counts of the summons and plaint.

NOTE.

The reporter has obtained a note of the following case, decided in the Court of Exchequer:—

Exchequer.

Jan. 13, 1863.

KINGSLEY
v.
HACKETT.

O'Donnell, Q.C. (with him *Coates*), applied to set aside the defence filed to the third count of plaint as embarrassing, inasmuch as it stated a contract different from that declared on, and then pleaded a lodgment of money on the contract as set forth in the defence. The count averred a contract for the purchase of 100 puncheons of whiskey to be delivered within a reasonable time. Breach—that the same was not delivered within a reasonable time, or at all; and claimed damages for non-delivery of the entire. The defence stated that the contract was for a delivery of the whiskey in lots as should be required. That the defendant from time to time as required, delivered 30 lots, and that the defendant was, before action, only required to deliver one other lot, which lot, defence admitted, was not delivered; and as to plaintiff's claim for damages in respect of the non-delivery of that lot, the defendant brought £20 into Court. It is submitted that money could only be lodged on the contract set forth in the plaint, and not on one totally different as stated in the defence, and that the effect of all the authorities is that payment into Court admits everything which plaintiff would be obliged to prove in order to secure the amount so lodged, *Dyer v. Ashton* (1 B. & C. 3); *Tattersall v. Parkinson* (16 M. & W. 752). The money could not be taken out without admitting the contract in defence; and thus plaintiff would be deprived of his right to support the case relied on in the count.

Chatterton, Q.C. and *E. M. Kelly* for defendant relied on *Taylor v. Kenyon* (8 Ir. C. L. App. 76) as establishing a principle under the present system of pleading, now regulated by the Common Law Procedure Act, sufficient to support the defence.

Coates, in reply, contended that the Common Law Procedure Act did not affect the principles of pleading; but only got rid of technicalities; and that a lodgment of money on any other contract than that declared on, was contrary to all precedent; and that *Kenyon v. Taylor* was not law; and was undoubtedly disapproved of by the profession.

The Court expressed dissent from the decision in *Kenyon v. Taylor*, but felt bound by it as an authority, and refused the motion.

Court of Common Pleas.

[Reported by J. Field Johnston, Esq., Barrister-at-Law.]

BELL v. BELL.—Jan. 19.

Practice—Security from over-holding tenant in ejectment—Landlord and Tenant Law Amendment Act (Ireland), 1860, s. 75.

An application to the Court to compel a defendant in ejectment to give security for costs under the 75th section of the Landlord and Tenant Law Amendment Act (Ireland), 1860, ought to be listed.

An affidavit by the plaintiff making such an application, that he has no copy nor counterpart of the lease, and that there never was any, and a notice to the defendant requiring him to produce the original, will not be taken by the Court in substitution of "the lease, or other instrument, or counterpart or duplicate thereof," whose production by the plaintiff is required by the said section.

R. Dowse called the attention of the Court to a mo-

tion he intended to move, that an over-holding tenant in ejectment might be ordered to give security for costs under the 23 & 24 Vict., c. 164, s. 75. The application had not been listed. [*Christian J.*—Why not name a day? Is there a form of notice given?] No. The motion will be opposed. [*Monahan, C.J.* It is better to put in the list; it would be worth while to make this the subject of a general order.]

Jan. 22.—*R. Douce* moved the above motion. The plaintiff states in his affidavit that he made a lease to the defendant's mother of the premises sought to be recovered at a rent of £10 a year, and that it has expired; that he has no copy or counterpart of this lease, and that there never was any. We have served a notice on the defendant, requiring him to produce the original.

Johnston, for the defendant, was not called on.

Application refused.

ATKINSON v. MILLS.—Jan. 24.

Re-changing the venue.

A trial being had, and the verdict set aside upon grounds irrespective of the merits of the action, the Court, upon an affidavit by the plaintiff disclosing the improbability of getting a fair trial in the county to which it had previously changed the venue, upon the defendant's application, allowed the venue to be restored to the place in which the plaintiff had originally laid it.

THE plaintiff in this action, which was brought to recover damages sustained by the diversion of a water-course, applied upon affidavit to bring back the venue to the County of Dublin. A trial had been had in the County of Kildare, to which the venue had formerly been changed, it having been originally laid in Dublin, and, on that trial, a verdict had been had for the defendant. The facts appear sufficiently from the judgment of *Monahan, C.J.*

MONAHAN, C.J.—The old notion concerning laying the venue has been exploded. The plaintiff has a right to lay his venue where he likes, subject to a discretion in the Court to change it. In this instance the plaintiff exercised his right, and we, thinking the trial might be more properly had in the County Kildare, changed the venue accordingly. We had then no grounds for doubting that the case might be so properly tried in that county. It was tried, and the defendant had a verdict which we set aside upon the ground that at the trial an amendment was made, which the plaintiff swore took him by surprise, but not upon any ground which concerned the merits. We thought the verdict not satisfactory. The plaintiff now applies to bring back the venue to the County Dublin. This is like the case of the defendant endeavouring to change the venue. On the affidavits made, we cannot but think that a feeling exists in the County of Kildare, which will not allow a fair trial to be had, and if on the former motion we had had the materials we now have, we never would have come to the conclusion that a fair trial could be had there. No imputation could be made upon the jurors of the

County Dublin. We think a view may be advisable, and, following a case in the Court of Exchequer, whenever this case comes to be tried, I will have the jury brought the first day of the sittings, and procure one which will consent to go and view the premises. In this manner the parties will be relieved from the expenses of keeping their witnesses in town.

Application granted.

WEXFORD HARBOUR COMMISSIONERS v. REDMOND.

Jan. 30.

Defendant's right to inspect the books of the plaintiff.

An application by a defendant sued by the Wexford Harbour Commissioners for the amount of his promissory notes for an order to inspect the plaintiffs' books, and take extracts from them was granted, the defendant being a shareholder and director.

Serjeant Armstrong, for the defendant, applied for an order to inspect the books of the plaintiffs, and take extracts from them. The action was brought by the Wexford Harbour Commissioners, to recover the sum of £3,244, the amount of the defendant's promissory notes. The defence pleaded was a set-off, and the defendant had made an affidavit of his belief that there was a resolution in the books of the plaintiffs that if he would undertake certain liabilities of the Commissioners, they should be considered a set-off to the notes. The defendant was a shareholder, and director, and a portion of the set-off consisted of his attendances as commissioner, and his exertions in London in procuring Acts of Parliament to be passed, and he alleged that for want of seeing this resolution, he was unable to give further particulars. The plaintiffs replied that the set-off extended only to a portion of the claim, and the defendant accordingly served a notice requiring that himself and his attorney might be at liberty to inspect the books of the Commissioners, and take extracts from them. The plaintiffs refused this, but tendered an inspection of the list of directors, and the minutes of the meetings. The issues stood over till this matter was disposed of.

May for the plaintiffs.—The defendant has no right to go on a roving expedition through all the plaintiffs' books. We replied in our notice that we would furnish a copy of the resolution referred to, and that if the defendant was not satisfied, he might be at liberty to compare this with the original. [*Monahan, C.J.*—Show us anything in this notice to which you think the defendant is not entitled.] He wants to find out how often he attended the meetings. [*Monahan, C.J.*—He wants to find out transactions in which he was interested. As a shareholder he has a right to do this.] That is different from his being a party in an action. [*Monahan, C.J.*—Not at all; he does not cease to fill that character by his suing or being sued by the Company of which he is a member.]

Application granted.

Court of Exchequer.

GARNETT v. CULLEN.—Apr. 18.

[Reported by Oliver J. Burke, Esq., Barrister-at-Law.]

Pleading—Demurrer—Action of account between tenants in common—6 Anne, ch. 10, s. 23—Common Law Procedure Act, 1853, secs. 3 & 6.

An action of account under 6 Anne, ch. 10 (Ireland), sec. 23, being brought by one tenant in common against another—Held, upon demurrer, that the Common Law Procedure Act, in repealing that statute, abolished the form of proceeding only, and not the right of action—Kearney v. Kearney (6 Ir. Jur., N. S., 127), followed.

DEMURRER:—The first paragraph of the summons and plaint complained that John Garnett, the plaintiff, to wit in the month of, &c., 1854, was, and from thence hitherto has been, and still is, possessed undividedly of a certain share or portion of a certain farm and lands, to wit, the lands of Tinode, with the appurtenances situate in, &c., for the residue of a term of years not yet expired, that is to say, the plaintiff was and is possessed of and in one undivided third part thereof, and the defendant of one undivided third part thereof, and R. Huddleston of one undivided third thereof; and the defendant, during all the time aforesaid had the care and management of the whole of said premises, with the appurtenances, to receive and take the rents, issues, and profits, to the common profit of them, the plaintiff, the defendant, and the said R. Huddleston, and as bailiff of the plaintiff, of what he, the defendant received more than his just share and proportion thereof, to render a reasonable account thereof to the plaintiff, and his said share thereof, when the said defendant should be thereunto afterwards required, according to the form of the statute in that case made and provided, and although the said defendant, during all the time aforesaid, received more than his just share and proportion of the rents, issues, and profits of the said tenements, with the appurtenances, and the plaintiff's share thereof, and all conditions were fulfilled, and all things happened, and all times elapsed necessary to entitle the plaintiff to maintain this action, yet the said defendant, though he was afterwards requested by the said plaintiff so to do, hath not yet rendered a reasonable account to the said plaintiff of the said rents, issues, and profits so received as aforesaid, or any part thereof, or of the said share of the said plaintiff, or any part thereof, but hath hitherto wholly neglected and refused so to do, contrary to the form of the statute in that case made and provided, and the plaintiff prayed that a reasonable account may be rendered by the defendant pursuant to the statute of what is due by the defendant to the plaintiff in respect of the premises. To this paragraph the defendant pleaded, "that he admitted that the plaintiff was and is possessed undividedly of a certain share or portion of the town, &c., in summons and plaint mentioned, that is to say, that he, the plaintiff was and is possessed of one undivided third part thereof, and the defendant of one other undivided third part thereof, and one R. Huddleston of one other undivided part thereof, as in summons and plaint mentioned; and defendant says, that being so

possessed of said undivided third part, to wit, as tenant in common, and not otherwise, he had the care and management of the whole of said premises, and so received and took the rent of the whole of said lands, with the appurtenances, to the common profit of them, the plaintiff, the defendant, and the said R. Huddleston, but defendant saith, that except as being so possessed of said undivided third part, to wit, as tenant in common, he never had the care or management of the said premises, with the appurtenances, in the said first count mentioned, or any part thereof, to receive or take the rents, issues, and profits thereof, or as bailiff of said plaintiff, of what he received more than his just share and proportion thereof, to render a reasonable account to the plaintiff, and his said share thereof, as in said count alleged. To this defence the plaintiff demurred, upon the ground that said defence did not deny the material facts which constitute the cause of action in the said count mentioned, but, on the contrary, admitted the same, but denied that the action could be maintained by one tenant in common against another, and in effect insisted that the statute 6 Anne, ch. 10, sec. 23, was repealed, whereas the same is not repealed, but is still in existence; or even supposing, but not admitting, that same was repealed, it was re-enacted by the Common Law Procedure Act, 1853, and all rights given to one tenant in common against another were and are still in full force and effect. The following points were noted for argument by the plaintiff:—1st. Can the action of account be maintained by one tenant in common against another? 2nd. Is the statute 6 Anne, ch. 10, sec. 23, which gives the action of account between tenants in common, still in existence? 3rd. If said statute of 6 Anne, ch. 10, sec. 23, was repealed, were its provisions re-enacted by the Common Law Procedure Act, 1853? 4th. Are the rights given by the 6th of Anne, ch. 10, sec. 23, still in full force and effect?

Edward Gibson (with him *Brereton, Q.C.*) in support of the demurrer.—The summons and plaint proceeded on the supposition that the 6th Anne, chap. 10, section 23 (Irish), giving the right of action between tenants in common, without any special appointment as bailiff, was in existence while the defence impliedly relied on its being repealed. The statute of Anne, though repealed by the Schedule A. to the third section of the Common Law Procedure Act, is only repealed, in fact, as to the mode of procedure, but is unrepealed as to the right of action. The Procedure Act had merely reference to the course of procedure, and was in no way conversant with the rights of action, nor did it attempt to destroy a single right; on the contrary, the sixth sec. thereof says, that "the right to recover any debt or damages, in respect of any matter which might have been heretofore the subject of any action of debt, covenant, assumpsit, account, trespass, &c., shall and may be enforced in an action to be called a personal action." Such was the unanimous opinion of the judges in the Court of Queen's Bench in the case of *Kearney v. Kearney* (6 Ir. Jur., N. S., 127), where the identical question now under consideration was argued at great length, and it is submitted that this Court will not overrule the decision of the Court of

Queen's Bench, but will be bound thereby until that decision shall have been overruled by a Court of Appeal, or a Court of higher jurisdiction.—*Montgomery v. Swan* (Drury's Cases, temp. Nap., 520); *Geoffrey v. Saunders* (3 Wilson, 94); *Wheeler v. Horne* (1 Will., 508); *Henderson v. Eason* (17 Q. B., 701).

Charles Coates (with him *M. O'Donnell, Q.C.*) in support of the plea.—The 23rd section of the statute of Anne is actually repealed *nominatim* by the third section of the Common Law Procedure Act. Can it be said then that the sixth section re-enacts an Act of Parliament by implication, which by name was repealed by the third section? If then the statute of Anne be repealed, the action of account does not lie, for before the statute of 6th Anne no action of account lay between tenants in common. It is said in Co. Lit., 172, a, and in 200, b, "If one joint tenant or tenant in common of land maketh his companion his bayliffe of his part, he shall have an action of account against him, But although one tenant in common or joint tenant without being made bayliffe, take the whole profit, no action of account lieth against him." The decision in the Court of Queen's Bench in *Kearney v. Kearney* is open to criticism, nor will this Court be bound thereby.

PER CURIAM.—We feel bound by the decision of a court of co-ordinate jurisdiction in *Kearney v. Kearney*, and shall allow the demurrer accordingly.

LYNCH v. IRWIN.—Apr. 23.

Pleading—Embarrassing defence—Plea to the whole count answering a portion only.

To the common count in the summons and plaint for money had and received, on which was endorsed a bill of particulars, whereby it appeared that plaintiff paid defendant two sums of 28l. and 10l. for conacre oat soil, and also for conacre meadow, defendant pleaded "that the money paid by the plaintiff to the defendant for conacre meadow, amounted to 6l., and no more, and that said payment was made at the risk of the plaintiff, who was aware before, and at the time of such payment, that legal proceedings were pending against the lands on which said conacre was, and defendant says that plaintiff agreed with the defendant to pay said sums, running the risk of being disturbed in the cutting and carrying away said conacre crop." Defence set aside, as leaving a portion of the count uncovered, and also as embarrassing.

THIS was a motion on behalf of the plaintiff that the third defence to the third paragraph of the summons and plaint might be set aside, on the ground that same was framed so as to prejudice, embarrass, and delay the fair trial of the action, inasmuch as though purporting to answer the whole paragraph to which it was pleaded, it in fact only answered a part thereof, and neither traversed nor confessed and avoided the residue, and inasmuch as it mixed up inferences of law with matters of fact, and though purporting to rely upon some agreement, yet it stated no specific

agreement. The third paragraph of the summons and plaint was in form the common count for money had and received. By the particulars endorsed thereon it appeared that the plaintiff had paid the defendant the two sums of 28l. and 10l. for the use of conacre oat soil, and also for conacre meadow. the facts of the case being, that previously to the plaintiff's reaping the crop of oats, or cutting the meadow on the land for which he had so paid, he was evicted therefrom under a writ of habere, at the suit of the defendant, and plaintiff now sought to recover back the 38l. advanced by him on foot of the contract. The defence objected to was as follows:—"And for a further defence to said third paragraph, the defendant says that the money paid by the plaintiff to the defendant for conacre meadow amounted to 6l., and no more, and that said payment was made at the risk of the plaintiff, who was aware before, and at the time of such payment that legal proceedings were pending against the lands on which said conacre was, and the defendant says that the plaintiff agreed with the defendant to pay said sum, running the risk of being disturbed in the cutting and carrying away of the said conacre crop." There were other defences to the same paragraph of the summons and plaint.

H. MacDermot for the motion.—The defence on the face of it assumes to answer the whole cause of action, while in fact it only addresses itself to a portion of the count to which it is pleaded. The count in question is the common count for money had and received, but the particulars, which are incorporated with it by reference, shew that it is founded on money advanced for conacre oat soil, as well as for conacre meadow, yet the defence only deals with the latter. Before the Common Law Procedure Act, advantage might be taken of a defect of this character either by general or special demurrer—1 Chitty on Plead., 554. Since the Common Law Procedure Act, defences of this kind have been set aside under the 83rd section of that Act.—*Garret v. Waldron* (9 Ir. C. L., Ap. 34); *O'Driscoll v. Croker* (9 Ir. C. L. R., Ap. 29); the case of *Dunsandle v. Finnie* (10 Ir. C. L. R., 171) is in point. This defence is open to other objections; it suggests rather than states an agreement; there is no certainty in it, and we do not know whether defendant relies on an inference of law, or on a special agreement. Every person who contracts for lands or goods runs the risk of being disturbed by one who has a better title; but it by no means follows that he may not recover back the consideration, and it is not stated here that there was an agreement that in the event of an eviction the consideration money should not be recovered back.

W. Roper, contra.—The defence is good. Counsel for the plaintiff is quite correct in stating that the particulars are to be treated as incorporated with the pleading on which they are endorsed. The defence objected to is only pleaded to the claim for conacre meadow; there are other defences—namely, the first and the second, which cover the whole of the plaintiff's claim.

FITZGERALD, B.—We must set aside this defence. The case cited of *Lord Dunsandle v. Finnie* is a decision on the point. The defendant may, however, amend, and attention ought to be paid to the other

objections raised by the plaintiff's counsel, as they appear to me substantial.

Defence set aside with costs, with liberty to defendant to amend, taking short notice of trial.

Court of Probate.

[Reported by W. R. Miller, Esq., LL.D., Barrister-at-Law.]

MOLONEY v. CASEY; MANSERGH, INTERVENIENT.
May 8.

Conditional order for new trial—Undue influence—Will in favor of attorney—Entire will tainted thereby—Necessary proof.

The Court refused a conditional order for a new trial, where the verdict had been found against an alleged will, the evidence being conclusive of undue influence practised on the testator by the person principally benefited, and who was most active in giving the directions for, and in the preparation of the will, and held that no part of the will in favour of other persons could stand, nor the appointment of executor. The degree of proof necessary when the case is suspicious—the drawer, an attorney, taking great benefit under it.

Whiteside, Q.C., (with him Dr. Ball, Q.C.,) moved for a conditional order to set aside, as against the weight of evidence, the verdict had for the defendant at the sittings after last term, or so far as it affected any legacies but those to Mr. Mansergh and the residuary bequest. The verdict had been found against the will, and in favour of the defendant, who was the widow of the testator, on the ground of undue influence practised on the deceased by Mr. Moloney, the attorney who drew the will, and Mr. Mansergh, the principal devisee in the will. A bequest was in the will of £300 for the poor of the parish in which the testator lived, to be distributed according to Mr. Moloney's discretion, and £300 to the Protestant Orphan Society. A farm of land was left to Moloney in trust to sell, and the proceeds to be applied as he might think fit in charity, and Mr. Moloney was appointed executor, and also residuary legatee. We contend that the appointment of executor and the charitable legacies are all valid, and should stand as part of the will, though we may find it hard to sustain the residuary clause, as Moloney was the attorney who drew the will. The only parts of the will which should be touched, are those in favour of Mansergh, who used the undue influence, and the residuary clause in favor of the drawer of the will.—*Barton v. Robins* (3 Phillim., 455); *Fawcett v. Jones* (lb.); *Piercy v. Westropp* (Milw., 495); *Trimlestown v. Dalton* (1 Dow. & Cl., 85); *Boyce v. Rosborough* (6 H. of L. C., 45); *Carroll v. Carroll* (Milw., 434).

Cur. adv. vult.

May 22.—KEATINGE, J.—The motion now before the Court is substantially one, only questioning the verdict as it related to the charitable legacies, and to two small pecuniary legacies of £10 and £5, on the ground that it was against the weight of evidence.

The will in dispute left to Mr. Mansergh, the intervenient, the lands of Shandrum, a freehold property for his life, with remainder to his son Henry in fee-simple. There was a legacy of £300 to the Treasurers of the Clare Protestant Orphan Society, and to his executor, Mr. Moloney, £300, to be expended by him at his discretion among the poor of the parish of Miltown. A bequest next followed of his lands at Spanish Point, with his furniture, plate, books, and pictures, to the plaintiff in trust, to sell them, the proceeds to be distributed in charity among such persons as he should think fit and proper objects. There was then a sweeping residuary clause in favour of the plaintiff. The case made against the will by the defendant, the widow of the said deceased, was, that he was greatly addicted to drink, and that, never having had a very vigorous mind, as death approached, his mind was not even as strong as before. In 1856, he married Miss Locke, the defendant, but before that, he was on intimate terms with Mr. Ralph Mansergh, the intervenient. But for some reason, not necessary to mention, it occurred to Mr. Francis Casey (the father of the deceased, Mr. Alexander Casey,) that it would be better that after the marriage Mr. Mansergh should not be admitted to the house; and both sides admitted that a letter to that effect was written by Francis Casey to, and received by Mansergh, three or four days after the marriage. That was a cardinal fact in the case—but, notwithstanding that letter, Mr. Mansergh continued from time to time to meet Mr. Casey, the deceased, about the offices of his house, and in the neighbourhood. Some days after the marriage, Mr. Mansergh wrote an angry letter to the deceased, telling him that he should not allow any woman to separate him from his old friend, and he followed up that by sending several others, some in his own hand, and signed by him, others in a feigned hand, and anonymous, but which the deceased told his wife came from Mr. Mansergh, and containing serious charges against her—amongst others, they charged her with infidelity, than which, no heavier charge could be brought against any respectable lady. Some misunderstanding appears some time after to have occurred between the deceased and his wife, which seemed traceable to only one cause—Mansergh's letters to the unfortunate man. The evidence plainly showed that Mansergh was the instigator of the outrage committed during the last visit of the defendant to the deceased, when she tried to effect a reconciliation with him. She then was obliged to have recourse to the Consistorial Court in Dublin for protection, and in June, 1861, she got a decree for permanent alimony at the rate of £150 a year. In those proceedings, Mansergh, on the part of the deceased, took an active part, by writing letters, and otherwise. After the death of Francis Casey, Mansergh was in all the concerns of the deceased, the master of the house, Casey was continually drunk; and even Mansergh himself admitted that he always expected that the deceased would do something for him and his son. There is evidence that the deceased was anxious to be reconciled to his wife, and that Mansergh interposed. It appeared that in the Consistorial Court an attempt was made to prove that Mrs. Casey had been unfaithful as a wife, and she

was cross examined as to it. But her character had been triumphantly vindicated by the letters of the deceased himself, which proved the utter groundlessness of the charge. It appears, then, that when the deceased was anxious for a reconciliation, Mansergh prevents it by telling the deceased that she was more another person's wife than his, when the deceased said, "My God! I never knew that before," to which the other replied, "Then know it now!" This course of conduct continued for some time, until the making of the will. The deceased had a copy of the proceedings in the Consistorial Court, and it was continually referred to by the deceased and Mansergh. Can anyone doubt why this was done, or why Mansergh and his son took up their residence in the house? In September, 1860, Mr. Moloney, a solicitor, was introduced to the deceased. He was consulted by Mansergh about the propriety of appealing from the decree of the Consistorial Court, and from time to time he transacted business also through Mansergh. Now, it is quite true that the plea of incapacity has failed; the deceased was not incapable to make a will, but, in all business transactions, Mr. Mansergh was his right hand man. Dr. O'Brien, an eminent physician in Ennis, was called in to see the deceased on the 15th January, 1862. The will is dated the 24th January, 1862. Moloney did some little sessions business at Ennis for the deceased, but in every case Mansergh attended for the deceased—he never was absent from his side. Dr. O'Brien had, on his visit on the 15th January, a bad opinion of the deceased, and then Mansergh wrote on the 16th to Moloney the letter as to some accounts of the steward, which Moloney was to audit; but the important part is the postscript—"P.S. Private.—Will a deed or a will be more secure as to leaving property? He wishes to know." On the 17th, Moloney answered that a deed would be better, if registered. Now, this showed that Mansergh was then busy about the arrangement of the affairs of deceased, and his using the word "private" meant, it is not necessary to say anything about it to the deceased. Several other letters of a similar kind were referred to by the Court, showing an arrangement going on between Moloney and Mansergh as to the disposition of the property. Dr. Flanagan proves that the deceased's state was then alarming, and he thought it right to have a consultation with Dr. O'Brien, and on the 21st January, the latter was written for, and told to attend on the 22nd. Then Mansergh writes on the 21st to Moloney, while he was settling the accounts, to come up at once, and bring up a will with all necessary materials for execution. Moloney did come that night—the deceased was in the parlour at a late dinner; but on the next day when he came, deceased was in bed, but got up, and appeared at table. The company present were, Dr. Flanagan, a Mr. Lucas, a magistrate on confidential terms with Mansergh, and who lived seven miles off, and who was written to also on the 21st to attend as a witness on the 22nd, which he did. Moloney and Mansergh were there, too; but Dr. O'Brien did not come, and nothing was done; but Mr. Moloney says that the deceased arranged that he was to come up the next morning to arrange about his will. As to this, or the

instructions for the will, he is the solitary witness. What occurred between the 22nd and 23rd is all important. Dr. O'Brien appeared on the 23rd, and it is plain that it was not considered right or safe to approach Mr. Casey about a will, till Dr. O'Brien could be prevailed on to mention the subject to him. But the doctor was expected on the 22nd; the attorney and the witness Lucas were there, but the doctor did not come, and nothing was done, but Mr. Lucas held his ground, and waited until the will was executed. However, on the 23rd the doctor arrived, and was requested by Mansergh to speak to the deceased about settling his affairs, which he did; and Mr. Maloney goes into the deceased's bedroom at about half-past ten, and remains there until about half-past two or three in the morning, and he represents that he was all that time taking the instructions for the will from the deceased, and prepared a draft and two copies, as the deceased desired that the will should be in duplicate. Now this important part of the case rests on the sole unsupported testimony of Mr. Maloney. No one else was there during the preparation or the reading over to the deceased of the will, except Maloney. A more suspicious case never came under my notice. This will leaves the freehold lands of Shandrum to Mansergh and his son for ever, and it gives to Maloney £300 to be applied among the poor of Miltown, and to be applied *at his discretion*—he an attorney residing seventeen or eighteen miles away at Ennis. Then comes after a legacy of £10, and another of £5, a bequest of his house, with furniture, plate, pictures, books, linen, and stock of every kind, to the said Moloney, his heirs, executors, administrators, and assigns, in trust to sell, and the produce to form a fund to be distributed in charity, as he may think fit and proper. A testator had a right to make a will as capricious as he pleased, if not sounding in folly, but that such a bequest should be found here is most astounding. He has the selection of the charity, and of the objects of such charity, vested as a personal trust in him. Then comes the sweeping residuary clause to him. The propriety of the verdict is not questioned, so far as relates to the devise to Mansergh, and the residuary clause in favour of Moloney. But I am called upon to set it aside, so far as regards the charitable legacies and small pecuniary legacies, and, above all, as to the appointment of the executor, and on the ground that, although undue influence or fraud may be relied on in impeachment of the will, yet that it will only affect the parties who are benefitted by the will, who practised them, and not any others. I deny that proposition altogether. Each case must depend on its own circumstances. A case may come before the Court in which influence, fraud, or contrivance, is plainly applicable to a part, and not to the whole of the will. Others may arise in which it was extended as to all, and it is the duty of the judge to bring under the notice of the jury the several parts of the instrument to which the defence applies. I am not aware that I failed in this case to do so, and no motion is made to set aside the verdict on the ground of misdirection. The Trimlestown case was referred to in support of this application, but I do not think it establishes any such proposition. That case is better reported in 1

Bll., N. S., 427, and it depended on its own circumstances. His Lordship referred to pp. 275, 453, 457, in support of his view. Three things are necessary to support a will—1. Adequate capacity. 2. Testamentary intention. 3. Due execution.—*Jones v. Goderich* (5 Moo. P. C. C., 21). I am now considering this case as if the legacies were not affected by fraud, though I think they were. Were there not eminently suspicious circumstances? and though fraud cannot be presumed, yet the authorities say that circumstances may render fraud so probable or highly suspicious, that stronger proof is required than in cases where the natural presumptions and free will were in favour of the dispositions of the testator. In ordinary cases what is required by law, if the capacity is unquestioned, is established by the mere fact of execution; but that is not so where there are suspicious circumstances; further proof is then required that the will is according to the intentions. Here there is a most suspicious circumstance; the will is not read in presence of any third person—no one present but Moloney, the drawer, and who takes so much interest under it. I can imagine a case where a man wrote a will largely benefitting himself, and the jury might, under the circumstances find in his favour. But how could the public be safe, if wills of this kind were to stand, and if property were to be left to an executor, who was almost a stranger to the testator. It was quite competent for the parties to have given evidence as to those legacies, but there was none save Moloney's, and the Attorney-General does not move to set aside the verdict on that ground. As to the additional proof required in such cases, see *Von Stentz v. Comyn* (12 L. E. R., 631), where all the cases on the subject are cited. In my judgment, the jury exercised a wise discretion in not acting on such evidence as was offered here, and, under all the circumstances of the case, I make no rule on the motion.

No rule.

WADE v. STEPHENS—May 27.

Practice—Administration creditor—Costs—31st Rule Contentious.

A person having an interest as creditor, &c., is not, in general, entitled to the costs of citing next of kin to accept or refuse administration, if the latter appear and accept, unless a conditional decree has been made; and unless such person has cited all the prior parties, the 31st rule (contentious) does not apply, which directs him to enter a side-bar rule that the defendant do extract within 14 days, or, in default, the administration be given to the plaintiff.

Dr. Miller, for the plaintiff, moved that the defendant be ordered to extract letters of administration to the goods, &c., of the deceased, Jane Haw, within 14 days, otherwise that same should be given to the plaintiff, and that if the defendant should extract, then that the plaintiff should be paid his costs of the proceedings he had taken in order to get administration. It appeared that the trustees of the late Lord Rossmore had obtained a judgment on the 6th March, 1861, against one John Branion, for the sum of £69

3s. 4d. debt, besides costs, and that John Branion, having been arrested on a *ca. sa.*, issued on foot of that judgment, on the 2nd May, 1862, filed his petition and schedule in the Insolvent Court, praying to be discharged as an insolvent debtor, and in his schedule he stated that by a deed of assignment of the 9th March, 1859, but not executed until March, 1861, he had assigned over to the deceased in this cause, his sister, a farm of land of which he was the owner, in consideration of the sum of £30. That the insolvent was discharged as an insolvent on the 4th January, 1862, and the plaintiff was appointed his trade assignee, and that the insolvent was still in possession of the farm; and in order to impeach in Chancery as fraudulent and void the said assignment of said farm, the plaintiff required a personal representative to the deceased. The deceased died in July, 1862, intestate, leaving one son now in America, and two daughters, viz:—Sarah Jane Stephens, wife of Mr. Stephens and Mary Haw, her only next of kin. On the 2nd May, 1863, a citation was issued from the registry, and was served on Mrs. Stephens and Mary Haw, on the 5th May, calling on them to accept or refuse letters of administration of the goods of the deceased, otherwise to show cause why same should not be committed to the plaintiff, and on the 8th May, Mrs. Stephens appeared, and accepted the grant, but no service was yet made on the son. A written notice had also some months before the issuing of the citation been given to the defendant and her sister, requiring them to take out a grant, but no notice had been taken of it. The case was not within the 31st rule contentious, as the son in America was not served in any way, and, therefore the plaintiff could not enter the side-bar rule there pointed at, as he was not yet in a condition to be able to extract, and to that extent the notice of the present motion could not be pressed, but as to the costs the authorities in England were conclusive, that if the next of kin delay even for 6 months to extract, and so render it necessary that a creditor, or any person having an interest to extract administration should issue a citation, and afterwards the next of kin appear and accept, the costs so incurred are ordered to be paid either by the next of kin or out of the estate—*Cole v. Rea* (2 Phillim., 428); *Jones v. Baytagh* (3 Ib., 685); *Goods of Spitty* (16 Jur., 92), in the first and third of which the proceedings were the same as in this case—a citation, and then an appearance; in the second there was a conditional decree, but in all of these the costs were given; see also 1 Wms. Ex. 385. The plaintiff here, though not exactly a creditor of the deceased, has still such an interest in the goods of the deceased as to be entitled to raise a representative to her, and has all the rights of creditors in such cases.

E. Johnstone, for the defendant, relied on the fact that the plaintiff had not entered the side bar rule mentioned in the 31st General Order, and that he was not a creditor of the deceased, but of Branion, the insolvent, and, therefore, that the cases cited did not apply.

KEATINGE, J.—I do not consider that the 31st rule applies to this case, as the son has not been served, but the practice of the Prerogative Court in

Ireland was not to give creditors, citing next of kin, who appear and accept, their costs, unless the case went as far as a conditional decree, then the creditor got his costs. Now the practice of the Prerogative Court is, by the Probate Act, continued to be the practice of this Court, unless where it is altered by statute or rule, and I considered that the Prerogative Court in Ireland is what is there intended. It does appear from the cases cited that a different practice has prevailed in England, and that the creditors there are allowed their costs when next of kin delay to extract, but that is not the practice here; but as a notice was given before the proceedings were had, which has not been attended to, the order I shall make will be, No rule on the motion. Let the defendant extract within fourteen days from the date of this order, and in default of her so doing let her pay to the plaintiff the sum of £10 for his costs in this case.

Order accordingly.

GAMBLE v WILLIAMS.

Practice—Husband and wife—Parties.

In testamentary causes, the husband of a plaintiff propounding a will should be joined as a co-plaintiff.

Dr. Ball, Q.C., for the plaintiff, who was about to propound, as executrix, a will of the deceased in the cause, applied for an order that the husband of the plaintiff, who was a *feme covert*, should be made a party. In the Prerogative Court, this was not done, and it is not easy to see why it was not the practice, but in this Court it is generally the practice to make these parties.

KEATINGE, J.—I do not like to alter the appearance; you had better tender a consent to the other side to sign, to make the husband a party, and probably as it is for their benefit, no objection will be made. If any objection is made, you may serve a notice of motion for the morning, and I can then make the proper order.

IN THE GOODS OF ROBERT HOLMES, DECEASED.—June 3.

Letters of administration, notwithstanding will in the registry—Lunatic.

Where a will, on its face rational, was made by a person who was sworn to have been at the time of unsound mind, and was soon after its execution confined as a lunatic in an asylum, where he died, the Court gave administration as in case of intestacy to one of the next of kin, reciting in the order its opinion of the invalidity of the will.

Dr. Townsend, on behalf of Edward Holmes, the eldest son of the deceased, applied for letters of administration of the goods, &c., of the deceased, notwithstanding an alleged will bearing date the 18th day of August, 1862, lodged in the registry. From the affidavit to sustain the motion, it appeared that deceased was, at the time of the date of said alleged

will, in a very excited and unsound state of mind, and that the members of his family were afraid to oppose him, and that on the day in question he drew up the will, and brought it to two persons in Strabane, who, knowing said deceased to be insane, witnessed it merely to prevent said deceased getting more excited, and not to annoy him, and he was, on the 22nd of December, 1862, removed to the Omagh District Lunatic Asylum, and he died there, a lunatic, on the 17th September, 1862. The said will was, after deceased's death, found in deceased's pocket by the medical officer of the asylum, who informed the family of deceased of it. The deceased left a widow and several children—some here, some in America, and some minors; but those who are of age, and in this country, consented to the application. There was no other will of the deceased forthcoming. The alleged will was quite rational on the face of it, giving all the deceased's property, freehold and leasehold, and all other property, to his children equally. The real property was worth about £600, and the personal assets about £1,300. The only object was to have a legal authority for some one to carry on the business of the deceased, who was a brewer in Strabane.

KEATINGE, J.—I cannot, in this matter, condemn the will; but I can, on my order, record my opinion of its invalidity, and when the parties are all of age, it can in a proper suit be formally pronounced against, or, if valid, can be established. Accordingly, my order is, that the Court, being of opinion that the paper writing of the 18th of August, 1862, is not the last will and testament of the deceased, doth give liberty to Edward Holmes to apply in the registry for, and obtain letters of administration of, the goods, &c., of the deceased.

DEVLIN v. M'CARTHY.

Quarter sessions—Creditor—Will.

On consent, a case was sent to the sessions, in which a will was in litigation, a creditor of the deceased propounding it. Quære—Can a creditor be allowed, without consent, to propound and litigate a will?

Dr. Townsend, on behalf of the plaintiff, a creditor of deceased, moved to make a consent a rule of Court. The consent was to send the case for adjudication to the quarter session of the County of Kerry, the personal assets being sworn to be under £200, and no real estate whatever. If the consent should not be made a rule of Court, then he moved that the caveat and appearance of the defendant be set aside, and administration with the will given to the plaintiff. The plaintiff's affidavit stated that the deceased, Charles M'Carthy, died on the 10th of April, 1861, having left a will, which gave the residue to his sister, a nun, in Madrid, and nothing at all to the defendant, and appointed Justin M'Carthy his executor, who had renounced. The residuary legatees had been duly cited, and had not appeared. The only assets were a policy for £100, and it was alleged that the debts of the deceased far exceeded that amount: the plaintiff's debt was £27. The defendant is the brother, and one of the next of kin, and has no interest

in the assets.—*West v. Wildby* (3 Phillim, 374). The registrar declined to act on the consent, not considering that a creditor could contest a will.

Raymond, for the defendant, objected to the alternative part of the motion, to set aside the caveat and appearance. He disputed the plaintiff's demand, and alleged that the estate was not insolvent.

KRATINGE, J.—I cannot try that question here, and I cannot assume that the defendant has no interest. He may come in for some assets, but, on the consent of the defendant, I may allow the case to go to the sessions; but it is a very peculiar case, and I am not aware that there is any authority for the proposition that a creditor has a right to litigate with the next of kin the validity of a will; but here there is a consent, and I, therefore, think it may be made a rule of Court.

Order accordingly.

Court of Bankruptcy & Insolvency.

• [Reported by John Levy, Esq., Barrister-at-law]

[BEFORE LYNCH, J.]

Re MESSRS. SCOTT.—May, 1863.

Partnership allowance to partners in proportion to dividend on the joint estate.

Where a dividend is paid on the joint estate of partners, entitling them to an allowance in proportion to the dividend paid, such allowance will be double, or as much to each as if paid on a separate estate, upholding the decision in the case of Gibbs v. Howard (Montague's Reports, 105).

Quære, if only the one per-centage was given to be divided between the bankrupts, would they have the right of appeal?

THE bankrupts were extensive ship owners at Queens-town, Cork, and had been declared bankrupts so far back as November, 1858, and, after several adjournments of their cases, they had passed their final examinations. There had been considerable delay in realising the assets, on account of their ships being on foreign voyages, and the accounts of foreign correspondents having to be investigated. Throughout the whole proceedings they were vigorously opposed by a creditor named Benson, although the assignees seemed to be satisfied. Ultimately, their estate paid a dividend entitling them to a per-centage under the statute, and

Heron, Q.C., came in on their part to obtain it.

Dowse, Q.C., for Benson, opposed the application. The chief grounds on which he relied were, that the bankrupts had already received large sums of money out of the estate, and that they and the assignees were willing to compromise a debt for £800 less than was afterwards obtained on foot of it, and that through the exertions of Benson that sum was brought in; and that, if the bankrupts' recommendation had been attended to in the matter, it would have been lost to the estate.

JUDGE LYNCH, in giving judgment, said—In this case the bankrupts are before me meritoriously, and I believe they deserve from this Court the fullest extent of allowance that it is in my power to give.

Every stage of this case has been most carefully watched by the opposing creditor, Mr. Benson, and I certainly do not complain of his proceedings. He has been successful, at least to a considerable extent, and it is to me a great satisfaction to find suitors who have looked carefully, nay, suspiciously, to the working operations of bankruptcy, and who bring to my notice any matter which they think ought to be complained of. Laxity and undue confidence might easily creep into a system such as that which ought to govern the practice of the Court, if it were not carefully watched, and the mercantile public are invited by me, as far as I have influence with them, to examine carefully all acts done here, and to bring publicly under my notice in Court, all and every act of the Court and its officers of which they think they have the least reason to complain. I say this, because Mr. Benson has been mentioned as one unduly complaining; but, in justice to him, I am bound to say that I do not find fault with what he has done; but, at the same time, I must do justice to the Messrs. Scott, by declaring that, having gone through an ordeal of adverse scrutiny into every act of theirs, since, as well as before they came into this Court, they now stand in the position of persons who deserve thanks from their creditors, and who have received it from all, except Mr. Benson. Therefore, my duty is plain, namely, to give them the fullest allowance that it is in my power to give them, and the only question I have to consider is, how far I am authorised to go, in awarding the highest allowance I can give under the statute. The question in the case being that of partners, am I authorised to give an allowance to each, or must it be one allowance or a per-centage in proportion to the dividend, that per-centage to be divided between them, or can I give to each the per-centage to which a bankrupt is entitled where there is no partnership? I have a strong opinion on the point, and, in my judgment, section 302 would be properly expounded by taking the limit thereby given as the limit of charge upon the estate thereby administered, whether that estate relates to partners or to an individual—in truth, the whole power to give allowance is derived from section 302, which provides that "the court may make to every bankrupt who shall have obtained his certificate, and every insolvent who shall have obtained his final discharge, such allowance out of the estate as the Court shall think fit, not exceeding the rates and amounts following, that is to say, if the net produce of the estate shall pay the creditors five shillings in the pound, an allowance at the rate of three pounds per centum; and if such produce shall pay such creditors ten shillings in the pound, an allowance at the rate of five pounds per centum; and if the dividend is twelve and sixpence in the pound, then an allowance of seven pounds ten per centum; and if the dividend is fifteen shillings in the pound or upwards, then an allowance of ten pounds per centum." The 303rd section provides that "the Court may make such allowance to any partner, if a sufficient dividend shall have been paid upon the joint estate, and upon the separate estate of such partner, although the other partner may not be entitled to any allowance." As I have said, the power to give the allowance is derived from the

302nd section, and this power is limited to a specific amount of charge on the estate, out of which the allowance is to be given. However, the case of *Gibbs v. Howard* (Montague's Reports, 105), is a very strong authority that each partner is entitled to a full allowance as if no partnership existed, or as in case of separate estates, and although it is in conflict with other decisions, still I think it is an authority on this point, and that I should follow it, and Mr. Benson can appeal from this order, if so advised, for my decision will certainly be the subject of appeal, if it be in excess of my authority—whereas if I decided to give only the one amount to both, it may be questionable how far the Court of Appeal would vary an order as to the amount, where the statute left it altogether to my discretion. Besides, I have the satisfaction of feeling that I leave the case of appeal to one so very willing to move in any matter connected with this bankruptcy as Mr. Benson has shown himself to be. I may say that I am not satisfied on any arguments that I have heard that this rule of double allowance is the proper one, but I yield to the authority of the case cited, and I, therefore, order an allowance to each in proportion to the dividend.

Court of Queen's Bench.

[Reported by William Woodcock, Esq., Barrister-at-law.]

BRAXY v. MURPHY.—April 30; May 1, 8.

Landlord and Tenant Law Amendment Act, 1860, s. 75—Instrument regulating the terms of the tenancy—Schedule to Landed Estates Court conveyance.

A landlord cannot under s. 75 of the Landlord and Tenant Law Amendment Act, 1860, obtain security against a tenant from year to year unless there is a lease or other written instrument regulating the terms of the tenancy.

Per Lefroy, C.J., and Hayes, J.—The schedule to a Landed Estates Court conveyance stating the tenant's name, his tenure and rent, and the time at which his tenancy might be determined, is an "instrument regulating the terms of the tenancy" within the meaning of s. 75 of the Landlord and Tenant Act.

Per O'Brien and Fitzgerald, J.J.—Such a schedule is not such an instrument.

Thus was a motion on behalf of the plaintiff that the defendant should, within six days from the date of the application, enter into recognizances by himself and two sufficient sureties in a reasonable sum conditioned to pay the costs and damages and mesne profits which should be recovered by the plaintiff in the action. The action was one of ejectment on the title brought by the plaintiff against the defendant as an overholding tenant of the lands of Kilmichael in the county Wexford, and the summons and plaint contained the notice directed by the 75th section of the Landlord and Tenant Act. The facts material to the present motion were the following:—In the month of February, 1862, the plaintiff was declared the pur-

chaser for the sum of £3,210 in the Landed Estates Court of part of the lands of Kilmichael in the county of Wexford, and by deed bearing date the 21st July, 1862, said lands were conveyed to the plaintiff by one of the judges of the Court subject to the tenancies referred to in the schedule to said deed. In that schedule the defendant's tenancy was stated as being a tenancy from year to year of part of the lands of Kilmichael, containing 75a. Or. 22p. or thereabouts, at the yearly rent of £30 12s. 3d., and determinable on the 25th March in each year. On the 4th September, 1862, the plaintiff caused a notice to be served on the defendant to quit the lands on the 25th March then next, if his tenancy originally commenced at that time of the year (of which he required the defendant to inform him at the time of the service) and if otherwise then to quit them at the end of the year of his tenancy which should expire next after the end of half a year from the time of service of the notice. This notice was not complied with, and on the 26th March plaintiff proceeded to the lands to demand possession, and possession having been refused, the plaintiff handed to the defendant's son a demand of possession in writing directed to the defendant. The present ejectment was then brought. The notice of the present motion was for the first opportunity, not for a fixed day.

J. E. Walsh, Q.C. (with him Coates) for the plaintiff.—The question will be raised on the other side whether this case is within the 75th section of the Landlord and Tenant Act, as there is no instrument in writing produced by the landlord, and *Vernon v. Jordan* (12 Ir. C. L. Rep. app. xiv.) will be relied upon; but we say, first, that the construction put upon the Act in that case was erroneous; and secondly, that even if the Act does require an instrument in writing, the Landed Estates Court conveyance and the schedule to it form such an instrument. It has no doubt been decided upon the Act, 1st G. 4, c. 87, that an instrument in writing was necessary in proceedings under that Act—*Doe v. Roe* (5 B. & Ald. 770); but the words of the two sections are different. The true meaning of the latter part of the 75th section of the Landlord and Tenant Act is that where there is an instrument in writing it must be produced; but that does not limit the operation of the earlier part of the section which is sufficient to include cases of tenancies from year to year where there is no instrument in writing. This being a matter in which there is no appeal, the Court will not be bound by the decision of a Court of concurrent jurisdiction. [*O'Brien, J.*—It may have been the intention of the Legislature to give this remedy in cases where there are instruments in writing in order to encourage the practice of reducing to writing contracts of tenancy. *Hayes, J.*—It also may have been its intention to limit applications of this kind to cases which are perfectly clear.] The case here is perfectly clear. We have the Landed Estates Court conveyance and the schedule to it: they, together, form an "other instrument regulating the terms of the tenancy," within the meaning of s. 75 of the Act. Those words cannot be held to apply to an agreement, because under other sections the word "lease" includes that. The words must therefore be held to apply to something else be-

sides a lease or an agreement. The tenancy ascertained by the conveyance and the schedule to it is as certain as if it was ascertained by any instrument between the parties. The schedule is conclusive evidence of the terms of the tenancy. Statute 21 & 22 Vict. c. 72, s. 54; *Errington v. Rorke* (6 Ir. C. L. Rep. 279). [*Fitzgerald, J.*—It seems very strong to call that which is an adjudication of a Court of competent authority, the instrument regulating the tenancy.]

Devitt for the defendant.—In the first place it is a fatal objection to this motion that the notice is for the first opportunity—*Doe dem. Holder v. Rushworth* (4 M. & W. 74.) Then as to the other points, *Vernon v. Jordan* is a decision that the order sought for in this case can be granted only where there is some writing produced. The decision of a Court of co-ordinate jurisdiction must be considered binding. The section mentions several matters essential to the motion; among them is the production of a lease or some instrument in writing regulating the terms of the tenancy. The cases decided on the statute 1 G. 4, c. 87 are conclusive upon this point, and there is no substantial difference between the statutes.—*Doe v. Roe* (5 B. & Ald. 770); *Doe dem. Beard v. Roe* (2 Gale 131); *Avery v. Roe* (6 Dowl. Pr. Cas. 518); *Doe dem. Caulfield v. Roe* (3 Bingh. N. C. 329). Such an instrument as the Landed Estates Court conveyance never could have been contemplated as the instrument regulating the terms of the tenancy. The schedule to the conveyance is no more than a declaration by a Court of competent jurisdiction that a tenancy such as that described existed before the conveyance was made. The judges of the Landed Estates' Court have jurisdiction only to sell subject to tenancies from year to year, but not to determine when the tenancy commenced, as to which it is open to the tenant to dispute their decision—stat. 21 & 22 Vict. c. 72, ss. 61 & 63.

Coates replied.

May 8.—*FITZGERALD, J.*—In this case a motion was made on the 30th April by counsel for the plaintiff under the 75th section of the recent Landlord and Tenant Act that the defendant, Murphy, should be compelled to give security according to the terms of that section. The facts as they appear are these: the defendant was a tenant from year to year, and had been so of the farm in question prior to the conveyance to the plaintiff. The plaintiff claimed under a conveyance from the Landed Estates Court, and in the schedule of tenancies in that conveyance appeared the defendant, Murphy, as tenant from year to year, and his tenancy was stated in that schedule to be determinable on the 25th March, in any year. It was admitted also that save for this schedule the tenancy was not regulated by any writing, that is, there was no lease or written contract between the landlord and the tenant. The object of the motion was to induce the Court to overrule the case reported to have been decided by the Court of Exchequer, *Vernon v. Jordan* (12 Ir. C. L. R. app. p. xiv.) in which that Court is represented to have held, though without argument, that the 75th section of the Landlord and Tenant Act applied only where the contract of tenancy was a contract in writing, and, accord-

ingly, in that case the Court is represented to have refused the rule to compel the defendant to give security, it having been admitted that there was no such writing. In the course of the argument we were referred to the case of *Doe v. Roe* (5 B. & Ald. 770) and a number of other English and Irish authorities on the old Act, 1st G. 4, c. 87, an imperial Act, of which the 75th section of the Landlord and Tenant Act is, with some variation, a re-enactment. Those cases had established that under that Act it was necessary that there should be a contract in writing, either a lease or an agreement, and we have to consider whether there is any such distinction between the two Acts, the one of which is a modified re-enactment of the other, as would induce us to depart from the construction given to the 1st G. 4, and come to the conclusion that the recent Act is to be construed differently. The language of the 1st G. 4 was this, so far as it is necessary to refer to it, "where the term or interest of any tenant now or hereafter holding under a lease or agreement in writing, any lands, tenements, or hereditaments, for any term or number of years certain, or from year to year, shall have expired or been determined by notice to quit," and the construction put upon that section was that the expression "holding under any lease or agreement," governed all that came subsequently, and applied to a tenancy from year to year as well as to a tenancy for a time certain. Such was the decision in *Doe v. Roe* and the subsequent authorities. It has been urged that the language of the 75th section of the Landlord and Tenant Act is so different, that upon it we ought to arrive at a different conclusion, but I have to state not only my own opinion, but the opinion of the Court that there ought to be no difference between the constructions put upon the two Acts. The enactment which we are now dealing with is the 75th section of the Landlord and Tenant Act, an Act passed to consolidate and amend the law of landlord and tenant in Ireland, and in the schedule of Acts repealed by that statute appears the 1st G. 4, c. 87. The recital at the commencement of the Act is that it is expedient not only to amend, but to consolidate and amend the law, and the first section is different in its language from other interpretation clauses, for the language here is that in the construction of the Act certain terms "shall have the force and meaning assigned to them unless there be something in the subject or context repugnant thereto." It is not that the terms may be construed in the manner pointed out, but that they shall have the force and meaning assigned, and amongst the words of which this construction is given appears the word "lease" which it is enacted "shall mean any instrument in writing, whether under seal or not, containing a contract of tenancy in respect of any lands, in consideration of a rent or return," so that according to the interpretation clause it is not alone that the word may include those things, but when you meet it subsequently in the Act, unless there is something repugnant, it shall include every agreement in writing between landlord and tenant for the tenancy of any lands in consideration of a rent or return, and it shall equally apply whether it applies to a lease for a term certain or to a tenancy from year to year or even at will and pleasure, for that too

may be regulated by a contract in writing. With an eye to that let us read the 75th section of the Act, and see whether there is any real distinction between it and the 1st G. 4, c. 87. It includes tenancies at will, which the former Act does not; but save in that respect let us see whether there is any real distinction between the clauses. The words of the 75th section are, "In any case in which the term or interest of any tenant under any lease of lands for any term or number of years certain, or from year to year, or at the will and pleasure of the parties shall have expired or shall expire or be determined by notice to quit given either by the landlord or the tenant." If we read the term "any lease" by the light of the interpretation clause we are to read the section "In any case in which the term or interest of any tenant under any instrument in writing whether under seal or not containing a contract of tenancy in respect of any lands for any term or number of years certain or from year to year," &c. I confess that putting the two Acts side by side, and reading the term lease in the sense which in the interpretation clause it is stated it shall bear, I am at a loss to see any ground on which a different interpretation is to be put on this section from that which has been put on the 1st G. 4. The Act then goes on after other provisions, "It shall be lawful for the landlord producing the lease or other instrument regulating the terms of the tenancy, or some counterpart or duplicate thereof and proving the execution of the same, and that the premises have been actually enjoyed under such lease or instrument in writing, and that the interest of the tenant has expired or been determined by a regular notice to quit, and that possession has been lawfully demanded, to move the Court or a judge," in the manner specified. This is what is to be done in Court, and this throws a strong light on the preceding portion of the section. It was admitted of course that the words "producing the lease or other instrument regulating the terms of the tenancy, or some counterpart or duplicate thereof, and proving the execution of the same, and that the premises have been actually enjoyed under such lease or instrument in writing, and that the interest of the tenant has expired or been determined by a regular notice to quit," are very forcible to throw a strong light on the true interpretation of the section, but the argument was that we were to read the words "producing the lease or other instrument," interpolating the words "if any," and no doubt the Court may add words of the kind if the context requires the addition; but let us see the context here, "and proving the execution of the same, and that the premises have been actually enjoyed under such lease or instrument in writing." It is impossible, on the true construction of the section, to arrive at any other conclusion than that the statute applies only where the landlord shows that the contract is regulated by a written instrument, and it would further appear to me that public policy requires this construction. First, it would be observable on that section, that, assuming it to be a fact that the section applied to the ordinary tenancy from year to year, the terms of which were not ascertained by writing, there is no provision that the landlord shall prove the terms of the tenancy; the only thing provided for is, that he is to produce the

lease or other instrument regulating the terms of the tenancy. We all know that a tenancy from year to year is often implied from the acts of the parties, and sometimes great difficulties arise. The provision that the landlord must produce the instrument regulating the tenancy imposes no difficulty on him that did not exist before, and we save the tenant from the difficulty of having his case investigated on conflicting affidavits. I am therefore of opinion that upon the true construction of the 75th section, we should adopt that which has been done in reference to the 1st Geo. 4, c. 87, and hold that the Act applies only where the landlord produces an instrument in writing regulating the terms of the tenancy. We therefore think that the decision of the Court of Exchequer in *Vernon v. Jordan* was correct. Another point, however, was argued on which there is a difference of opinion amongst the members of the Court. It was urged upon us that assuming the true construction of the Act to be such as I have mentioned, there was here a writing; and the plaintiff's counsel relied on the conveyance from the Landed Estates Court containing a schedule at foot in which the defendant is mentioned as a tenant from year to year of those lands, his tenancy being determinable on the 25th March in each year; and it was said that that satisfied the requirements of the statute and was an instrument in writing regulating the terms of the tenancy. I have found it impossible to arrive at that conclusion. The conclusion I have arrived at is that the statute means that the instrument to be produced should be a writing, whether a lease or an agreement, *inter partes*, creating the tenancy and defining its terms. The expression in the Act is "producing the lease or other instrument" not *ascertaining* but "*regulating* the terms of the tenancy" and further the proof must be of "the execution of the same," and further that the enjoyment of the premises has been "under such lease or instrument in writing." It was urged before us that the conveyance of the Landed Estates Court regulated and ascertained the tenancy, and we were referred to the provisions of the Act under which the Landed Estates Court is constituted requiring for the purpose of ascertaining the tenancies on estate about to be sold, that notices shall be given to each occupier, and that if the tenant comes in to show cause the Court shall determine the relation between him and the landlord, and that the tenancy shall be stated in the rental and in the conveyance; but it appears to me, notwithstanding this and the strong decisions both in this country and in the House of Lords in the case of *Errington v. Rorke*, that though it is true that, for certain purposes, the statement in the schedule ascertains what is the position of the tenant in reference to his landlord at the time the notice was served, what was his prior tenancy, what is his existing tenancy, and how long is it to continue, it is impossible to come to the conclusion that that statement in the schedule is the lease or contract in writing regulating the terms of the tenancy. It does not regulate the terms of the tenancy, though it does conclusively ascertain what they are, and in this case it ascertains that there is no contract in writing, and that the relation which existed at the time the estate was brought into the court to be sold was that there was a tenancy from year to year without writing. It

ascertains this conclusively, but it would be violating the provisions of this Act to hold that this is an instrument regulating the tenancy. I consider that what is intended by the Act is an instrument which, *inter partes*, regulates the terms of the tenancy, and not this judicial determination of what they are. On both points therefore it seems to me that the motion ought to be refused.

HAYES, J.—So far as my brother Fitzgerald has expressed himself on the point decided by *Vernon v. Jordan*, I concur with him. I agree that there is an absolute necessity that the holding should be under some instrument in writing, and that upon the plain principles of public policy; for I would rather base my decision on the policy of the Act than on the former decisions in England made upon a different statute. There is a difference in the language of the two Acts, which might possibly authorise us to come to a different conclusion in the present instance from that arrived at in the cases under the 1st G. IV, c. 87, but I rest my judgment on the policy of the Act, that the landlord shall not have the remedy given by this section, save when the terms of the tenancy are clearly and almost indisputably ascertained, that he shall not, except in such cases, deprive the tenant of the benefit of a defence. That is the plain policy of the Act, and I confess that policy has led me to a conclusion on the other point also. It is admitted that there ought to be some instrument in writing; but it is said that the words of the Act are not satisfied by the production of the Landed Estates Court conveyance. I have come to a different conclusion. I think that that conveyance is an instrument regulating the terms of the tenancy. It evidently ascertains the terms of the tenancy, it fixes them, neither party can go inside or outside of them, and if that is not regulating a tenancy I confess my mind is not subtle enough to discover what is. I will shortly refer to the terms of the Landed Estates Court Act. The first section of that Act to which I shall refer is the 54th, which runs as follows:—"Where a sale shall be made or a conveyance executed, or a title declared under this Act, the judge shall, when and so far as he may deem necessary for the purpose of such sale, conveyance, or declaration, ascertain the tenancies of the occupying tenants, and if any lessees or under-lessees whose tenancies, leases, or under-leases, and other such rights as aforesaid, affect the land or part thereof, to be sold, conveyed, or to be the subject of such declaration * * * and the sale, conveyance, or declaration shall be made subject to the tenancies, leases, or underleases, rights of common, rights of way, or other easements, and to such boundaries ascertained as aforesaid, and subject to which the owner, incumbrancer, or other person applying for a sale, conveyance, or declaration under this Act shall be owner or incumbrancer, and such other of the tenancies, leases, or under leases, or easements ascertained as above, as shall appear to the said judge to have been granted *bona fide* by the owner or person in possession or in receipt of the rents and profits, and subject to which it shall appear to the said judge, the sale, conveyance, or declaration should be made, and the decision of the said judge in relation to such claim under leases or of easement, or in rela-

tion to such boundaries, shall be final and conclusive as to all persons whatsoever, but subject to the appeal hereby provided from the orders of the judges." It appears to me that nothing can be plainer on the reading of that section than that it was the clear intention of the Legislature that the tenant should not be left at the mercy of the landlord when the sale was effected, and should not be thrown over to a stranger, and accordingly it constitutes the judge of the Landed Estates Court, as a tribunal, to adjudicate on the whole matter, to pronounce on the state of affairs between the vendor and his tenant, and to secure the rights of the tenant. The judge has done that in this case, and I think that where there has been a judicial proceeding of this kind instituted for the benefit of the tenant, it is not for the tenant to dispute the result of that proceeding now. There are other sections of the Act which carry out the same policy. For instance, the 61st section which says that "every such conveyance executed as aforesaid by the said judge, purporting to pass an estate in fee simple shall be effectual to pass the fee simple and inheritance of the land, subject to such charges, tenancies, rights of common, or other easements, leases, and under-leases as may be expressed or referred to therein as aforesaid, but, save as aforesaid, and as hereinafter provided, discharged from all former and other estates, rights, titles, charges, and incumbrances;" so that if it were not for the saving contained in this section Mr. Murphy's tenancy would be nowhere. Section 63 then enacts that the Court shall, "on the application of any purchaser, issue an order to the sheriff to put such purchaser in possession of all such lands not in the occupation of lessees, under-lessees, or tenants, subject to whose leases, under-leases, or tenancies the sale shall have been made, and who shall have attorned to such purchaser within a time to be limited in such order, and such order shall be executed by the sheriff in like manner as a writ for the delivery of possession." Now I say the meaning was that after the purchaser had got his conveyance he was to be entitled to the injunction of the Court to be put into possession of the lands in the occupation of tenants, whose rights were not acknowledged by the conveyance. If any person was mentioned in the conveyance, and if he chose to take and attorn to the landlord, he was not to be disturbed, but even if he was mentioned in the conveyance, but chose not to attorn, the Court would exercise its powers. In this case the gentleman has chosen the wiser part, and has thought fit to submit to his landlord's rights, for the sale was made in the month of February, 1862, the conveyance was on the 21st July, 1862; this gentleman paid his rent after that date, so that he has given strong proofs of his willingness to attorn. Then there is section 87, which is important as regulating the rights of the purchaser against the tenants. These are the various sections of the Act, which bear upon the subject, and which induce me to come to the conclusion that in the plain meaning of language, as well as upon the plain policy of the Act, this is, in fact, an instrument regulating the terms of the tenancy. I think that everything necessary has been done by the landlord to entitle him to the relief which he seeks, and that this

is a case within the policy and the language of the statute before us.

O'BRIEN, J.—I concur in the opinion which has been expressed by the two members of the Court who have preceded me, that a landlord, to entitle himself to the benefit of the section, must show that the tenancy is one under an instrument in writing. It is an important question, as this is a new statute, though it is to a certain extent a revival of an old Act, and it is satisfactory that there should be a decision not only unanimous, but also agreeing with the decision in the Court of Exchequer. Now, though we are unanimous on this subject, I think it well to refer in detail to the reasons which have induced me to come to this conclusion, because it was argued that notwithstanding the English cases upon the 1st G. IV., c. 87, this section did not require an instrument in writing at all, by reason of the difference of the words which are used in this section, and in the former Act. *Doe d. Bradford v. Ros* decides the point upon the 1st G. IV., c. 87. The words of the first section of that Act are, "that where the term or interest of any tenant now or hereafter holding under a lease or agreement in writing any lands, tenements, or hereditaments, for any term or number of years certain, or from year to year, shall have expired or been determined." It goes on then to provide for the Court's compelling the defendant to give security. Now the words of the present Act are—"In any case in which the term or interest of any tenant under any lease of any lands for any term or number of years certain, or from year to year, or at the will and pleasure of the parties shall have expired or shall expire, or be determined by notice to quit." Now when we read these words, let us look at the interpretation clause which, as my brother Fitzgerald has remarked, is framed in a peculiar manner, and we find that it says, "the word 'lease' shall mean any instrument in writing, whether under seal or not, containing a contract of tenancy in respect of any lands in consideration of a rent or return." So then we read the section as if it was "where the term of any tenant under any lease or instrument in writing, containing a contract of tenancy, shall have expired or been determined." Now, how it can, on the grammatical construction of the passage, be contended that there is any reasonable or observable difference between this and the old Act I cannot understand. The words of the former Act are as I have before read them. If the words in the commencement of it have been held and properly held to govern the rest of the sentence, I cannot see how a different construction can be arrived at here, or how it can be held otherwise than that the words "any lease," &c., govern the rest of the sentence. If the section was intended to apply to the case of all yearly tenancies, whether in writing or not, I cannot see the use of using the word lease at all. If the Act was intended to have the meaning Mr. Walsh would ascribe to it, it would have said, "where the term or interest of any tenant shall have expired or been determined." This is a consideration which it seems to me should go a long way to help the construction which I think should be put on the Act. The policy of the enactment is plain. Whether a yearly tenancy exists or not, is often a question of difficulty. Even when the

fact of the existence of the tenancy is ascertained, we all know that the gale-days are often a matter of dispute, and I can understand that the reason for excluding tenancies not under written instruments, is not merely put on that, but also as a sort of encouragement to have contracts of this description reduced to writing. If there can be any doubt on that part of the section, it is removed by looking at the subsequent part of it. It is rendered a condition precedent for the landlord to produce to the Court the lease or other instrument in writing regulating the terms of the tenancy. The only way in which Mr. Walsh could get rid of that was by saying that we should introduce the words, "if any" into the section. Courts do constantly introduce into a clause of an Act words for the purpose of carrying out the clear intention of the Act, as it is expressed in other parts of it, and for the purpose of preventing repugnancies between that clause and the preceding one; but when the construction of the preceding clause is at best ambiguous, there is no ground for introducing words elsewhere in order to give effect to that ambiguous construction. Well, now, that being so, the next question is that on which there is a difference of opinion among the members of the Court, namely, whether the conveyance here and the schedule to it make an instrument in writing under which, according to the 75th section of the Act, the tenant is to be considered as holding. Now, with every respect for the opinion of those members of the Court who take an opposite view, I have come to the conclusion that it is not such an instrument. It is true that the conveyance and the schedule to it do state the terms of the tenancy. With regard to this, it is quite right to state that in every one of the principles which have been relied on as to the binding efficacy of those documents, as to the conclusiveness in the way of evidence of the statement in the schedule, I entirely concur, and I would give the fullest effect to the validity and the conclusiveness of those statements; and I concur also in the decisions which have been come to, holding that whatever is purported to be done by the schedules, it is for the Court to arrive at the conclusion what the commissioners purported to do, but having once arrived at the conclusion as to what is expressed to be done by the conveyance and schedule, they shall consider that as actually done. That is going to the full extent of the authorities on the subject, but I still think that the instrument is not one that is contemplated by the Act now before us. I have referred to the word "lease" at the beginning of the section, and in my opinion it is manifest on reading the Act that whatever is the instrument referred to in the first part of the section is the instrument referred to in the end. Though the words "lease or instrument" are used in the latter part, and the word "lease" alone in the beginning, it is to be supposed that the Legislature were dealing at the latter part with the same class of instruments as at the beginning. Now, the interpretation clause of the Act is as follows: [his lordship read the interpretation clause, which has been already given.] What is a contract? An agreement between two parties. Does the schedule to the Landed Estates Court conveyance contain any contract? In my opinion it does not. It is clear evidence if you will that

there was a contract. It ascertains the tenancy then existing, but it does not create the tenancy. The very words are, that the lands are sold subject to the tenancies specified in the schedule. That in itself implies that they deal with existing tenancies, and that the tenancy in the schedule had existed previous to the sale. I admit that that is conclusive, that it is not open to the purchaser to show that the tenant never was in possession, or to the tenant to show that he held under a lease, but the words of the conveyance are on the supposition that it was under a tenancy then existing. It is said this regulates the tenancy. I read these words as referring to and meaning the instrument which creates the tenancy. That is borne out by the words in the second part of the section. The landlord is to produce the instrument. It is to be such an instrument as regulates the tenancy. I say this document shows what the terms are, but it does not, within the Act, regulate them. The subsequent portion of the Act is within that argument. It says, "the landlord shall prove that the premises have been enjoyed under the instrument." Is it to be said that because the Landed Estates Court conveyance shows the terms of the tenancy, therefore the tenant held under it? More, if this argument be good, that the Landed Estates Court conveyance is to be the instrument within this Act, it ought to have that effect in every case. Take it that the tenancy stated in the schedule was for one year certain, to expire on the 29th September, that the instrument was executed on any day before the 29th; on the 30th the landlord brings his ejectment. Can it be held then that the instrument is one under which the tenant holds? It forms the tenant's title and it limits it, but it goes on the supposition of a previously existing tenancy, and if the previously existing tenancy is under the writing, that is a writing under which the tenant holds. That may be altered, set at nought by the conveyance, but still, though the conveyance and schedule confirm the title, it does not make it, and it is not, in my opinion, the instrument under which he holds. It may be said that the case which I have put is an extreme one, but it tests the principle, because if it was an instrument within this Act in one case it would be so in all, and my opinion is that it was not in the intention of the Legislature to include this conveyance. If they had intended to extend the provisions of the section to tenancies from year to year, evidenced by the schedule to Landed Estates Court conveyances, it would have been easy for them to have done it. They have not done it, and as the provisions of this section are provisions which I think ought to be construed strictly, I think the sound construction is the other way.

LEFROY, C.J.—The test to which my brother who spoke last very pertinently brought the question was this: how could the landlord, supposing the conveyance to have been made to him only a short time before the gale of rent in question fell due, or supposing the ejectment in question was brought very shortly after the conveyance, how could the landlord in such a case give that essential evidence of enjoyment by a tenant under a lease, or the agreement as set out in the schedule, which is required by this section, and I agree that if that be so, the construction which I was disposed to give, and still continue to be disposed to

give to the section, would not be sound; but is it true that the landlord could not, under any circumstances, if the conveyance had been executed the day before, make the affidavit of the tenant holding under the document adverted to in the schedule? The Legislature have provided by the same Act which constitutes the Landed Estates Court, that if the tenant does not attorn to the purchaser he shall be turned out upon a writ that will be issued to the sheriff. If we therefore find him in possession, it can only be because he has attorned and admitted himself to hold under the instrument, which, as the statute says, is a lease or an instrument regulating the tenancy. I admit that the word "lease" used in the section is to be taken as "writing" or "agreement," but see then what it does. We have then not merely "lease," or "agreement" by construction, mentioned in the section, but also some "other instrument" which is neither a lease nor an agreement in writing, but another instrument regulating the tenancy. Now, my experience in the Court of Chancery and the Equity Exchequer for many years before this Act was introduced, enables me to recollect the mode of dealing with landed property in Ireland in the case of incumbered estates. The rule generally was that a receiver was appointed. The tenants came into the court frequently for abatements of rent, and the court took on itself to make those abatements. When the estate came to be sold it was often a question subject to what leases it should be sold, because if the incumbrancer had a legal title prior to the lease the tenant was at the mercy of the Court. Well, it was often not merely an appeal *ad misericordiam* to the Court, sometimes it would be a hardship and a positive injustice to leave the tenant at the mercy of the purchaser. Well, then, when this Act was passed, it conferred in the case of every incumbered estate on the judges of the Landed Estates Court the exercise of all the delicate but necessary jurisdiction of ascertaining subject to what leases and at what rents the estate should be sold. This is a jurisdiction which must appear monstrous to anybody not acquainted with the antecedent state of property. But how much better was it to establish a jurisdiction which would exercise between the incumbrancer, the purchaser, and the tenant what would be the reasonable principle on which to sell the estate; and accordingly the judges of the Incumbered Estates Court had jurisdiction given to them to say subject to what leases the estate should be sold in every case of an incumbered estate where there was a legal title under which the tenant had no right against the incumbrancer. The Incumbered Estates Court Act gave the Court the right to call on the tenants to make a return of what tenure they had, whether by lease made after the incumbrances, or whether by tenancies from year to year, at an abated rent which might have been fair at the time, while circumstances might have changed so as to make it unreasonable at the time of the sale, when circumstances also made it right to make the most of the estate. Accordingly, that jurisdiction of ascertaining subject to what leases and what rent, and under what circumstances the estate should be set up for sale, was given to the Commissioners, and accordingly they exercised it, but the modifications they made in the position of the tenant as to lease, rent, or other cir-

circumstances, were to be ascertained before the estate was set up, upon hearing the tenant, if he had any reasonable objection to make; but when the tenant acceded, when the modification was made and published, and the estate was set up subject to that modification, the further provision was made, that as between the purchaser who was to become the new landlord, and the tenant, their respective rights should be adjusted beyond all possibility of doubt or equivocation, and that in the schedule which was annexed to the conveyance were to be written down the precise terms upon which the purchaser was to take the reversion, subject to what leases, subject in whose hands, subject to what rent. The tenant was bound in this way by a provision that if he had the opportunity of raising the objection to that modification, he should come in on the notice which had been given to him; but he was not to be as a dog in the manger, on the one hand, to refuse to make an objection himself, and, on the other, not let the incumbrancer have a sale for his just claims. Then came the provision that if the tenant acceded, if he did not then attorn to his new landlord, thereby admitting that he held under the lease adjusted by the Commissioners, subject to which the purchaser had taken, and had become his reversioner, and was constituted his landlord, he was to be put out by an injunction, for the Court was to exercise a jurisdiction which was not to be merely fabulous or imaginary, but substantial, and accordingly, if he did not attorn and confess himself to hold under the purchaser, or if he did not pay his rent, and the purchaser was put either to bring an action of ejectment or some other proceeding to enforce that which the Legislature had sanctioned his taking under the Commissioners, then and in that case the tenant was subject to be turned out. If the landlord is obliged to proceed, why is he to be worse off than any other landlord? Why is the purchaser under the Incumbered Estates Court not entitled to have his rent secured to him equally with any other landlord? Here we have a case where the purchaser has taken under this Act of Parliament. He has taken under the instrument regulating the tenancy. What other instrument regulates the tenancy? It is not an inquiry what was the original contract which we have to make here. There is no such thing as an original contract; it is cancelled under the authority of the Act. What then can the alternative words, "or other instrument" mean, if not an instrument such as we have here? I confess, therefore, although I concur entirely with my brothers on the other point, still I differ with them on this point in giving the most liberal construction to this Act in respect to requiring a written instrument; and therefore, if in the case of any other landlord he should be obliged to show the original contract, or the instrument in writing, or the lease, when the landlord who is such under this Act cannot have the original lease—for it is cancelled by the Commissioners, and they have the authority to say what is the instrument which they shall introduce into the schedule—is he not to have the benefit of that which the Legislature has provided for? It is not what was the tenancy originally, but what is the tenancy at the time in question that we have to consider: and what is the time in question? The time at which the landlord brings his action or proceeding for the

purpose of recovering what alone he can recover, the rent regulated by the instrument; and if it is asked, where is the contract, he can answer, that there is the contract, the legislative contract, made by the Commissioners under the authority of the statute. I cannot find any difficulty here; if we are to rest on the word "contract," I say that we have a contract here, and therefore I do not see my way to giving to the words of the Act any construction but that from the time of the sale the tenant shall hold under the instrument indorsed on the conveyance, and that that shall be the instrument between the landlord and the tenant. Well, we have had in this court several cases in which the question arose on a traverse; the question was raised as to what was the tenure of the tenant, what were the incidents of his tenure, what was the rent payable by him. And what has been the test in those cases? The production of the schedule to the conveyance. There was one case in which I remember my brother Perrin thought it would be a harsh construction against the tenant to rest upon that merely, but he did not hold by that, for when he came to consider the matter he altered his opinion. This authority was constituted to give security to the landed proprietors, and to both landlords and tenants an equitable adjustment for the rights of both, and I think by maintaining the rights of the landlord we are only giving him his share of the equity. I am of opinion, accordingly, that it must be by a written instrument alone that the landlord can get this benefit, but that he complies with the substance of what the Act requires by producing the instrument which has been produced here, and by calling for security for the rent mentioned in it.

No rule.

O'BRIEN, J.—For the future, in these notices parties must mention a day for the motion, and not merely give notice for the first opportunity.

Court of Common Pleas.

[Reported by J. Field Johnston, Esq., Barrister-at-Law.]

BENNETT v. BARRY.—Jan. 29, 30, 31.

Libel—Demurrer—Plea of privileged communication—Plea of want of statutable notice of action.

A, a Commissioner of Fisheries in Ireland, in a meeting of proprietors and persons interested, convened under the 5 & 6 Vic. c. 106, to inquire into all matters relating to certain Fisheries, charged B, a neighbouring magistrate, with a violation of the Fishery Laws. Held, that the occasion was privileged.

Held, also, that the utterance of the words in question was not such a thing done by virtue or in pursuance of the "Act to regulate the Irish Fisheries," the 5 & 6 Vic. c. 106, as entitled the defendant to twenty-one days' notice of action under the 110th section.

The first count of the summons and plaint complained that the plaintiff before and at the time when defendant spoke and published the words hereinafter complained of, was a Justice of the Peace for the county of Cork, and during the time that plaintiff was such

justice, it was unlawful to take or kill salmon in a certain river called the Arrigadeen River, in the county of Cork, during a certain period of time in each year, said period being called and known as the close season, and any person or persons violating the laws in force in relation thereto by taking or killing salmon in said river during the period fixed as the close season in and on said river, were liable to be brought before certain justices of the peace of said county, (of whom plaintiff was one) and by said justices to be summarily punished according to the law, and plaintiff, as such justice, was in duty bound himself to observe the laws in force in relation thereto and also to see that others observed same, and in every respect to aid and assist in preventing salmon from being killed or taken by any person or persons in or from said river during the said close season, and in and on said river and in the present year said close season commenced with respect to said river on the 15th day of October last past, and continued up to the present time, and plaintiff was such justice of the peace during all said month of October, and still is such justice; and the defendant after the time when said close season had commenced, that is to say, on the 29th of October last, past, at a certain meeting held in the Grand Jury Room in the city of Cork, and in the hearing and presence of divers persons falsely and maliciously spoke and published of and concerning the plaintiff as such justice of the peace, and with the intent and object of bringing the plaintiff as such justice into great disrepute and infamy, the false, slanderous, and defamatory words following, that is to say, "A gentleman of considerable position in the county and a magistrate, Mr. Thomas Hungerford, met me this day and told me that there is a dreadful slaughter going on in the Arrigadeen river, salmon being killed, in immense quantities, (meaning an unlawful slaughter of salmon during the close season.) Mr. Carleton, in order that no mistake should arise, put the time when the season closed on the back of the licence, but the public, I am sure, will be surprised to hear that this Mr. Bennett (meaning the plaintiff) actually wrote to the commissioners (meaning the Commissioners of Fisheries in Ireland) asking them more than a month ago for permission for himself to fish with a rod and to alter the period then fixed upon by the regulations of the commissioners. He (meaning the plaintiff) was told it was utterly impossible to do so. What the inference is I shall leave to the public, that is, whether Mr. Francis Evans Bennett (meaning the plaintiff) is one of those persons referred to by Mr. Hungerford in his statement of to-day. If persons of that class of life would not aid the commissioners by observing the law, to say nothing of enforcing it, it is hard to expect that they could punish a poor man for committing a breach of that law which a rich man himself will not observe. This gentleman (meaning the plaintiff) should be cautious in what he does. He is a gentleman of considerable standing in the county and a magistrate besides, and he ought to know well what ought and what ought not to be done. He was, at a not very remote period, a magistrate of the county of Cork, and he was removed from the commission of the peace because of its having been proved that he was engaged

in transgressions of the Fishery Laws. He was for a considerable time out of it, but through the interference of some friends, he was again restored to it. If he does not aid in upholding the laws it is hard to expect that they can be enforced," the defendant meaning thereby that the plaintiff was one of those persons who killed salmon in said river during the close season, and was thereby guilty of a crime punishable by law, and that as such justice of the peace he did himself wilfully violate those laws which he was bound to observe and enforce, and was unfit to hold or enjoy such commission of the peace as he, plaintiff, did then enjoy; and that as such justice he did not and would not observe or enforce the laws he was bound to observe and enforce, and that as such justice he did not and would not aid in upholding those laws which as such justice he was in duty bound to uphold, and by reason of his wilful misconduct in violating said laws and neglecting to uphold and enforce them, he was unfit to be a justice of the peace. The second and third counts charged the utterance of the same words with the innuendoes slightly varied. To the three counts the defendant pleaded the two following pleas, 1. that before and at the time of the speaking of the said alleged slanderous words, the defendant was a commissioner of fisheries in Ireland duly appointed pursuant to the statutes in that behalf, and that under the provisions of a certain Act of Parliament passed in the sixth year of her present Majesty, and the Acts for amending and regulating the said Act, it was and is unlawful to kill salmon in Ireland with the rod or otherwise at certain periods of the year hereinafter called the close season, and that upon the Arrigadeen river in the said first count of the summons and plaint mentioned it was at the time of the speaking of the said alleged slanderous words and is unlawful under the provisions of said Acts to kill salmon at any time in the interval between the 15th day of October and the 1st day of November in the said Arrigadeen river in the neighbourhood of which the said plaintiff resides, and that the said Arrigadeen river was and is situate within the Cork fishery district and that for said district conservators of fisheries had been duly elected and appointed for the protection of the fisheries within the said district pursuant to the provisions of an Act passed in the twelfth year of her present Majesty, entitled "an Act for the protection and improvement of the salmon, trout, and other inland fisheries," and that before and at the time aforesaid, J. P. Carleton, Esq. had been and was the inspector of fisheries, and also secretary to the conservators within the said district, duly appointed by the said board of conservators for the protection of fisheries in the said district and for generally enforcing the fishery laws within the same and that it is and was the duty of the defendant as such commissioner of fisheries and within the scope of his authority as such to enforce the provisions of the fishery laws and in particular to enforce the observance by the plaintiff and all other persons of the regulations in said Acts contained and made in pursuance thereof, prohibiting fishing for salmon during the said close season, and that it was also the duty of the said J. P. Carleton as such inspector as aforesaid to report to the defendant all instances of infraction of the fishery

laws within his said district, and to bring under the notice of defendant the names of all persons whom he believed to be in the habit of violating or to have in fact violated the said fishery laws, and that before the speaking of the alleged slanderous words in the said first count of the summons and plaint mentioned the commissioners of fisheries duly published in pursuance of the Fishery Acts notice of a meeting to be held by the defendant as such commissioner within the said district in the county Cork court house, Cork on the 29th day of October, 1862, for the purpose, amongst other things, of inquiring into all matters relating to the fisheries within the said district, and that prior to the convening of said meeting applications had been made to the said commissioners for permission to fish on the said Arrigadeen river after the period permitted by the fishery laws, and that before the said meeting was held defendant was informed by one Thomas Hungerford that a great slaughter of salmon was going on in said Arrigadeen river, that is to say, during the said close season, and was also informed by the said J. P. Carleton as such inspector and secretary as aforesaid that several of the gentlemen resident in the neighbourhood of the said Arrigadeen river were desirous of obtaining permission to fish in the said river for salmon after the period permitted by law and that several persons were in the habit of illegally fishing in said Arrigadeen river during the close season without permission, and that an association had been formed of certain persons, of whom the plaintiff was one, for the purpose of protecting the fish in said river, and that the water-bailiff appointed by the board of conservators for the Cork district at the nomination of the said association had received orders from the said association not to prosecute, as was his duty under the Fishery Acts, any persons fishing for salmon between the 15th of October and 1st of November on the said river although such fishing was in fact illegal, and that the plaintiff had applied to him for permission to fish on said river during the period in which it was by law unlawful to fish, as he, the plaintiff well knew, founding such application on an alleged concurrence of the defendant therein, although none such had been given, as he, the plaintiff, well knew; and the statements made by the said J. P. Carleton induced this defendant to believe and defendant did in fact believe that plaintiff was one of the persons who had by fishing on said river during the close season been guilty of a breach of the fishery laws. That plaintiff during all the time aforesaid was a justice of the peace in and for the county of Cork, and that he was bound to observe the fishery laws then in force, and as such justice to enforce the observance of those laws by others. That the defendant afterwards by virtue of his office presided at said meeting and that the alleged illegal fishing upon the western rivers of the Cork district of which the Arrigadeen river was one became and was the subject of discussion at said meeting, and that there were present at said meeting divers members of the said board of conservators for the Cork district, and also certain members against whom charges had been made of illegally taking salmon during the close season in other places within the said district, and that all said persons were interested in this that said laws should

be observed and enforced and all persons deterred from violating or continuing to violate same; and defendant upon said occasion in discharge of such his duty as such commissioner of fisheries, and acting as he *bona fide* believed within the scope of his authority as such and with a view to the better observance of said laws and regulations and the deterring the plaintiff and all other persons from violating same, spoke the words in the first count of the summons and plaint complained of believing same as in said count explained to be true, and without malice in fact as he lawfully might for the cause aforesaid which is the speaking and publishing in the first count of the summons and plaint complained of. 2. That the several matters and things complained of were done by the defendant by virtue of a certain Act of Parliament passed in the 6th year of her present Majesty's reign, entitled "an Act to regulate the Irish fisheries," and the Acts for amending the said Act, and that this action was commenced against defendant before twenty-one days' notice thereof in writing had been given to defendant or left at his usual place of abode. The plaintiff demurred to the first of these defences on the following grounds: That said defence does not show that the slander spoken of plaintiff by defendant was uttered under such a state of circumstances as rendered same privileged; and does not show any facts that justified defendant in speaking and publishing same as complained of; and does not show any facts that warranted defendant in arriving at the conclusion he says he arrived at as to plaintiff's guilt, and does not state that any person had in fact told defendant that plaintiff was guilty of the offence which defendant said he, plaintiff, was guilty of; and does not show how it was defendant's duty by virtue of his office to utter such slander against plaintiff's character at said meeting. To the second plea the plaintiff demurred because that said defence does not at all show how the publication of slander was or could be a matter or thing done under the Act or Acts of Parliament referred to, and because said Act or Acts do not nor does any of them directly or indirectly sanction the publication by defendant as such commissioner of false and malicious slander or in any way make it a matter or thing that could or might be done under said Act or Acts.

James Murphy (with him *Serjeant Sullivan*) in support of the demurrer.—The first of these defences does not disclose a privileged occasion. Under the old system which allowed the general issue, when the circumstances were proved, it was for the presiding judge to decide whether these circumstances constituted a privileged occasion, and if he so decided it lay on the plaintiff to prove express malice. In *Toogood v. Spyring* (1 Or. M. & R., 193) Parke B., in giving judgment, lays down the rule thus. "The law considers such publication as malicious, unless it is fairly made by a person in the discharge of some public or private duty, whether legal or moral, or in the conduct of his own affairs, in matters where his interest is concerned." *Toogood v. Spyring* and *Wallace v. Carroll* (11 Ir. C. L. R., 485) have extended the protection of privilege to the furthest limits, but the principle of them will not embrace this case. The 11th section of the "Act to

regulate the Irish Fisheries," the 5 & 6 Vic., c. 16, which is relied on, enacts "that it shall and maybe lawful to and for the said commissioners to hold general meetings of proprietors of fisheries in any district, on giving due notice by advertisement or otherwise of the time and place, when and where such meetings are appointed to be held, and to inquire into the state of the fisheries in each such district, and the best means to be adopted for the regulation, improvement, or protection thereof." [*Monahan, C.J.*—Does the plea state that there were none but conservators of the fisheries present?] No; nor is there any particular class to which the meeting was restricted. There is not anything in the Act to prevent any member of the public from walking into the meeting, nor anything in the plea to show that a special class was present; a defence that the defendant spoke the words believing them to be justified, would not be sufficient, because the circumstances would not appear which showed that it was so [*Monahan, C. J.*—In *Murphy v. Kellett* we held that it was not necessary to show what was the information, or where the defendant got it, if he stated he had information.] The defendant may not be bound to state the person from whom he received the information, but if this case were tried before the new system of pleading, and the defendant swore he spoke the words believing them to be true and without malice, that would not be held a justification, for the presiding judge should tell whether the facts present to the speaker's mind at the time constituted a privileged occasion. In this plea it is never stated that either Hangerford or Carleton mentioned the plaintiff's name, or suspected the plaintiff to have been guilty. [*Monahan, C.J.*—Is there any case in which it was decided that the Court must be satisfied from the pleadings that the party had grounds for uttering the words? Is there any case deciding that the particulars of the information must be set out? In considering *Murphy v. Kellett* we were unable to find any. That was an action against the medical officer of a workhouse for saying of the plaintiff that if the Poor Law Guardians gave him their custom he would supply the inmates with African sherry, and we held that the position of the party as a medical officer, and the meeting in which the words were spoken being one of Guardians, together constituted a privileged occasion.] Particulars have never been held to be complied with by the defendant's saying, "I heard so and so," and in this plea it is not stated that any person even told the defendant he suspected the plaintiff. If the plaintiff goes to trial on these pleadings what fact can he dispute? What question can he raise about the insufficiency of these facts? Or if it is his right, then it is his right to raise that question now. [*Christian, J.*—It seems to me that there are two conditions to be complied with, first, a privileged occasion; secondly, that the party brings himself within the privilege.] When is it to be decided if he has brought himself within the privilege if not now? [*Monahan, C.J.*—Is there any case deciding that if a master be charged with giving a bad character to his servant, he must have reasonable and probable grounds?] The relation of master and servant is peculiar.

[*Christian, J.*—There is this difference, that in the case of master and servant the opinion of the master is a fact which it is material for the party making the inquiry to know.] It is not stated that it was a part of the business of the meeting to stigmatize absent men. Upon the principle of this plea a defendant might justify a slander, on the ground that a number of ticket-of-leave men were present, and were interested in the matter—*Gilpin v. Fowler* (9 Ex. R. 615); *Ede v. Scott* (7 Ir. C. L. R. 607); *Martin v. Strong* (5 A. & E. 535). As to the second defence, *Cook v. Leonard* (6 B. & C., 351) shows that a notice is only necessary where the defendant had reasonable grounds for supposing the thing done was done under the authority of the Act.

Samuel Walker (with him *H. E. Chatterton Q.C.*) in support of the pleas. The functions of the Court and of the jury in reference to a plea of privileged communication are distinct. I need only show that there was here such an occasion as will rebut the legal inference of malice and it will then be for the plaintiff to make out that it is not privileged either from the words used themselves or from extrinsic circumstances. *Cooke v. Wildes* (5 El. & Bl. 328). In *Amann v. Damm* (8 C. B., N.S., 600), Willes J. says "It matters not how harsh or how hasty the defendant may have been, or how untrue the charge, if he *bona fide* made it." With the reasonableness or unreasonableness of the defendant's belief, with the prudence or imprudence of uttering these words the Court has no concern—*Mailand v. Bramwell* (2 F. & F. 623); *Humphreys v. Stilwell* (2 F. & F. 590). The 33 s. of the 5 & 6 Vic. c. 106 gives the commissioners power to alter the close season and with that view to call a meeting of persons possessed of or interested in the fisheries. The plea does not turn upon this section but it is material to show that the commissioners can only summon proprietors or persons interested. The 89th section gives them the power to apprehend offenders. The 111th section gives the power to hold meetings for inquiring into the state of the fisheries in each district and the best means to be adopted for the regulation, improvement and protection thereof. [*Ball, J.*—This section only mentions proprietors of fisheries whereas the 33rd includes persons interested.] The plea states that the meeting was advertised to be "for the purpose amongst other things of inquiring into all matters relating to the fisheries." [*Ball, J.*—It does not state exactly who were summoned.] No, but it must be assumed that the defendant did his duty in that respect under this section. The 38th section of 11 & 12 Vic. c. 92 empowers the commissioners to attend and advise at meetings of conservators. There is only one commissioner in Ireland now but originally there were more than one. The plea states that the defendant was a commissioner of fisheries. It then states that the time of the speaking of the words was the close season. It then states that the district was under the conservators elected to protect the fisheries. It then states what Carleton was. It then states that it was the defendant's duty to enforce the observance of the regulations contained in the Fishery Acts. It then states that it was Carleton's duty to bring under the defendant's notice

the names of all persons whom he believed to be in the habit of violating or to have in fact violated the fishery laws; that there was a desire existing to fish in the close season; that the defendant was informed that a great slaughter was going on on the Arrigadeen river, and that Carleton stated the plaintiff had applied for permission to fish in the close season. [Ball J.—Is there any power in the Commissioners to grant this?] No, except by a bye law of which notice should be given. The plea charges a wilful falsehood upon the plaintiff in alleging a concurrence by the defendant in his application to fish in the close season. It states that the defendant had received intelligence from Carleton respecting the plaintiff before he used the words in question. [Christian J. Assume so much; suppose the meeting duly summoned, suppose that those entitled to be there were there and no one else, and the defendant duly proceeding—show that his duties include a right to hold up to the meeting an individual as having committed a crime against the fishery laws, and as having been dismissed from the magistracy previously on account of that same crime.] [Monahan C. J.—If a meeting of magistrates were convened to consider the state of crime in the country, any one of them might describe the general state of the neighbourhood but would he be justified in saying that an individual had committed crime and had been dismissed from the commission of the peace for such crime?] The question is this, was there an occasion? The meeting was not a public meeting, the season was the close season. The defendant is told that there was a great slaughter going on. He honestly believes that the plaintiff is guilty. This was one of the best means for attaining the purpose of the meeting (at least it is not unnatural that the defendant should think so) that the parties present should know who had been guilty. He had a duty and an interest to consult with the members of the meeting respecting the plaintiff as to the best means of protecting the fisheries. It was of vital importance to the conservators to know that a magistrate had been acting in this way, and the poor were interested in not being wrongfully suspected or punished. "Duty," will include duties of imperfect obligation, *Harrison v. Bush* (5 El. & Bl. 344); *George v. Goddard* (2 Foster and Finlason 689); *Beatson v. Skene* (5 H. & N. 838.) It was natural that the defendant should think it reasonable that the persons present should know who had been reported to have broken the fishery laws. [Christian J.—It might be strongly argued that imparting to each other their information regarding persons came within the scope of the purposes for which the meeting was called.] It is enough to show anything which rebuts the *prima facie* inference of malice. [Christian J.—The position of the party accused might be a fact to be taken into consideration in consulting as to what measures should be taken.] And the plaintiff was a magistrate whose duty was to protect the fishery. [Monahan C. J.—The words "what the inference is I shall leave to the public," might merely mean the public who were present.] *Ruckley v. Kiernan* (7 Ir. C. L. R. 75) decided that the Court upon demurrer will give to the pleading demurred to the meaning that will support it. In England a question like this

cannot come upon demurrer, it must come before the Court after trial upon a motion relating to the judge's charge or some such thing, and it would be going far in a judge at Nisi Prius to exclude the parties from submitting this whole question to the jury. [Monahan C. J.—But the judge at Nisi Prius, taking into regard the nature of the meeting and the duties of the defendant would decide whether these constituted a privileged occasion.] But the judge could not anticipate, nor can the Court here, the duty of the jury in saying whether the defendant had grounds for his belief. The words were relevant to the occasion which was the convening of a meeting under the 111th section. Every thing connected with the fisheries in Ireland is subject to the Commissioners. [Monahan C. J.—It may be very material in deciding the question of privilege, to consider if a stranger could have attended this meeting.] [Christian J. Or would the presence of a person who had not a right to be there alter the character of the meeting, or change the occasion?] Considering that it had been stated that the plaintiff had discouraged prosecutions against those who violated the statutes, it was not improper for the defendant to state what he did to the persons interested. The fishermen who were present were interested. [Monahan C. J.—If a man charge another before a magistrate with a crime, he must have reasonable and probable grounds for doing so and it will not be sufficient for him to state that he has, but he must satisfy the judge at the trial that he had.] [Christian J.—If you unnecessarily set out the grounds of your belief which are more properly for the jury, does the appearance of that matter upon the record withdraw the consideration of it from the jury?] [Monahan C. J.—That, I conceive, depends more upon the form of the plea, than upon abstract reasoning. It is conceivable that at the trial a party might give many things in evidence which a judge could not withdraw from the jury.] [Christian J. Surely the judge at the trial might say that there was no case to go to the jury, and if we, upon the argument of this demurrer where the defendant has set out most particularly in his plea the grounds of his belief, should hold that they made no grounds for believing, what would be the result? yet he would be a very courageous judge who would withdraw from the jury all that is stated in this plea.] As to the second plea *Read v. Coker* (13 C. B. 850) decided that where a statute gives protection, it is not necessary that the party should be aware of the existence of the statute. *Booth v. Clive* (10 C. B. 827); *Kirby v. Simpson* (10 Exchequer Rep. 358); *Hazeldine v. Grove* (3 Q. B. 997); *Horn v. Thornborough* (3 Exchequer Rep. 846); *Garton v. Great Western R. Co.* (El. Bl. & El. 837); *Acland v. Buller* (1 Exchequer R. 837); *Hermann v. Seneschal* (11 W. R. 184).

Sergeant Sullivan in reply.—Until the judge decided the occasion privileged, it remained unprivileged. Nor until then could any case go to the jury. What the judge decided at Nisi Prius, the Court have now to decide upon demurrer. The learning on this subject is almost exhausted in *Coxhead v. Richards* (2 C. B. 569), in which case, though the Court differed in opinion, they all agreed that the question of privi-

leged occasion lay at the bottom of the whole. The use of deciding that the occasion is privileged is to rebut the *prima facie* inference of law, that there was malice, and shift upon the plaintiff the onus of showing malice in fact. The first of these defences does not disclose a privileged occasion. It is almost admitted that unless the meeting was such as the Act of Parliament authorized, the occasion was not privileged. The plea states the meeting to have been convened for the purpose of inquiring into all matters relating to the fisheries, and the words "all matters" are put in with the express purpose of covering the words used by the defendant. The 5 & 6 Vict., c. 106 gives no jurisdiction to convene a meeting to inquire into "all matters." The 33rd section authorizes meetings to be held to alter the close season. The 11th section, which is relied on by the defendant, is peculiar, and authorizes meetings of proprietors only, and not of persons interested. Meetings under this section relate to the ownership and not to the fisheries being open or close. I test their power to enter into all matters by this question—Could the Commissioners, under the 11th section, alter the close season? [Christian, J.—Are not all fisheries proprietary?] The only power given to the commissioners in relation to the law being violated is by the 89th section, which empowers their officers to apprehend offenders. [Christian, J.—The words in the plea are, "as such commissioner." I see no objection to their combining in one meeting the purposes of both the 33rd and 11th sections.] The defendant's duty was to hear evidence at the meeting. *Gilpin v. Fowler* (9 Ex. R. 615) is a stronger case than the present. The defendant uttered these words without hearing evidence. [Christian, J.—The meeting had a right to discuss what course was advisable.] This was not a private meeting. [Christian, J.—It was a general meeting of proprietors]. *Monahan, C. J.*—If once we are obliged to admit that such words as these, "I believe A. B. and C. D. have been violating the law" were justifiable, then, though in this instance the defendant went very far in the words he used, we should hold the occasion privileged. Is he not to speak at all? He had no right to name any one. [Ball, J.—Is he to sit and say nothing? He is chairman and sole chairman, but we know that a sole chairman takes a part in the discussions, and does not resemble the Speaker of the House of Commons.] The true rule is stated in *Toogood v. Spyring* in felicitous language. [Monahan, C. J.—In language so good that it has been used by every judge since when dealing with the question.] I admit that excess in the language will not take away the privilege according to *Cooke v. Wildes*, and I admit that if the words used had been, "from statements I have heard it is likely that A. B. is implicated," they would be privileged, but here the defendant prejudices the plaintiff in the van of his inquiries. No portion of the words was "fairly warranted," to quote the language in *Toogood v. Spyring*. A commissioner sent down by the Crown to inquire into the conduct of a Lord Mayor and Town Council, would not be justified in commencing his inquiries by stating that the Lord Mayor and Council were guilty of all that had been alleged against them. This oc-

casional, irrespective of the language used, was privileged, but it is not privileged when the words themselves are taken into account. There is no authority that I know of, laying down that in a plea of privileged communication the grounds of the information ought to be set out, but it was done in every case that I ever saw. [Christian, J.—This case differs from *Murphy v. Kellett* in this, that the plea in that case did not profess to set out the grounds.] [Monahan, C. J.—Was there ever such a question left to a jury as, whether the grounds of information were sufficient? Is not the question this:—If the defendant honestly and *bona fide* believed, &c?] Upon the second plea *Cook v. Leonard* is a strong authority. The things authorized by the Act are to seize nets and stakes and to assess boundaries. It must come to this that the defendant is to get notice of action for everything done privileged or not privileged. Does a man open his mouth under an Act of Parliament? Does this defendant, because a commissioner, speak under the Act of Parliament every time he speaks?

MONAHAN, C. J.—We think that this was a meeting convened under the 5 & 6 Vic. c. 106, and that the defendant was justified in inquiring into the state of the fisheries; that all attending the meeting had a right to communicate to each other such information as they had received, and that the occasion was privileged. We must assume, upon the first of these pleas that the defendant *bona fide* believed in the truth of the statement made by him. The reasonableness of that belief will go to show *bona fides* in fact. I do not wish to bind myself by saying that the evidence will be sufficient. We do not think that the defendant was entitled to notice of action.

Judgment for the defendant upon the plea of privilege. Judgment for the plaintiff upon the plea of want of notice of action.

Court of Exchequer.

KEEGAN v. MOWLDS.

Reported by Oliver J. Burke, Esq. Barrister-at-Law.

Landlord and Tenant—Renewable Leasehold Conversion Act—Partial declaration of use—Resulting use.

On the 25th December, 1825, a lease for lives renewable for ever was made of certain lands in the County Dublin, by W. S. to G. F. M., in consideration of G. F. M. paying the rent thereof and performing the several covenants therein contained. On the 21st July, 1831, said G. F. M. assigned to a trustee, in consideration of ten shillings, said leased premises, upon trust, to permit his wife after his death to receive the rents and profits after payment of head-rent, reserving no life interest for himself. On the 13th Dec. 1853, G. F. M. (junior) and H. C. K. were appointed new trustees of the settlement of 21st July, 1831, for the benefit of the wife of G. F. M. On the 30th September, 1856, a deed, purporting to be a fee-farm grant, was made by A. S., the devisee of W. S., to the said trustees, G. F. M. (junior) and H. C. K., their heirs and

assigns for ever, upon the trusts of the settlement of 21st July, 1831, he, said G. F. M. (senior) paying the annual rent thereof to said A. S., who, in 1859, assigned his interest to H. K., whose widow and devisee plaintiff was. On the trial of an ejectment for non-payment of the fee-farm rent, the plaintiff was nonsuited, on the ground, amongst others, that the deed of 30th September, 1856, was not a fee-farm grant under the Renewable Leasehold Conversion Act. Held, that the relation of landlord and tenant did not exist as between the plaintiff and the trustees of the settlement, or any other person, within the meaning of the 7th section of the Renewable Leasehold Conversion Act, inasmuch as the legal estate was in the trustees, the rent being payable by G. F. M. (senior.)

Held also (Fitzgerald, B., dissentiente) *that where a lease for lives is conveyed with a partial declaration of uses, there is no resulting use to the grantor.*

EJECTMENT for non-payment of rent brought by Susan Keegan, of Bahana, in the County of Wicklow, plaintiff, against George F. Mowlds (senior) of Larkfield, in the County of Dublin, Henry C. Kelly, and George F. Mowlds, junior, defendants, for the lands known as Moore's Nevil's Field, Long Meadow, and Cow Pasture, as then or formerly in the possession of George Frederick Mowlds (senior) containing 32 acres 1 rood and 6 perches, Irish Plantation Measure. The plaintiff was widow, devisee, and executrix of Henry Keegan, who purchased the interest in the lease of the lands in question from Anthony Sutton, the executor of William Shea, deceased, who, in the year 1825, by virtue of a lease for lives renewable for ever, leased the lands in plaint mentioned to George Frederick Mowlds, senior, one of the defendants. The plaintiff, in his summons and plaint, alleged that the lands were held under a fee-farm grant, at the yearly rent of £96, and that two years' rent up to the 29th September, 1862, was due to the plaintiff. The defendants denied that they, or any of them, held the lands, or any of them, as tenants to plaintiff, as in plaint alleged. The case was tried in the sittings after Michaelmas Term, 1862, before the Lord Chief Baron and a common jury. The issue was, whether the defendants, or any of them, or any other person or persons, held said lands as tenants to the plaintiff, as alleged. The plaintiff, at the trial, relied on the said lease of lives renewable for ever of 25th December, 1825, which was made between William Shea, of Mountpelier, in the city of Dublin, of the one part, and George Frederick Mowlds, senior, of North Cumberland-street, in the city of Dublin, of the other, whereby it was witnessed that William Shea, for the consideration of the rents, &c., granted, bargained, &c., unto George Frederick Mowlds (senior) all that the town and lands of Kilgoblin, known by the name of Moore's Nevil's Field, Long Meadow, and Cow Pasture, &c., containing 33 acres 1 rood and 6 perches, be the same more or less, situate in the parish of Kilgoblin and County of Dublin, *HABENDUM* to said George F. Mowlds, his heirs and assigns, for three lives therein named, and for the lives of such as should be for ever thereafter added—by virtue of the covenants for perpetual renewal in said deed contained, he, the said George Mowlds,

(senior) paying the yearly rent during the term, and the renewal thereof, to William Shea, his heirs and assigns, that is to say, three guineas per acre, amounting on the whole to the sum of £104 17s. 1d., British currency, from 25th of December, 1825, up to the 25th December, 1830, and thence during the residue of said term, at the rent of four guineas per acre, amounting to £130 12s. 3d. sterling, British currency, payable quarterly. The deed contained a power of distress and a condition of re-entry, and also a covenant with William Shea, his heirs and assigns, on the part of George F. Mowlds, (senior,) his heirs, executors, administrators, and assigns, to pay the rent to said William Shea, his heirs and assigns, and also a covenant for perpetual renewal, and to keep in repair.—By post-nuptial settlement of 21st July, 1831, between George Frederick Mowlds (senior) of the one part, and Daniel M'Donnell, trustee for Margaret Mowlds, otherwise Puxton, of the other part, after reciting the said lease of 25th December, 1825, and that said lease was taken by George Frederick Mowlds (senior) in order to make a provision for his said wife after his death, if she should survive him, and that, for the purpose of securing said provision for her sole and separate use after his death, and in consideration of love and affection for her, said George Frederick Mowlds agreed to assign said lease, and the premises therein demised, to said trustees upon the trusts, and subject to the power and provision thereafter declared, witnessed, *in consideration of ten shillings* in hand paid, the said George Frederick Mowlds (senior) did grant, bargain, &c., release and confirm unto the said trustee, Daniel M'Donnell (in his possession, &c.), and to his heirs and assigns, the premises, to hold to the said Daniel M'Donnell, as trustee upon trust, that he, the said Daniel M'Donnell, his executors, administrators, and assigns, should permit and suffer the said Margaret Mowlds to have the use, occupation, and enjoyment of the premises for her own sole and separate use and benefit after the decease of said George Frederick Mowlds (senior) she paying and performing the rents and covenants in and by said lease reserved and contained, or should (in case she should so think fit) order, or direct, let and demise the premises for her natural life at such rent as she should think proper, and receive the rents and profits, and apply the same (after payment of head-rent, &c.) as she should appoint, and, in default of appointment, to pay the said rents and profits into her own proper hands for her own use while remaining sole, and after the decease of said Margaret Mowlds, the said premises and their appurtenances should remain and be upon such uses, &c., as the said George Frederick Mowlds, senior, by deed or will should appoint, and in default of, and until such appointment in trust for the children of the said George Frederick Mowlds (senior) and Margaret his wife, in equal shares, their heirs and assigns. *This deed reserved no use for the life of George Frederick Mowlds (senior).*

By order of the Court of Chancery, bearing date 13th December, 1853, George Frederick Mowlds, junior, and Henry C. Kelly, two of the defendants, were appointed trustees of said settlement of 21st July, 1831, in place of Randall M'Donnell, the heir-at-law of

Daniel M'Donnell, deceased. The fee-farm grant bears date the 30th of September, 1856, and was made between Anthony Sutton aforesaid, the devisee, executor, and trustee, named in the last will and testament of said William Shea, of the first part,—the *cestui que trusts* under the will of said William Shea of the second part,—George Frederick Mowlds, senior, of the third part, and George Frederick Mowlds, junior, and Henry C. Kelly, trustees as aforesaid on the part and behalf of Margaret Mowlds, wife of said George F. Mowlds (senior) of the fourth part, whereby the said Anthony Sutton granted, demised, and confirmed the lands in question to the parties of the fourth part, and their heirs and assigns, for ever, for and upon the trusts, intents, and purposes, in said deed of settlement of the 21st July, 1831, mentioned, expressed, and contained, he, the said George Frederick Mowlds, senior, (*to whom the grant was not made*) his heirs and assigns, yielding and paying therefor and thereout for ever unto the said Anthony Sutton, his heirs and assigns, the yearly sum of £102, present currency (being a sum different from that reserved by lease of 1825), fee-farm rent, under the Renewable Leasehold Conversion Act, on the quarterly days therein mentioned, with power of distress and re-entry to the grantor and his heirs, and a covenant by said George F. Mowlds (senior) for himself and his heirs, for payment of said reserved rent, and that he and the parties of the fourth part, their and each of their heirs, executors, administrators, and assigns, would keep in repair; and said deed contained a further covenant by the grantee, for himself, his heirs, executors, and administrators, with the parties of the fourth part, their heirs and assigns, that the said George Frederick Mowlds (senior) his heirs, executors, administrators, and assigns, paying the said reserved rent, and performing the reservation and covenants, shall and may peaceably and quietly have, hold, possess, and enjoy the said demised premises, with the appurtenances, for ever thereafter.”—By indenture of grant, dated the 8th of March, 1859, the premises comprised in said last-mentioned indenture were assigned by Anthony Sutton to Henry Keegan.—By consent, and by an award made thereupon, it was agreed that the rent reserved in said fee-farm grant should be reduced to £96 per annum, which consent was followed by deed of 10th March, 1862, between plaintiff, of the first part, George F. Mowlds, senior, of the second part, and the trustees, George F. Mowlds, junior, and Henry C. Kelly, of the third part, whereby after reciting said consent and award, the said George F. Mowlds, senior for himself and his heirs, did covenant with the plaintiff, his heirs and assigns, to pay said reduced rent of £96 yearly, instead of said reserved rent of £102, and the plaintiff, for herself and her heirs, did covenant with the said George Frederick Mowlds (senior) George Frederick Mowlds (junior) and Henry C. Kelly, their heirs and assigns, that she, her heirs and assigns, would for ever thereafter accept the said annual rent of £96, in lieu of said annual rent of £102. On the trial before the Lord Chief Baron, it was proved that George Frederick Mowlds (senior) was in possession of the demised premises, and paid the rent down to the 29th of September, 1860, and that two years' rent were in arrear at the commencement of the action.

At the close of the plaintiff's case, counsel for the defendant called for a non-suit on the ground, amongst others, that said grant of the 30th September, 1856, was not a fee-farm grant under the Renewable Leasehold Conversion Act. That the conveyance of the 8th of March, 1859, transferred no right or interest to Henry Keegan, under whom plaintiff claimed, and that the rent reserved by the so-called fee-farm grant of 30th Sept. 1856, had been extinguished by the deed of 10th March, 1862, whereby it was agreed that Susan Keegan, the plaintiff, was to accept the annual rent of £96, in lieu of and in stead of £102 reserved by the fee-farm grant of 1856. The learned Lord Chief Baron directed a non suit (the plaintiff consenting) to be entered, but reserved leave to the plaintiff to move to set same aside, and enter a verdict for the plaintiff, if the Court should be of opinion that the plaintiff was so entitled, and directed the jury to assess the amount of rent due at the commencement of the action with reference to that contingency. The jury found that there was due at the commencement of the action of rent so reduced the sum of £192. On the 13th January, 1863, a conditional order was obtained to set aside the non-suit, and instead thereof, that a verdict be entered for the plaintiff.

Mac Mahon now shewed cause on behalf of one of the defendants, George Frederick Mowlds (junior) one of the trustees for Mrs. Margaret Mowlds, the wife of George F. Mowlds (senior) against making the conditional order absolute. First point—George Frederick Mowlds (senior) had no legal estate in the lands under the deed of 1856, being the alleged fee farm grant, and the rent being by said deed payable by him, the relation of landlord and tenant did not exist, as between the plaintiff and the trustees to the settlement, or any other person, within the meaning of the Renewable Leasehold Conversion Act, and therefore no ejectment for non-payment of rent lay, because under the settlement of 1831 the legal estate in the lease of lives renewable for ever was vested in Daniel M'Donnell the trustee of that settlement. No use resulted under that instrument to George Frederick Mowlds the elder, first, because the consideration of 10s. was sufficient to pass the legal estate to the trustee.—*Porter's Case* (1 Coke 24 a.); 2 Rolls Abrid. 787. In *Lloyd v. Spilla* (Barnardiston, 387, Chan.) it is said that the consideration of 10s., if there was no more than that alone, is sufficient to raise a use for the benefit of the grantees, and by the Statute of Uses the grantees in consequence must be entitled to the legal estate. Secondly, because there is no resulting use in the lease for life as survives to the lord; and the right and liability to forfeiture are sufficient considerations for the use, so that although there may be only a partial declaration of a use in a lease for life, the residue of the use as declared passes to the assignee—*Castle v. Dodd* (Cro. Jac. 200); 1st Cruises, Digest, 406. Thirdly, the fee farm grant is not conformable to the Renewable Leasehold Conversion Act, as it does not comply with the requirements of the statute, because the rent thereby reserved and made payable is one-third less than it should have been, had it followed the requirements of the said statute. The cases decided on the necessary requirements. Leases made by tenants in tail under the Statute of Henry

VIII. shew that the execution of a statutable power to render the leases valid, they must strictly conform to all the requirements of the statutes creating the power.—1st Platt. 70, and the cases there stated—*vide Sugden on Powers*, 902. But *Shea v. M'Donnell* (an unreported case) decided that the trustees took the legal estate in this very case. In this case the rent is payable by Mowlds (senior) who is not the tenant to the lands, the trustees being the tenants thereto under the fee-farm grant—*Bonham v. Doyle* (Batty, 171), and *Servants v. Hartley and others* (Batty, 179), are in point, and establish the principle that where rent is not payable by the party to whom the lease is made, no ejectment for non-payment of rent lies. *M'Areary v. Hannam* (13 I. C. L. 70) also shows that the relationship of landlord and tenant must exist between the parties, and the rent must be payable by the tenant of the land to the owner of the reversion—*Gilbert on Rents*, 79. *R. v. Wilson* (5 M. & Ry. 140) shows that to create the relationship of landlord and tenant in a grant in fee there must be the assent of the Crown or superior landlord under the Statute of *Quia Emptores*. That portion of the deed of 1862 diminishing the rent, amounted to a covenant not to sue for the rent under the deed of 1856, and therefore released the original fee-farm rent—*Smith v. Maplebank* (5 T. R. 146).

Brereton, Q.C. with *S. Ferguson, Q.C.* and *Osborne* were for making the conditional order absolute on the following grounds, firstly, that Anthony Sutton being owner of the reversion did by the indenture of the 30th September, 1856, grant to George Frederick Mowlds, sen. being owner of the lease of 25th December, 1856, an estate of inheritance in fee simple in the lands contained in said lease subject to a perpetual fee farm rent within the meaning of the Renewable Leasehold Conversion Act. Secondly, that upon the true construction of the settlement of 21st July, 1831, the said George Frederick Mowlds took a life estate in the said lands, and that said indenture of 30th September, 1856, operated as a grant in fee farm to him as owner of said lands within the meaning of the Renewable Leasehold Conversion Act. Thirdly, that said indenture of 30th Sept. 1856, is a fee farm grant within the provisions of the 20th sec. of the Renewable Leasehold Conversion Act, and not within the exception of the Act of 14th & 15th Vic. c. 20, s. 1. Fourthly, that the relation created by said indenture of 30th Sept. 1856, between the parties thereto in respect of the lands in question, is since the commencement of the Landlord and Tenant Act, 1860, the relation of landlord and tenant. That the relation of landlord and tenant was created and still continues in respect of the lands in question between the plaintiff and the said George F. Mowlds (senior) by the deed of 10th March, 1862. Sixthly, that ejectment for non-payment of rent lies on the indenture of 30th September, 1856, by virtue of the provisions of the Renewable Leasehold Conversion Act; and also by virtue of the provisions of the Landlord and Tenant Act, October, 1860. Seventhly, that if the relation of landlord and tenant was not created as above, it continues to subsist under the original lease of 1825. It is submitted that the grant of 1856 was a grant from the owner of the reversion to the owner of the lease of an estate

of inheritance in fee under the Conversion Act. It is not disputed that Sutton was the owner of the reversion, it is conceded that George F. Mowlds (senior) was at all events equitable tenant for life under the settlement of 1831, and therefore owner of the lease within the meaning of the Act. To conclude that the grant was to him, it is necessary to consider the effect of the grant, as if the declaration of uses in the settlement of 1831 had been included therein *totidem verbis*. These uses are to take effect after the death of George F. Mowlds (senior). The effect is that a springing use would arise on that event, and if the grant stopped there, the whole use would result to Sutton the grantor—*Doe v. Whittingham* (4 Taunt. 20). The subsequent agreement by Sutton that Mowlds and his heirs shall enjoy for ever, amounts to a declaration of the intent of the parties, and attract the statute which executes the fee in Mowlds and his heirs, (Saund. Uses 96) the grant of the fee being to the owner, the 7th section of the Conversion Act applies. The Act does not prescribe the form of the grant, it may as such a grant by a conveyance operating by the Statute of Uses as by a direct donation, nor does the difference of interest prevent its being a good conversion grant. The landlord may forego part of his demand, the rent contemplated by the Conversion Act is as it existed at the time of the conversion. Under the settlement of 1831 the estate *pur autre vie* resulted to the settlor for his life, which absorbed the whole estate at law—[*Pickingsgill v. Grey* (30 Beav. 352)], suffering the uses in the grant of 1856 to be executed according to the resulting use as one of the uses of the settlement of 1831. The grant of 1856 vested the fee in George F. Mowlds (senior) directly out of the seizin of the grantees without any necessity of considering the covenant as a declaration of uses, the result being in effect the same. As regards the difference of rent, that reserved by the deed of 1825 being different from the rent reserved by the so-called fee-farm grant, the case ought to be sustained under the 37th sect. of the Renewable Leasehold Conversion Act; and if the rent came under that section it would be a fee farm rent, and within the saving of the 14th & 15th Vic. c. 20, s. 1. Ejectment for non-payment of rent will also lie on the grant of 1856, under the 52nd & 63rd sections of the Landlord and Tenant Act, 1860. A tenancy existed since that Act came into operation. An agreement in the 3rd section of that Act does not mean an agreeing, but terms agreed upon; and the Act imposes new legal regulations on the relations, in fact, existing before its coming into operation.

PIGOT, C. B.—I deeply lament to say we cannot find sufficient reason for setting aside the non-suit; the grant of 1856 is alleged to be a fee-farm grant under the Renewable Leasehold Conversion Act of the lease of 1825; that lease reserves a grant of three guineas an acre up to the 25th of December, 1830, and four guineas afterwards. It was put in settlement by the deed of 1831. In that deed Daniel M'Donnell is described as a trustee for Margaret Mowlds, and the premises are therein described as the "premises hereby assigned;" in the deed of 1856, the trustees represent the heir-at-law of Daniel M'Donnell; the grant is to the trustees, to and upon the

uses of the deed of settlement of 1831, George Frederick Mowlds (senior) yielding and paying the rent of £102. In the instrument described as a fee-farm grant, under the Renewable Leasehold Conversion Act; there were clauses of distress and re-entry, and a covenant with the trustees for quiet enjoyment by Mowlds (senior) and his assignees. The plaintiff contended that there was a resulting use to George F. Mowlds, the settlor of the deed of 1831, and further that the conveyance of 1856, being to the same uses, either directly vested the estate in him, or, if not, that the use resulting to Sutton was executed in Mowlds in full, by force of the covenant for quiet enjoyment; on the other hand the defendant referred to the case of *Castle v. Dodd*, and also to the case of *M'Donnell v. Shea* in this court; that case I find with reference to my note was elaborately argued; it arose thus:—Shea, the lessor of the lease of 1825, had brought an ejectment for non-payment of rent in the Court of Queen's Bench, to which Randal M'Donnell, the heir of Daniel M'Donnell, was not made a party. Judgment was allowed to go by default in that action, and Shea recovered possession, but Mr. Mowlds, observing that the non-service of Daniel M'Donnell would be a fatal objection in this court, instituted a cross action in this court in the name of Randall M'Donnell, as lessor of the plaintiff, and I find that upon the trial of the cross ejectment, counsel on behalf of the defendant submitted that the deed of 1831 did not give such an estate as entitled the lessor of the plaintiff to maintain the action, and that point was reserved; the question as to the effect of the service was also raised, and I find that in the argument *Castle v. Dodd*, and the portion in Cruise's Digest, that there cannot be a resulting use in the conveyance of an estate *pur autre vie*, were referred to: the point as to the estate of the trustee was directly before the court, and it was then determined that the trustee took the legal estate. I think it perfectly clear upon the settlement, that the legal estate vested at once in the trustee, for this *Castle v. Dodd* is an authority for the proposition, that a resulting use would not arise on a conveyance, *pur autre vie*; same law in Rolle, adopted in Comyn's Digest, B. 2; reasons are given by Gilbert on Uses, and not objected to by Lord St. Leonards in his edition of that book. The deed of 1856, giving the estate to the same uses as the deed of 1831 gave it to the trustees, if there was nothing else in the deed, the covenant might have the effect contended for by the plaintiff with regard to the deed of 1862, I don't think it can make in plaintiff's favour, it can have no effect in enlarging the rights of Sutton, or of his assignee, the plaintiff, but even if the estate had vested in Mowlds for his life, the serious question would remain whether it would operate as a fee-farm grant, because in such case though Mowlds (senior) would be seised for his life, the remainder in fee would be vested in the trustees, and the rent would be payable under the *reddendum* by Mowlds (senior) and his heirs, but I am of opinion that the legal estate under the deed of 1856 was vested in the trustees of the settlement of 1831, and upon that ground I think the nonsuit was right, and that the cause should be allowed with costs.

FITZGERALD, B.—Since *M'Donnell v. Shea* has

determined that the trustee took the legal estate, the 7th section of the Conversion Act vests the estate given by the deed of 1856 in the trustees, who now represent the trustee of the deed of 1831. I do not assent to the doctrine that there cannot be a resulting use upon a conveyance *pur autre vie*.

Court of Bankruptcy & Insolvency.

[Reported by John Levy, Esq., Barrister-at-law.]

RE CHARLES LISTER.

Final examination—Want of proper books—Fabricated statement of accounts, with a view to gain indulgence and fresh credit—General misconduct with regard to former partner.

Where the business of a partnership was prosperous up to the time of dissolution, when one partner went out upon an arrangement that he was to be secured an annuity, no portion of which was ever paid, although the outgoing partner was obliged to file a bill to raise the amount; and where regular books were discontinued, and accounts kept on slips of paper, the inference is that it was done for a fraudulent purpose. If a trader submits fabricated accounts for the purpose of obtaining forbearance and fresh credit, and is guilty of criminal acts, the Court is not bound to pass the examination, although he may fully account; but where regular books are not kept, and the entire accounts are not satisfactory, it is evidence that a true disclosure has not been made, and the examination will be adjourned sine die.

THE bankrupt had been a wine merchant in Fleet-street, and succeeded Mr. Furlong, with whom he had previously been in partnership. The case had been two or three times before the Court, for the purpose of passing the final examination, which had been opposed by Mr. Furlong on the ground of fraud and the want of proper books to vouch his dealing and transactions.

Heron, Q.C., and *Leech*, appeared for Mr. Furlong.

Purcell appeared for the Royal Bank, who opposed on the ground of his having made to them a false and fraudulent representation of the state of his affairs, and that by using a fabricated statement, he induced them to stay proceedings against him.

Kernan, Q.C., was for the bankrupt.

The facts fully appear in the judgment of Judge Lynch. His Lordship, in giving judgment, said:—This case is now before me upon the final examination of the bankrupt, and two parties, principally, object, to wit, namely, Mr. Furlong and the Royal Bank. As far as Mr. Furlong is concerned, the case is one of grievous hardship and oppression. The bankrupt was formerly in his employment; he afterwards, having saved some money, was taken by him into partnership in the year 1856. The partnership lasted until 1859, when it was dissolved, and articles of dissolution duly prepared, giving an annuity of £250 a year, at least, to Mr. Furlong, and making

other provisions for him with respect to his share of the capital in the concern; and it now appears plainly that the trade was a prosperous one up to the time of the dissolution of the partnership, and yet Mr. Furlong has never since been paid his annuity, but on the contrary, has had to pay enormous costs in an equity suit, and has now a bankrupt estate to look to for his valuable trade, and his successful suit, to have the partnership accounts settled. The result is, that ruin has been brought on all the parties, the trade has been put an end to, the property all wasted in litigation, and, in my judgment, all mainly through the default of the bankrupt, for the Court of Chancery has altogether placed the bankrupt in the wrong. It has been remarked that Mr. Furlong was himself the plaintiff, and that if the assets have been wasted in litigation, he is to blame; but the bankrupt had possession of all the property—he had everything in his power; he was in, and Furlong was out, and unless Mr. Furlong had submitted to an unfounded claim, he had no other course but to institute proceedings; but he did not anticipate that, although successful in establishing his claim, the answer to it was to be insolvency, and, judging by the nature of the defence made by the bankrupt in this suit, I do not consider that he acted *bona fide* in those proceedings. The judgment of Master Litton (than whom a higher authority cannot exist) has remarked on the state of the books, as kept during the partnership. These books were not before me, but every word of that judgment with additions thereto, might fairly be used in reference to the books of the bankrupt produced here. The evidence taken in this Court shews the nature of the book-keeping disclosed in this case. Regular books were abandoned—loose sheets torn out of books adopted instead—entries made said to be taken from others in regular books, but how taken? Why, by totally changing them. It is said by way of excuse that the Chancery suit so occupied the time of himself and his clerk, that the books could not be regularly kept; but this seems to me an idle excuse, for it seems more troublesome to keep the loose sheet accounts than to go on with entries in regular books. The value of mercantile books is, that if truly kept they record the transactions occurring in the trade, and give a true history of the trader's operations, and enable the creditors to test the accuracy of his statements made to them. The moment they bear this character, when, as here, they are representatives of past transactions, made long after this occurrence, when bankruptcy may have been in view, they lose all their value, and can be only covers for frauds contemplated. So extraordinary a mode of book-keeping as was exhibited in this case, perhaps never was shewn to the Court, and it is hard to say that there is a true disclosure by accounts kept in such a way. But as connected with this accounting and mode of book-keeping, I think I may properly refer to the transactions with the Royal Bank. It appears that for some reason not rationally explained, the bankrupt procured a statement of his affairs to be prepared for him. It is said he wanted to know how he stood, and accordingly he got this account prepared; but the primary item, namely, his profits, he himself states, he got the accountants, Brown and Craig, to adopt,

without even testing its truth, and I am somewhat surprised that the name of Brown and Craig was procured to such a document as this, and a formal account like this, which *prima facie* imported that it was checked from the books of the trader, could be procured from them under the circumstances stated. Messrs. Brown and Craig disclaim all knowledge of the use that was afterwards made of that account, and I trust the disclaimer now made will prevent them again from authenticating a similar document. The use to which it was applied was, to make a full and fraudulent representation to the Royal Bank of the state of his affairs, and the Royal Bank now makes the charge against him that he used that fabricated statement to stay proceedings, and to procure (in which he failed) fresh credit. This case against him on the part of the bank is not denied, and I was asked to allow further accounting in order to shew conclusively the real falsehood of the representation made; for of course he stands in this dilemma—if that account were true, he has not yet accounted for his assets; if false, he made a deliberate mis-statement, and perhaps some vague notion of a decision said to be made by the Court of Appeal (and it is a test of the propriety of such a rule), makes them prefer to take the latter alternative, in order to have the final examination passed. In this Court, *In re Keon* (10 I. C. R., 111), I decided that, although I considered the party had fully accounted, yet that it was my bounden duty to adjourn the examination *sine die*, inasmuch as the conduct of the bankrupt shewed fraudulent dealings and criminal acts, calculated to disqualify from getting a certificate or going into trade again, and I purposely framed my order so as to have the question tried upon appeal, if the parties thought proper to do so. There was some decision in *Burke's case* not yet reported, and I cannot say what it is. Every case, no doubt, must be tested by its own merits, and the peculiar facts and circumstances connected with it, but I will never believe, unless coerced by a superior authority, that no matter what fraud or crimes a trader may commit, if he boldly comes into Court and acknowledges them, he is bound to have his examination passed, get his certificate, and, after the lapse of a certain time, get into trade again. In my opinion such cannot be the law in this country; however, that question is not necessarily involved in the present case. As to the right of the Court to adjourn the examination *sine die*, the power of the Court is perfectly general, as given by the 140th section, and must be applicable to a case like this, or else this Court would be put in the position of giving a false character and giving false testimony, in a manner prejudicial to the law and offensive to justice. In this case, however, I cannot certify that the bankrupt has fully accounted; he has not books to verify his transactions, and it is possible that there may be many transactions not now recorded, in books kept in the way in which they were kept. I am not satisfied with the accounting, because I have no certain basis to act upon in taking the accounts, and I do not see a reasonable ground for adopting the statements of the large losses. I see a heavy and expensive equity suit provoked and litigiously carried on by the bankrupt, to the ruin of himself and his former partner. I

see deliberation in framing a false account, and procuring for it the false credit of the accountants' name thereto. I see this done fraudulently. I will enter my judgment as to this fraud on the minutes, and, considering all the circumstances of the case, I will adjourn this examination *sine die*.

[BEFORE LYNCH, J.]

RE WILLIAM M'CARTHY AND Co.—*June, 1863.*

Final examination—Improbability of bankrupt's account of loss of money and deficiency of assets—Certificate.

Where the account given by a bankrupt and his friend, who had the alleged custody of a large sum of money, the property of creditors, is so highly improbable, and out of the range of the ordinary transactions of life, as to make it impossible for the Court to believe that the account is true, and where such account leads to the general inference that there is deliberate falsehood, the Court, although it will adjourn the examination sine die will not direct a prosecution.

Where partners in a concern take little or no part in the business, and know nothing of the accounts, although their examination will be passed, their certificates will be suspended.

THE bankrupts were ironmongers, carrying on business in William-street, Dublin; but two of them, although nominally in the partnership, had very little to do with the business. They were all brothers, and William M'Carthy was the only one with regard to whose examination any question arose, and certainly his story was of the most improbable character. The facts of this extraordinary case appear in the judgment of Judge Lynch.

HIS LORDSHIP said—This case is before the Court on the final examination of the bankrupts; but, of course, Mr. William M'Carthy is the only one of them with respect to whom any serious difficulty arises, and with respect to him it is a very serious question, indeed, whether I can feel myself justified, on the facts before me, in passing his final examination. Two objections principally are made. 1st. That a serious amount of assets remains unaccounted for, even taking the accounts rendered by himself. And no doubt this is so. He has himself furnished a basis whereby the assignees could arrive at the stock on hands on the day of the fire, the 7th of February, and yet these accounts, as furnished by himself, show a deficit unaccounted for to a large amount—over £600 or £700—an amount so large that no waste or loss by the fire could fairly account for it. However, though this is a serious view of the accounts, and calls for attention, it raises some natural suspicions, I do not think it would be a case to call upon me to go farther than to consider it on the question of the certificate, or, at all events, to direct still further investigation to be made respecting it. The loose accounts kept, the unsatisfactory nature of the possible checking, all would bring the case to the level of so many others in this

Court, where it is impossible to trace the fair operations of trade by means of the book-keeping of the trader. The case on this objection was of the ordinary class, unfortunately too large a class in this Court. But, secondly, the assignees object to the account given by the bankrupt of the large sum of £956, now a deficit admittedly on the accounts; and this objection is the serious objection in the case, and one calling upon me especially to exercise a careful judgment in disposing of it. The assignees submit to me that I cannot in this Court receive the account given respecting this large sum as satisfactory, and they call upon me on this ground to adjourn the final examination *sine die*. I will shortly state the facts respecting this loss, as they appear to me to be established by the evidence. Mr. M'Carthy, before the 7th of February last, was an arranging trader, and had paid the first instalment of the composition agreed on; he, however, was unable to raise sufficient funds to meet the second instalment, and could only, as it appears, make up a sum to meet about one-half of the instalment then falling due. Mr. M'Carthy at this time had an account in the Royal Bank, on which he drew drafts up to the 7th of February; but for some reason not very intelligible he kept out of the bank large sums of money, and eventually, as he states, had in his own hands the very large sum of £956, and we shall see the sort of care he took of it, according to his own statement. This sum, he says, was accumulating for a considerable time, and he gives a very confused account indeed of its custody for the few days previous to the 7th of February. There is not produced by him any voucher or account to show the truth of the statement made, that he had, in fact, on this day this large sum of money. Although the trade-books were all saved—although no book was harmed by the fire—it is an unfortunate circumstance for Mr. M'Carthy that the two books which could vouch the truth of the allegation of this sum have disappeared; and I cannot help adding, that M'Carthy seems, on his own showing, to have taken very little trouble indeed searching for them. I say here, that as a fact there is no vouching to show that he had this large sum in his possession. It is asked on his behalf, why should he charge himself with its possession if he had it not? To this it may be averred, that supposing a fraud was intended, and that he wanted to relieve himself of a charge brought upon him by the accounts, it would be the easiest case to state this large sum as existing in cash in hands to be at once accounted for by the allegation of its loss by accident. It brings matters to a very simple point, indeed, to be balanced by an alleged robbery. I say this in answer to the astute reasoning brought before the court, but at present I only state the thing as a fact, that there is no proof of the possession of this large sum by him on the 7th February. A curious matter appears in evidence respecting the custody of this money. Mr. M'Carthy had for some years a safe in his office—a proper custody for his cash—but, curiously, it appears that some days before the 7th February he sold this safe for the sum of £6, and just at the time that he was accumulating this large sum he parted with the means of its safe-keeping. Again, another strange matter appears. When he

parted with the safe, the only seeming mode of safe keeping for this money was a small cash box, which he used to lock up in the desk in his office, and also a money drawer in the desk. But a few days before the 7th February the key of the desk was lost, and for some days it appears the desk could not be opened. The account of the custody of this money for the two or three days before the 7th February is most unsatisfactory. At one time it was stated that he kept the money about him, and brought it out to Bray, where he lived; at another time he denied this, and contradicted the evidence of the other witnesses as to the time when the desk was repaired. On this point it is impossible on his evidence to state what was exactly the custody of this money for the two or three days before the 7th of February. However, on the 7th February, it appears by his statement that a new key was to have arrived, but it not having arrived at five o'clock, he left for Bray. And I now come to the manner of his accounting for it. A young man named Fitzgerald, a clerk in the Head Police-office, was an intimate friend of his. He was not in his employment, but he used to attend in the evenings at his shop to make up his accounts, and act as book-keeper. He holds a small situation; he lodged in the northern suburbs, near Clontarf, and being a young man unfettered by domestic relations, he appears to have frequented Jude's Tavern, in Grafton-street, after he concluded the voluntary employment he undertook for the bankrupt. This gentleman was with Mr. M'Carthy on the evening of the 7th February (Saturday), and the key of the desk not having arrived, Mr. M'Carthy says he entrusted this large sum of £956 to Mr. Fitzgerald's keeping, to be kept by him until he got the key to lock it up in the desk; and he further states that Mr. Fitzgerald undertook to bring out the key of the desk to Bray on the next day (Sunday). Its custody by Fitzgerald was to be only until the desk key arrived in the evening, then to be locked up, and the key brought out on Sunday to Mr. M'Carthy. By way of proving this case, Mr. M'Carthy produced a receipt signed by Fitzgerald, in which the amount, £956, is stated, and by which, somewhat in contradiction to this statement, Fitzgerald undertook to be accountable for this money until Monday. It is asked, why introduce this if the story was fabricated? Well, without at present giving any answer to that question, again I say it is a fact in the case that the terms of the receipt are not consistent with the sort of custody by Fitzgerald, deposited to by the bankrupt. Now, I have to ask myself, was this a natural custody for so large a sum of money? Is it according to usage to commit so negligently to a young man like Fitzgerald so tempting a sum? He had a bank account—he had a safe custody for it. Is it a thing to be believed on mere statement that any trader in this city would carry about in his pocket so large a sum, and would not delay his dinner for half an hour to see that it was safely disposed of? The whole story up to this point shows, on its own statement, such a negligence on his part of common precaution for the safety of his own property as almost to unfit him, on that ground alone, from being suffered safely to be a trader. I must here add

that the demeanour of Mr. M'Carthy and his brothers, and I may add Fitzgerald, was the most extraordinary I ever witnessed in this Court. Their carelessness of manner in telling the story of the fire and the loss of the money—the manner in which they seemed to smile and enjoy the whole thing as a sort of joke, surprised me, undoubtedly greatly to their disadvantage. It may be their misfortune to have manners so unsuited for witnesses in such a case—and it may only be manner—but I cannot help remarking on it as another unfortunate circumstance in the case. But let me now see how Fitzgerald discharged the duty he undertook of guarding this large sum. Then the story proceeds on Mr. Fitzgerald's evidence. He states that having parted with Mr. Fitzgerald, and having received into his keeping this sum, he dined in some Tavern in Trinity-street, and then proceeded to M'Carthy's shop, which he was able to open and enter. He appears to have had this money in the breast pocket of his outside coat; and, according to his evidence, he took it out in the office and laid it on the outside of the desk, preparatory to putting it into the desk. He was for some considerable time in the office making out, as he says, some list of debtors. Brennan, a clerk of M'Carthy's, came back to the shop, but was told by him to walk about for some time until he was ready to go; and accordingly Brennan left him there alone for some time, and eventually came back and went away with him. Now, it appears the desk key was there on his return; it further appears as a fact that the key of the cash box was in the desk; but Mr. Fitzgerald says that not finding the key of the cash box he intended to bring this money home to his own lodging—lock it up in his desk, and bring it out next day to M'Carthy, at Bray. He then states that he left the office, believing he had this large sum in the breast pocket of his top coat, with his pocket-handkerchief; and the bulk created by his handkerchief seems, according to his evidence, to have led him into the belief that he had the money then. He then went to Jude's billiard room, and remained there some hours, and coming out from Jude's he heard of a fire in the neighbourhood. He found the fire was at M'Carthy's, and he went there, but pays very little attention to how matters stood, except that he sends a telegraph for Mr. M'Carthy, and he himself returns to his lodgings and retires to bed. For one so trusted, so old a friend, so anxious for Mr. M'Carthy, it is marvellous the carelessness he displayed when he saw this fire and the destruction of the property of his friend. But he goes quietly to bed, and the next morning, about ten o'clock, he finds, for the first time, that he has not the money in his top coat pocket; and then it flashes on his mind, as he says, that in leaving the office and taking up his gloves he put this pocket book down on the counter, and forgot it then after him. It is strange, indeed, that, having for the first time in his life, as it appears, so large a sum, and his attention being awakened to his friend's affairs, by seeing the fire that broke out in his concerns, it never once occurred to him to see if the large sum in his possession was safe. But at ten o'clock on Sunday morning he does discover his loss—he knows he left this large sum in the office—

and yet, according to him, he took no steps whatsoever to discover where this property was gone to. He, connected with the police by his situation, keeps this loss a profound secret until he reaches Mr. M'Carthy by the ten o'clock train from Harcourt-street. He says he intended immediately on ascertaining the loss to go out to Bray—but a rather curious contradiction appears in the evidence of Mr. David M'Carthy, who states that as he was going for the same train he met Fitzgerald going towards the Crescent at Clontarf, in the opposite direction, and that he invited Fitzgerald to go out with him to Bray, and that he turned back and went with him; but it appears as a fact that he went to Bray, and, arriving there, the ladies of the family being present, he withholds all information respecting this loss until, in the course of a walk round Bray Head, he tells this tale of his negligence, and the ruin he has brought on M'Carthy by losing this large sum. Well, at this stage we have now the knowledge of this strange story brought home to M'Carthy himself—and what step is then taken? Is any search instituted?—is any information given to the police? Does Mr. M'Carthy rush to town to examine—to search? No, not one step. The ladies are not to be disturbed, and the family party, after the walk round Bray Head, enjoy themselves in quiet, and leave the thieves who stole the money to enjoy equal repose. Not a word is said of it to any one until M'Carthy confides the secret to Mr. Perry, who so unfeelingly remarked to him that not a man in Dublin would believe his story. Now, certainly, this remark of Mr. Perry showed, perhaps, a want of poetic imagination in his mind when applied to business matters, and it was a strong matter-of-fact way in dealing with a sort of sensational story of bankruptcy. It appears now that the fire in William-street was only a trifling thing, and, perhaps, justified the conclusion Fitzgerald showed about it. Some fire broke out below the shop, and part of the counter was burned near the place at which, it flashed on his mind, they left the money; but the theory is not that the money was burned—it was stolen, they think. And certainly I must say that the parties, one and all, exercised great kindness towards the thieves in taking so little pains to have any attempt made to disturb them in disposing of so rich a booty. Of course, this story told to his creditors most naturally brought him into this Court to repeat here this story to me, and the question I have to answer on behalf of the mercantile community is this, am I satisfied with this story as a fair account for the disposition of the large sum of £956? Mr. Heron, on behalf of the bankrupt, tells me that truth is strange—stranger than fiction—but he forgets that before we apply this poetic adage, we must be satisfied that it is truth, and, being so satisfied, we then may marvel at its strangeness; but I cannot, simply because it seems an extreme fiction, on that very account act on it as truth. Unfortunately, my duty here has very little of poetry about it, and I have very judicially to consider the matters before me, and for mere matter-of-fact men to answer, whether this is a satisfactory accounting. In my judgment it is not. I cannot allow this statement to pass here as a sufficiently reasonable account to render to his creditors for the loss of so

large an amount. It is just possible that all this evidence may be true. The gross and unparalleled negligence stated may be the truth; the carelessness and folly of all the parties concerned in this matter may be a reality; but everything about it is so unlike the ordinary conduct of reasonable men, that I feel I would imperil mercantile dealings and accounts if I admitted such statements as the foundation of my judgment here. Did I admit this examination to pass in this Court, I feel that I would establish a precedent for any fraudulent trader hereafter to secrete from his creditors the principal part of his assets, and tell any sort of improbable tale, incapable of direct contradiction, to cover the deficit thereby admitted in his accounts. Mr. Heron asks am I ready to convict the parties of several felonies involved necessarily in the supposition of the falsehood of the case made by them? I answer him at once, that I convict these parties of no crime—that is no part of my duty here. As far as I see, I not only cannot convict them of any crime, but I cannot reasonably direct any prosecution in this case. Mr. M'Carthy has the whole benefit of this declaration by me; but am I bound, therefore, to pass the final examination? In my judgment it is absurd to say I am. I cannot receive this account as a reasonable or credible account for so large a sum. I cannot say that I am at all satisfied that he has made full and true discovery of his assets; on the contrary, I refuse to accept as true the discovery made by him, and acting on this view, and declaring his schedule unvouched and his accounting entirely unsatisfactory, I refuse now to pass his final examination as long as this story stands the sole accounting. I refuse to allow it as sufficient; and this being now the accounting to which he is committed, I must adjourn the examination *sine die*. If Mr. M'Carthy now will give up his unparalleled negligence and carelessness, and betake himself to seek out this large sum, and if reasonable diligence used by him shall lead to some further clue to this loss, and perhaps to the recovery of the money, he can hereafter apply on a further case made; and he has certainly left open a door for himself, without any great loss of character, to bring forward further discovery respecting this sum of money. At present my judgment is, that the examination of Mr. William M'Carthy be adjourned *sine die*. As to the other brothers, they seem very careless about the whole matter. I think they deserve blame for the extent of negligence they displayed, and I think their certificates should be suspended for six months at least; but now, as to them, I pass their examination, and leave it to the assignees, if they think it worth while, to enter an objection to their certificates.

Mr. Kernan, Q.C., with Mr. Larkin, solicitor, appeared for the assignees.

Mr. D. C. Heron, Q.C., with Mr. Goff, solicitor, appeared for the bankrupt.

Court of Chancery.

[Reported by Edmund T. Bewley, Esq., Barrister-at-Law.]

KENNEFICK v. KENNEFICK.—*Jan. 19, 22; Feb. 18.**Pleading—Notice—Amendment of petition—Adverse title.*

By an agreement in writing in the form of an accepted proposal, dated the 12th of February, 1839, A. gave to his son B., on his marriage, a moiety of the lands of X. B. entered into possession and continued in possession until his death in 1840, when by his will he left all his estate and interest in the said lands to his daughter C., then an infant. B.'s widow entered into occupation of the lands, but was subsequently induced by the representations of A. and D., a brother of B., to give them up the possession in consideration of receiving a sum of money. A. and D. continued to hold the lands jointly until A.'s death, after which and up to the time of the present suit, D. remained in exclusive possession. C. attained the age of twenty-one years in 1861, and having unsuccessfully endeavoured to get possession of the lands from D., she instituted the present suit, seeking to obtain possession, and an account of the rents and profits from D. The answering affidavit of D. set up a title to the lands under a registered deed of 1840, whereby A., in consideration of a sum of £150, conveyed the lands to D. and E., his brother; and D. claimed to be a purchaser for valuable consideration without notice. Notice having been clearly proved, Held, that D., having confessedly taken possession from the minor's guardian, could not set up a title adverse to the minor, and Semble, that the question of notice was sufficiently put in issue without an amendment of the cause petition.

By indenture of lease bearing date the 1st day of August, 1819, the Dowager Countess of Kingston demised to Edmond and William Kennefick, All That and Those the lands of Caroghturk, containing about 29 acres and 23 perches, to hold to them, their heirs and assigns, for the lives of three persons therein named, at a certain yearly rent therein mentioned. Edmond Kennefick married, and had several children, amongst whom was William, the father of Bridget Kennefick the petitioner in the present cause. On the marriage of this William Kennefick (called the younger) with Mary Roche, and in consideration of the marriage, Edmond Kennefick agreed to give his son William one-half of his said farm for all the estate and interest he possessed therein. This agreement was carried out by means of a proposal dated the 12th February, 1839, made by William Kennefick the younger, and duly accepted by his father, Edmond Kennefick. By this, William Kennefick the younger proposed to pay Edmond Kennefick £5 sterling yearly, for and during the continuance of the lives of three persons therein mentioned, "for that part of the lands of Caroghturk, which my father, Edmond Kennefick, has agreed to give me on my intermarriage with Mary Roche, which said lands are half my father's present farm, half inland and half mountain." This marriage having taken place, there

was issue of it one child, Bridget Kennefick, the petitioner. Immediately after the acceptance of the proposal above mentioned, William Kennefick the younger entered into possession of one moiety of the lands, and so continued up to the time of his death, which occurred in June, 1840. By his will duly made and published, dated the 15th of June, 1840, William Kennefick the younger bequeathed to his daughter, the petitioner, All That and Those his landed property in Caroghturk, containing 10 acres, or thereabouts, plantation measure, in as large and ample a manner as testator then held the same by virtue of a deed from his father, or in as large a manner as it would yet be determined by arbitration during the said term. In case the child should not survive, the lands were limited to Mary Kennefick, wife of the testator, as long as she did not re-marry, with remainder over, in case she married again, to Jeremiah Kennefick, provided he paid her the sum of £70 sterling. On the death of William Kennefick the younger, Maria Kennefick, the petitioner's mother, on behalf of the petitioner, went into possession of these lands, and continued to remain in possession of them until October, 1840, when Edmond Kennefick, the petitioner's grandfather, and John Kennefick, her uncle, and the respondent in the present cause, "by some representation with which the petitioner is unacquainted, induced petitioner's mother to give them up possession of the said lands." From that time, Edmond and John Kennefick remained jointly in possession until the death of the former in 1843. After that, John Kennefick had been, and at the time of the present suit still was, in exclusive possession of the lands. At the time that John Kennefick so entered into possession, the petitioner was but an infant, and she only attained the age of 21 years in January, 1861. She then demanded possession of the lands from John Kennefick, and requested him to account for the rents and profits during her minority, with which requests, however, John Kennefick refused to comply. Such were in substance the facts set out in the cause petition, the prayer of which sought for an account of the rents and profits of the lands from the month of October, 1840, when the petitioner's title accrued, and also prayed that the respondent, John Kennefick, might be compelled to give up possession of the lands to the petitioner, and, if necessary, that the agreement of the 12th of February, 1839, should be specifically performed, and a partition made of the said lands, and that the portion to which the petitioner was entitled should be ascertained and defined by proper metes and bounds. In the answering affidavit filed by the respondent, John Kennefick, it was stated, amongst other things, that Edmond Kennefick being possessed of and entitled to a moiety of the lands as before mentioned, by a deed duly executed on the 10th of September, 1840, in consideration of the sum of £150, conveyed this moiety to the respondent, and Edmond Kennefick the younger, a son of the said Edmond Kennefick the elder, their heirs and assigns, and that this deed contained, amongst others, covenants for good title, for quiet enjoyment, and further assurance, and was duly registered. It was further asserted in this affidavit, that the respondent had not, at the time of the execution of this deed, any notice of the peti-

tioner's title to the lands, and that neither he nor Edmond Kennefick the younger had any reason to suppose that the petitioner was so entitled, and it was therefore submitted that being a purchaser for valuable consideration without notice of any right or claim, he could not be affected by any unregistered pretended agreement. A further affidavit was filed by the petitioner, and also an affidavit by John Roche, a maternal uncle of the petitioner. The latter averred that an agreement, such as was stated in the cause petition, had been entered into previous to the intermarriage of William Kennefick the younger and the petitioner's mother, and it was alleged that John Kennefick, the respondent, was fully acquainted with this arrangement, and knew that Edmond Kennefick the elder had, by the accepted proposal, agreed to give one moiety of the farm to his son William, and that the marriage had been celebrated on the faith of this agreement. It was stated also that a partition of the lands had been agreed to between Edmond Kennefick and William Kennefick; and that after the execution of the alleged deed an agreement was entered into between the widow Kennefick, the mother of the petitioner, Edmond Kennefick, the elder, John Kennefick, the respondent, and Jeremiah Kennefick, one of Edmond Kennefick's sons, whereby for the sum of £80, £40 to be paid in hand, and the remaining £40 at the rate of £10 a year, it was agreed that the widow Kennefick should give up to Edmond Kennefick, the elder, and his sons, John and Jeremiah, the garden, land, stock, pigs, &c., &c., and that Edmond Kennefick and his sons should further give the petitioner a sum of £60 when she came of age. A further affidavit was filed by the respondent, in which it was admitted that the petitioner's mother had made some claim to the lands, and had retained possession of them after the death of William Kennefick, the younger; and that the respondent had then agreed to pay her a sum of money, and to secure a sum for the petitioner, in order to settle amicably this pretended claim.

Serjeant Sullivan (with him *Sherlock, Q.C.*, and *J. Green*,) for the petitioner, argued that the respondent had distinct notice of the respondent's rights; and that therefore the registered deed of the 10th of September, 1840, could not be set up against the prior agreement of the 12th of February, 1839. [Witnesses were then called, who proved their own signatures to the memorandum of agreement of February, 1839; and also the signature of John Kennefick, the respondent, as one of the witnessing parties.]

The Solicitor-General (with him *Exham*) maintained that the question of notice could not be sufficiently put in issue without amending the cause petition, and cited *Gresley on Evidence*, p. 22; *Story's Equity Pleading*, par. 885; *Mitford on Pleading*. The following authorities were also cited in the course of the argument:—*Daniell's Chancery Practice* p. 294; *Smith v Kay* (7 H. of L. Ca. 750).

Cur. adv. vult.

Jan. 22.—THE LORD CHANCELLOR stated that there was a question not touched on in the arguments of counsel which appeared to him of considerable importance in this case. The respondent having entered

into possession under the guardian of the minor, could not set up an adverse title to the minor as long as he held possession under the title so acquired. He would accordingly have the case set down again for argument in order that this point might be fully discussed.

Feb. 18.—The case came on to be re-argued.

The Solicitor-General raised a preliminary objection, that as the case involved a question of priority between the memorandum of agreement of September, 1839, and the deed executed to the respondent, John Kennefick, and to Edmond Kennefick, the petitioner should have made Edmond Kennefick a party to the suit.

Green, contra, argued that the real question at issue was not a conflict of deeds, but whether the respondent, having taken the lands under one title, could set up another inconsistent with that. It was charged also in the petition that John Kennefick, the respondent, had been in exclusive possession of the lands; and this assertion had not been denied.

THE LORD CHANCELLOR refused to allow the objection.

Serjeant Sullivan stated the case for the petitioner, and cited *Kernaghan v. McNally* (12 Ir. Ch. 89); *Hawkebee v. Hawkebee* (11 Ha. 230); *Perce v. Perce* 3 Ir. Ch. 210), in reference to the question of the respondent setting up a title inconsistent with that under which he had confessedly obtained possession of the premises. As to the point of notice being sufficiently in issue—*The Attorney-General v. Wharwood* (1 Ves. Sen. 538), and *Phillips v. Phillips* (31 L. J., N. S., Ch. 321) were cited.

The Solicitor-General (with him *Exham*).—The respondent was justified in resorting to any means he chose to get rid of any fancied right or claim of the widow Kennefick; and his previously acquired title should not be thereby affected.

Sherlock, Q.C., in reply referred to *Basset v. Norworthy* (2 Wh. & Ta. L. Ca. 1).

THE LORD CHANCELLOR.—If the petition sought only possession of the lands on account of the rents and profits, the petitioner's claim is very well founded. The respondent manifestly acquired possession from the mother of the petitioner; and having gone into possession under this fiduciary title, the petitioner is entitled to obtain from him an account in the usual manner. The agreement from which the petitioner's title is derived, is in the nature of a lease, reserving a yearly rent of £5; and the party now representing the lessee's interest seeks for restoration into possession, without prejudice to any proceedings that may subsequently be taken to determine the question of priority between the memorandum of agreement and the registered deed. As to the point of putting in issue the question of notice, no authority directly bearing on this has been cited. There is some authority to show that the petitioner could not take advantage of any new facts stated by the answer without amendment; but in the present case the matter put forward by the answering affidavit is not necessary to make the petitioner's case, and, therefore, if the case depended on the question of notice alone, I should be disposed to consider that it was sufficiently in issue between the parties. But not having all the parties

interested before me at present, this question is not properly open now. I shall accordingly grant the prayer of the petition so far as it seeks possession of the lands and an account, dismissing the petition so far as it prays for a partition.

Decree accordingly.

Court of Queen's Bench.

[Reported by William Woodcock, Esq., Barrister-at-law.]

[CORAM FITZGERALD, J.]

JACOBS v. BERNAL.

Costs—Taxation—Payment into the Court of Bankruptcy before action—Common Law Procedure Act, 1853, s. 243.

A issued a trader-debtor summons under the Bankruptcy and Insolvency Act, against B., claiming £104. B. appeared in the Bankruptcy Court, and admitted a sum of £39 to be due, which sum, upon the refusal of A. to accept it, he paid into the hands of the official assignee. A. subsequently brought an action against B. for goods sold and delivered, claiming £104. B. pleaded payment; and in his particulars of payment, amongst other items, specified the £39 paid into the Court of Bankruptcy. Before the defence, but after the issuing of the summons and plaint, A. with B.'s consent, had drawn the £39 out of the Bankruptcy Court, the order to pay the money out being made without prejudice to A.'s right to proceed for the recovery of the balance claimed by him. The questions in the action were referred to the Master of the Court, who, after giving the defendant several credits, including credit for the £39 paid into Bankruptcy, found that he still owed the plaintiff £15. Held—That the payment into the Bankruptcy Court of the £39 must be treated as a payment by the defendant to the plaintiff before action; that all that A. had recovered in the action was £15, and that therefore he was entitled to half costs only.

THIS was a motion by way of appeal from the taxation of one of the taxing masters, that the said taxing master should be directed to review his taxation of the plaintiff's bill of costs. The action was brought to recover the sum of £104 2s. 2d. for goods sold and delivered; and the bill of particulars endorsed on the summons and plaint set out sales to the amount of £190 2s. 2d., which sum was reduced by credits amounting to £86 to £104 2s. 2d., the amount claimed. The summons and plaint bore date the 4th September, 1862. The defence, which was filed on the 3rd November, 1862, pleaded that the goods sold and delivered to the defendant were of the value of £177 11s. 3d., and no more; and that defendant paid the said sum of £177 11s. 3d. before the commencement of the action, the particulars of which payments were endorsed on the defence. The particulars stated a number of payments by cash at different dates, amongst them one as follows:—"1862. August, 28. To cash paid into the Bankrupt Court

by defendant on the 28th August, 1862, and since drawn out by plaintiff, 39 3s. 3d." Issue was taken on this defence; and it appearing that the matter was one of account, the case was, by a consent order, dated the 22nd November, 1862, referred to the Master of the Court. Upon the reference the parties were examined; and the defendant, as to some of the items on the account, made the case that those items consisted of goods which had been entrusted to him by the plaintiff to sell upon commission, and which the defendant offered to return; as to others, he made a case of actual payment. The Master, by his report, gave credit to the defendant for several sums, including those charged by plaintiff for the goods asserted by defendant to have been sent to him for the purpose of being sold on commission on the terms of the defendant immediately returning those goods. He also gave the defendant credit for £39 3s. 3d. lodged by the defendant in the Court of Bankruptcy, and paid out to plaintiff on the 4th October, 1862, under and in pursuance of an order made by said Court of Bankruptcy on the 3rd October, 1862, and which last mentioned sum was, as appeared by said order, ordered to be paid over to plaintiff without prejudice to the proceedings then pending in this action. And on the whole case, after all credits, the Master found that there still remained justly due and owing by the defendant to the plaintiff the sum of £15 9s. 5d., and he accordingly found and awarded that the defendant should pay to the plaintiff said sum of £15 9s. 5d. The facts with respect to the £39 3s. 3d. stated to have been lodged in the Bankrupt Court were as follows:—On the 9th August, 1862, the plaintiff caused a trader debtor summons under the statute 20 & 21 Vic. cap. 60, stating a claim of £104 2s. 2d. to be served on the defendant. On the 19th of August, 1862, the defendant appeared under said summons in the Bankruptcy Court, and admitted that he was indebted to the plaintiff in the sum of £39 3s. 9d., stating that he had a good defence on the merits to the balance of the demand, and thereupon he lodged with the official assignee the said sum of £39 3s. 9d. He had previously offered the sum to the plaintiff's attorney, who had declined to receive it. On the 3rd October, 1862, the Court of Bankruptcy made an order, on consent of the defendant, that the official assignee should pay to the plaintiff said sum of £39 3s. 9d. without prejudice to the plaintiff's rights as to any other or further sum, for which proceedings were then pending. The money was paid out by the official assignee on the day following, the 4th October, 1862. When, after the reference, the costs in the present matter went to be taxed, the defendant insisted that the plaintiff was entitled to recover half costs only, as he had recovered by the action a sum of £15 9s. 5d., only, and that the payment of the £39 3s. 9d. to the official assignee in bankruptcy was a payment before action brought. The plaintiff, on the contrary, insisted that that payment could not be so treated; and that as the money had not been actually paid to the plaintiff himself until after the action, it should be treated as having been recovered by virtue of the action; and therefore, that he having recovered more than £20 in the action, was entitled to his full costs. The taxing master ruled in favour of the plaintiff, and allowed

him his full costs. From this decision the defendant appealed.

D. C. Heron, Q.C., and Daniel, for the appellant. —The payment into the Bankruptcy Court of the £39 3s. 9d. was a payment by us out of Court so far as the Court is concerned; and having been made on the 28th August, was a payment before action brought. The action commences with the issuing of the writ, which in this case was on the 4th September. It cannot be said that the sum of £39 3s. 9d. was recovered by the plaintiff in the action. All that he recovered in the action was the sum of £15 9s. 5d., and accordingly the case comes within s. 243 of the Common Law Procedure Act, 1853, and the plaintiff is entitled to half costs only—*Parr v. Lilliecrap* (7 L. T., N.S., 425); *Hughes v. Guinness* (4 Ir. C. L. Rep. 314).

Sidney, Q.C., and O'Driscoll, for the plaintiff, to support the taxing master's ruling. The payment into the Court of Bankruptcy was not a payment to the plaintiff but only to the official assignee *in usum jus habentis*. There is nothing in the procedure of the Court of Bankruptcy making that Court one in which a plaintiff can obtain a decree or order against a trader to enforce payment of his demand; and the £39 3s. 9d. could not have been drawn out of Court without the consent of the defendant; and that transaction amounted to a payment by him after action—*Feoster v. Boggett* (9 M. & W. 20); *Owens v. Vanhomrigh* (7 Ir. Jur., N.S., 200).

May 4.—*FITZGERALD, J.*—This case of *Jacob v. Bernal* was moved before me some days ago. It was a motion to have the taxing master directed to review his taxation of the plaintiff's bill of costs. I looked into the documents with the view to see whether there being a reference to the officer that made any difference. It appears from the proceedings that the action was brought to recover a sum of £104 2s. 2d. in September last; and the defence was, that save as to a certain sum, no goods were sold and delivered; and that as to that sum, the defendant had paid it before action; and the issue was, whether any other goods were sold and delivered, and whether the defendant had paid before action the sum which he alleged he had paid; and it appearing on the pleadings to be a matter of account, it was referred to the officer to take the account between the parties. The officer takes the account and finds a sum of £15 9s. 5d. due by the defendant to the plaintiff. At first I thought that there might have been powers given to the officer under the order to take the accounts between the parties and find equitably; but I must take it that the order was the common order of reference; and on reading the report I must come to the conclusion that the officer has decided all the items save £15 9s. 5d. in favour of the defendant; and that all that the plaintiff has recovered is £15 9s. 5d. The defendant alleged that as to £36 2s., portion of the demand, he was not liable as for goods sold and delivered at all; and that that portion of the demand related to goods sent to him on commission for sale, which he had not sold, and was willing to return. The allegation in the discharge is, that they were goods not sold but sent on commission, and that he was willing to return them, and the officer reports in his favour on that point.

The officer then reports that the defendant is further entitled to credit for the sum of £39 3s. 9d. paid by him into the Court of Bankruptcy; and there being no special circumstances, the report of the officer is in fact to be looked on as the finding of a jury, the only difference in fact between them being the substitution of the officer for a jury. The whole case turns then on the circumstances under which the £39 3s. 9d. was paid; because if the plaintiff has recovered £15 9s. 5d., and also by force of the action £39 3s. 3d., he has recovered what will entitle him to full costs; and I understand that the officer was of opinion that this was a sum recovered in the action, and that accordingly the plaintiff was entitled to full costs. If this was a sum paid before action, the plaintiff is entitled only to half costs; it would be otherwise if it was money paid after action, and I have now to consider the circumstances under which the payment was made. It appears that the plaintiff, before the present proceedings were commenced, instituted proceedings in bankruptcy of a very summary and forcible character against the defendant. I do not believe that there is any proceeding more forcible and summary than the proceedings by trader debtor summons. The sections of the Bankruptcy Act which relate to that mode of proceeding commence with s. 105 of that Act, and terminate with s. 113; and the substance of these sections, so far as they concern the present case, is, that where a creditor has brought by means of this summons his trader debtor into bankruptcy, the latter is put either to admit or to deny the debt, he may admit or deny it either in the whole or in part; but in this case the defendant being brought into bankruptcy, and it being a process to recover a demand, he makes a deposition saying he admits £39 3s. 9d. to be due, and he offers to pay that sum. The effect of the statute is, that where a debtor brought into court admits part and denies the residue of the demand, he is bound to pay the admitted part to the creditor, or to secure it or compound for it; and that if he does not do that within seven days he becomes a bankrupt. Well, these consequences are very serious; as I have stated, this is the most summary mode of compelling payment of a debt. Accordingly, the defendant (being brought into Court, and admitting £39 3s. 9d. of the demand against him to be due, says—"Here is your money: that portion I do not deny, and here it is;" and the Act says he must pay, secure, or compound for what he admits; and there is no question that it was the plaintiff's right to have the sum paid and his duty to receive it if by the receipt he did not compromise his right to the residue. Well, he does not receive it; and the plaintiff so refusing to receive it, it is, in presence of his attorney and counsel, paid into the hands of the official assignee in bankruptcy. He might have proceeded in bankruptcy to ascertain the disputed portion of the demand. The effect of paying into the Court of Bankruptcy is, that the defendant cannot get the money out; it is there for the plaintiff to take it if he chooses. Instead of taking it, however, he institutes an action to recover the full balance which he claims: but within a short time, and before the defendant pleads, namely, —on the 3rd October, the plaintiff applies to the Court of Bankruptcy, producing a consent from the

defendant that the money be paid over to him; and it is ordered by the Court that the official assignee do pay to the plaintiff or his attorney the sum of £39 3s. 9d., that is, the sum which lay there for him from the previous 28th August. There is in the order "without prejudice," that is, without prejudice to the proceeding for the balance. The defendant then, after this pleads that, save as to a certain amount, no goods were sold and delivered; and that as to that amount, he had paid it; and he identifies the payment in the particulars endorsed on his defence, as having been made on the 28th August. So, by his defence he treats it as a payment before action; and it was on the issues knitt on these pleas that the case went to the officer, who, as I have already stated, reported a sum of £15 9s. 5d. due. I have considered this case carefully in reference to the payment into the Court of Bankruptcy; and according to the best consideration I can give it, I can only treat this sum as paid before action brought, and as being so dealt with by the parties; and if I was not so to treat it, I think I would be doing great injustice to the defendant. I have pointed out the summary nature of these proceedings in bankruptcy by trader debtor summons. By that proceeding the plaintiff compels the defendant to make a payment into the Court; and the defendant could not get his money out of that Court to pay it into this Court with a plea *puis darrein continuance*; and there was no mode in which he could get the benefit of his payment but by treating it as a payment before action brought. When I refer to the proceedings in bankruptcy, to the fact of the order directing payment out of the money having been made on consent, and to the terms which in that order the defendant submits to, namely—that the payment shall not prejudice the action for the balance, I am at a loss how to treat this, except as a payment before action brought. If I am right in the view which I have taken, it comes to be a simple point, treating it as a payment before action brought. All that the plaintiff has recovered, whether by the ruling of the officer or by confession, or by verdict, is £15 9s. 5d. And by the 243rd section of the Common Law Procedure Act of 1853, he can only get half costs; and I think that in giving him only half costs I am working justice, for I think I cannot characterise his proceeding in the Court of Bankruptcy otherwise than as oppressive. The order therefore must be, that the taxing master do review his taxation. I should say that on the officer's own calculation the sum to which the plaintiff is entitled would seem to be only £14 9s. 5d.

Court of Common Pleas.

[Reported by J. Field Johnston, Esq., Barrister-at-Law.]

BLOOMFIELD v. JOHNSTON.—Jan. 16.

Practice—Bill of Exceptions—New Trial.

Where there is a bill of exceptions tendered by a party on the trial of a cause, he cannot move for a new trial on a point of law included among the grounds of exception, or which might have been included, unless the bill of exceptions be first abandoned.

Where a conditional order for a new trial has been improvidently granted by the Court, the proper course for the opposite party to pursue, is not to show cause against its being made absolute, but to apply to have it set aside.

Where both parties take exceptions at the trial, they should be incorporated into one record, and it is advisable that the one party should insert into his bill of exceptions the evidence on the judge's notes, and the other party prepare a short bill of exceptions referring to his opponent's, and adding his own.

Seemingly, there is nothing in the circumstance that one party tenders exceptions to prevent the other from having recourse to a new trial motion.

TRESPASS to a fishery. Verdict for the plaintiff. Bills of exceptions had been tendered by both parties at the trial, which was before Hayes, J., at the preceding Summer Assizes.

F. Macdonogh, Q. C., for the plaintiff, applied that a conditional order for a new trial for misdirection and reception of illegal evidence obtained by the defendant, might be set aside upon the following grounds, viz.—1. That the order was granted improvidently after a bill of exceptions had been tendered. 2. That it was conversant with matters of law. 3. That the defendant was bound to elect between his bill of exceptions and his new trial motion. There is no case in which both these measures run in parallel lines, and it is against the Statute of Westminster that they should. In *Fabrigas v. Mostyn* (2 W. Blackstone, 928), the rule was discharged, and the Court say, "The bill of exceptions is ordained by the Legislature to be in nature of a writ of error, and it would be highly unbecoming in us to stop it *in transitu*, unless you will waive the bill of exceptions." [Monahan, C.J.—Does it distinctly appear that the rule was discharged upon the point of law, or in respect of excessive damages?] I cannot say. No counsel appeared for the plaintiff. [Christian, J.—It was *ex parte*.] The order can neither be granted, nor, if granted, be made absolute.—4 Chitty's Practice, 77. In *Adams v. Andrews* (15 Q. B., 1001, and 20 L. J., Q. B., N. S., 39), the point of law on which the new trial motion was grounded was not included in the exceptions, but might have been, and the Court refused the rule, Lord Campbell, C.J., saying, "I never knew it done." [Monahan, C.J.—I know that there was a case in the Court of Exchequer in which the Court, when giving judgment, were in doubt whether it should be on the motion, or on the exceptions. Christian, J.—You say that the defendant should make his election; he only seeks to postpone the time for making that election. Monahan, C.J.—You are substantially right. Show us that you are entitled to have this order now discharged.] If it be made absolute, it will arrest the bill of exceptions, and deprive the plaintiff of his rights given him by the Statute of Westminster. *Crotty v. Price*, cited in *Adams v. Andrews* was misunderstood by the counsel moving for the rule, and is really an authority the other way.—*Marquis of Salisbury v. Gladstone* 5 (Jur., N.S., 369). There is no difference between bills of exceptions in England and Ire-

land.—Ferguson's Practice, 1008. [*Christian, J.*—In Ireland, the judges conceived that they were to give judgment on the whole record, and not merely upon the points contained in the bill of exceptions, but when that error was corrected it was never meant to be laid down that the practice was to be in all respects the same in England and Ireland.] It is against all principle that a party should be twice harrassed for the same cause. It was arranged that the plaintiff should insert into his bill of exceptions the entire of the evidence on the judge's notes, and that the defendant should prepare a short bill of exceptions referring to the plaintiff's, and adding his own. I suggested this course, because in *Montgomery v. Middleton* the Court intimated that it should be in that way. [*Monahan, C.J.*—I entertain no doubt that there is no difference between England and Ireland in this respect, that the parties cannot have both the bill of exceptions and the rule for a new trial.] Where there is no authority or reason the other way, the Court in Ireland is bound by the decision of the English judges. The case is stronger when both parties take exceptions. [*Monahan, C.J.*—I do not think there is any authority for this, that if one party at the trial takes exceptions on one point, the opposite party, if he has a point, must take exceptions likewise, and not resort to a new trial motion.] Two bills of exceptions were tendered at this trial, and the defendant has no right to put the plaintiff to the double costs of both these proceedings, the bill of exceptions and the new trial motion.

A. Brewster, Q.C., (with him *James Hamilton*), *contra*.—It would be superfluous to argue that if a bill of exceptions be tendered by one party, the other party is not bound to adopt the same course. The result of the contrary doctrine would be, that trivial points would be made by one party in order to coerce the opposite party. This motion ought not have been made until it appeared there was an intention to do something unfair. There are instances where what was done here was done. When both parties have matters which they wish to put upon the record, I apprehend the rule is that there should be but one bill of exceptions. [*Monahan, C.J.*—That there should be but one record containing the exceptions of both parties?] Yes. [*Christian, J.*—The bill of exceptions should be incorporated in the postea. *Monahan, C.J.*—There are two practices; the one is to incorporate the bill of exceptions with the postea, which I always do, and so have only one record. That is the right practice, but there is another. *Christian, J.*—There is great force in the plaintiff's objection, that the defendant has not a right to put him to the double costs of both these proceedings. *Monahan, C.J.*—Your duty is to suggest to Hayes, J., that there should be but one record embracing both bills of exceptions. I do not hesitate to say that if I were settling this bill as judge, I would not allow my registrar to prepare two records.] The plaintiff's counsel objected before Hayes, J., to the course of having the two bills of exceptions incorporated in the one record, and said he would never sign it. This was our embarrassment. I ask that this motion should stand till the record is in a proper state. I contend that there is no bill of exceptions in existence till signed by the judge. I

have no intention of attempting to go on with both courses. Many bills of exceptions fall through. That the Court should suspend action is what I ask for.—*Goddard v. Ingram* (5 Jur., 1197); *Richardson v. Corcoran* (7 Ir. C. L. R., 125). [*Christian, J.*—I cannot see how this controversy about the form of the bill of exceptions makes any difference. *Monahan, C.J.*—In one instance in which a judge died, the result was that the parties were never able to settle the bill of exceptions, and the Court decided that the fact of their being taken without being settled, was sufficient.] The judge's executor would be bound to sign the bill of exceptions. Besides, the plaintiff served us with a notice of showing cause against the conditional order, which notice is an acquiescence. The conditional order cannot be treated as a nullity. The notice is a waiver. [*Monahan, C.J.*—It is one thing to apply to have the order set aside—another to show cause against it: the latter goes on the ground that the order was properly obtained.] I ask the Court to do what was done in *Richardson v. Corcoran*. [*Monahan, C.J.*—And suppose we do that now, and ask you to elect.]

The motion was directed to stand until the following day, in order that the defendant's election might be known by that time.

Jan. 17.—The defendant elected to abide by his bill of exceptions.

Jan. 19.—*MONAHAN, C.J.*—Mr. Brewster was unable to sign the certificate, and the time for applying for a new trial was extended,* so that virtually the motion was made within the first four days of last term. It was then stated by him that the bill of exceptions was pending. The Court thought it right to grant the order on the grounds of misdirection and reception of illegal evidence. At the instance of Mr. Macdonogh, the plaintiff's counsel, steps were taken to procure Judge Hayes's report, and it was procured. Notice was served of cause to be shown against the conditional order for a new trial. It occurred to us that the proper form of application should be to set aside the order, and not to show cause against it, if improvidently obtained. Accordingly, a motion has been made to set it aside, inasmuch as the party had no right to obtain such an order, and the Court no right or power to grant it. We quite agree with the plaintiff's counsel, after looking into the cases, that the Court made this order unadvisedly. The Court ought to have held their hand for a few days, or have then forced the defendant to elect. What is to be done? The defendant not now abandoning his bill of exceptions, the conditional order must be set aside. But the question is, what rule shall we make as to the costs of the order, and the costs of obtaining Judge Hayes's report. We might discharge the order which would carry the costs of it. But we think the Court improvidently granted it. We shall say no rule on the motion to show cause, and let the parties abide their own costs.

Conditional order set aside without costs. No rule on the motion to show cause.

* See 8 Ir. Jur., N.S., p. 98.

JACKSON v. HODGENS.—April 20, May 8.

Common Law Procedure Act, 1853, s. 134—Charging order on reversionary interest—Substitution of service.

Upon the marriage of the defendant's father and mother, the father being in contempt of Court, a Master in Chancery in his report, made under the directions of that Court, approved of the draft of a marriage settlement, by which the personal property of the wife was to be vested in trustees in trust, to pay the proceeds thereof to the wife during her life for her separate use, and after her decease, in trust for the child and children of the marriage, in such shares as she should by deed or will appoint; and in default of appointment, amongst them equally, if more than one. The proposed settlement was never executed, but was subsequently acted upon in several instances by the Court and by the parties. Held—That the defendant, the only surviving issue of the marriage, had an interest in two sums of £1012 10s. 4d., government stock, and £16,989 12s. 2d., bank stock, standing in the Bank of Ireland to the credit of the cause of Thomas Hodgins and Anne Hodgins, otherwise Walker, his wife, v. Elizabeth Wheeler and Lydia Carr, and to the separate credit of Anne Hodgins (portion of the said personalty) chargeable, at the instance of a judgment creditor, under the 134th section of the Common Law Procedure Act, 1853. The defendant resided out of the jurisdiction.

Held—That service of the charging order authorized by the said section might be substituted upon the defendant's father and an attorney of the Court, who had acted for the defendant in a suit some years previously, and whose name appeared in several affidavits made to resist the motion of the judgment creditor, though in such affidavits the defendant's father and the attorney severally repudiated the character of the defendant's agent.

W. Sidney, Q.C. (with him H. Plunkett), moved that a conditional order made in chamber in this matter, and bearing date the 27th February, 1863, might be made absolute notwithstanding the cause shewn. The order was in the following terms:—"On motion of Mr. Plunkett, of counsel for plaintiff, and on reading the affidavit of James Peter Byrne, attorney; and it appearing by said affidavit that the plaintiff obtained a judgment in this cause in this Court in or as of Michaelmas Term, 1861, for the sum of £108 7s. 11d., including costs, and that said sum is still unpaid and unsatisfied; and it further appearing by said affidavit that the said defendant has a reversionary interest in the sum of £1012 10s. 4d., government new three per cent. stock, and in the sum of £16,989 12s. 2d. bank stock, now standing in the books of the Governor and Company of the Bank of Ireland, to the credit of the cause of Thomas Hodgins and Anne Hodgins, otherwise Walker, his wife, against Elizabeth Wheeler and Lydia Carr, and to the separate credit of said Anne Hodgins.—It is ordered by the Right Honourable Justice Fitzgerald that the interest of the defendant, Thomas Walker Hodgins, in said respective sums of £1012 10s. 4d., new three per

*cent. stock, and £16,989 12s. 2d., bank stock, do stand charged with the payment of the amount of plaintiff's said judgment debt and interest, or so much thereof as shall remain unsatisfied, unless cause be shown to the contrary by the said defendant or some other person interested, within ten days after service of this rule on Thomas Hodgins, the attorney for said defendant." On the 9th March the following order was made:—"On motion of Mr. Plunkett, of counsel for plaintiff, and on reading the order of the 27th February last, made in this cause and affidavit of James Peter Byrne, attorney, it is ordered by the Right Honourable Judge Keogh that service to be made of said order of 27th February last, and of this order on Thomas Hodgins, the defendant's father, and on Mr. Massy Onge, of Abbeyville, Harold's cross, both in said affidavit of James Peter Byrne mentioned, and on Thomas Hodgins, the defendant's solicitor (all in said affidavit mentioned), shall be deemed good service of said order of 27th February last on the defendant, unless cause be shown to the contrary within six days after such service as aforesaid." The application was made under the 134th section of the Common Law Procedure Act, 1853. The affidavit of Mr. James P. Byrne, the plaintiff's attorney, upon which the conditional orders were made, after stating the recovery of the judgment, and that the deponent was informed and believed that the defendant resided at Brussels, went on to add that it appeared by the certificate of the Accountant-General of the Court of Chancery, bearing date the 5th February, 1863, that there was in the Bank of Ireland, to the credit of the cause of *Thomas Hodgins and Anne Hodgins, otherwise Walker, his wife, v. Elizabeth Wheeler and Lydia Carr*, and to the separate credit of Anne Hodgins, the sum of £1012 10s. 4d., government new three per cent. stock, and £16,989 12s. 2d., bank stock. That the deponent was informed and believed that the defendant, Thomas Walker Hodgins, was entitled to the reversion in said sums expectant on the death of his mother, the said Anne Hodgins, under and by virtue of the settlement executed on the marriage of Thomas Hodgins, the father of the said defendant, with the said Anne Hodgins, in which settlement it was provided that certain monies, of which the above sums were part, were, after the decease of the said Anne Hodgins, to go to the issue of said marriage, if an only child, and if more than one, then to such children in such shares and proportions as the said Anne Hodgins should appoint; and in default of appointment, that said monies were to be payable to such children, share and share alike. That there were issue of said marriage only two children, one of whom, as deponent was informed and believed, died before attaining twenty-one years of age. That deponent was informed and believed there was on the 16th day of November, 1861, standing to the credit of the said cause the sum of £22,407 12s. 6d., Bank of Ireland stock; and that the said defendant, Thomas Walker Hodgins, being entitled to a reversionary interest as aforesaid in said sum, and his said mother being entitled to a life interest therein, they entered into a consent on or about the 1st day of June, 1861, and thereby agreed to draw respectively out of said sum of £22,407 12s. 6d. so much of said sum as at*

the price of the day would be equivalent to the sum of £6,500 each; and that in pursuance of said consent an order of the Court of Chancery in Ireland, bearing date the 16th day of November, 1861, was made directing the payment of said two sums of £6,500. That in pursuance of said order the said defendant, Thomas Walker Hodgens, executed and sent to his father, Thomas Hodgens, who resided at No. 8 Beech-hill, in the county of Dublin, the usual power of attorney to draw a sum of £6,500; and that the said Thomas Hodgens, on the 4th December, 1861, under said power of attorney obtained payment of said sum. That deponent was informed and believed that Mr. Thomas Hodgens, solicitor, who, deponent was informed and believed, acted for the said defendant in said Chancery cause, was said defendant's solicitor in Ireland; and that Mr. Messy Onge, of Abbeyville, Harold's-cross, as deponent was informed and believed, received rents for said defendant. [Christian, J.—The order must be one under the 134th section, that the interest of this young man, if any, shall stand charged, the result of which will be that the funds can never be realized without ulterior proceedings. The order cannot be made under the previous sections.] [Monahan, C.J.—This is a proceeding which decides nothing; and if it be a proper case for substitution of service, it will be competent for the owner of the fund to show that the defendant has nothing to do with it, and to draw it out. The question is, if we have jurisdiction.]

Michael Morris, Q.C., and Albert Hodgens, contra.—Thomas Hodgens, the solicitor, has made an affidavit, denying that he is the defendant's attorney, or has acted as such since the suit which was terminated on the 16th November, 1861. Thomas Hodgens, the father of the defendant, has made an affidavit denying that he is his son's agent, and stating that the defendant has not an interest in the funds in the order of the 27th February, 1863, set forth, sufficient for the Court to charge by an order, inasmuch as that interest is merely an equitable right as yet unascertained, there having been no decree of the Court of Chancery declaring him entitled to said fund; and the marriage settlement referred to never having been executed, and claiming to have himself an interest in the funds. Messy Onge has made an affidavit denying that he is the defendant's land agent, or agent in any capacity, or that he ever received any rents from him. This order cannot be made absolute, for two reasons. The Court must be satisfied that the defendant has an interest in this fund; or, at least, a *prima facie* case of such interest must be made. We appear for Thomas Hodgens, the father of the defendant, in two characters—as regards the fund, and as regards the substitution of service. There are no such words in the section as “if any.” The order will embarrass another Court. The parties to a suit in the Court of Chancery have a right to protest against a stranger coming into a court of law and embarrassing them in respect to the fund. [Christian, J.—They do not seek to charge your interest. If the order were to be made under the 132nd section you might be prejudiced, but it is under the 134th, which places the creditor in the same position as if the debtor had himself charged the fund.] *Hatchell v.*

Wyse (4 Ir. C. L. Rep. 286); *Gilmour v. Simpson* (8 Ir. C. L. Rep. app. xxxviii); *Bolton v. Byrne* (4 Ir. C. L. Rep. 176). In the last of these cases the Court of Exchequer would not make the order, because the nature of the defendant's interest was not sworn to. What interest is shown here? [Monahan, C.J.—It is sworn that the defendant has an interest expectant upon the life interest of his mother.] There may be equitable rights which the Court of Chancery can deal with, but there is no interest. [Monahan, C.J.—It is laid down in Ferguson's note to the 134th sec. that it is competent to charge the interest of a debtor which is merely contingent or doubtful.] [Ball, J.—Can you carry it further than that there is a dispute if the son has any interest?] There is no dispute. The alleged settlement never was executed as appears from *Hodgens v. Hodgens* (4 Cl. & Fin. 323). The defendant's father was guilty of a contempt of court in marrying a ward. The Master in Chancery afterwards made a report approving of the draft of a settlement. [Monahan, C.J.—What gave Mrs. Hodgens the life interest in the fund?] She has got an order to have the dividends paid to her during her life to her separate use. [Monahan, C.J.—And were no other rights decided by that order?] None. [Christian, J.—Was the Master's report confirmed?] Never. [Christinn, J.—Did anyone make objections to his draft?] It does not appear. It would seem that no steps were taken to get this settlement executed, because of other proceedings in the House of Lords. [Ball, J.—This draft has in all probability ascertained that the defendant, who is the only son, is entitled to the fund.] That is assuming that the settlement will be carried out, to do which there must be proceedings in Chancery. The son will have to come in by petition and obtain a decree. [Christian, J.—The facts of this case are, that the son has an actual equitable interest in a known existing fund. A charging order will not fetter the Court of Chancery, because unless a stop order is made our order will not prevent the fund from being transferred.] As to the substitution of service it may be taken for granted that the father corresponds with his son once a week, but that will not make him his agent; nor will three bad services make one good one. Special agency for this purpose must be a special continuing agency—*Kett v. Robinson* (4 Ir. C. L. Rep. 186.)

H. Plunkett in reply.—*Hodgens v. Hodgens* (4 Cl. & Fin., 323), shews that the defendant has an interest in this fund. The settlement, though not formally, is virtually executed, because the father has agreed to give up all claim to his wife's personal property except the one-fifth of it, which by the settlement she has power to appoint to him. The Court will do here what was done in *Rogers v. Holloway* (5 M. & G., 292), in which Maule, J., asks, “If stock is improperly charged, is not the Court of Chancery the proper tribunal in which to seek for a remedy?” A doubtful interest may be charged.—*Fowler v. Churchill* (2 Dowling's Rep., N. S., 562). If the defendant has no interest, the charging order will do him no injury. The cases cited on the other side were cases of orders attaching present vested interests. *Gilmour v. Simpson* was the case of a garnishee order. As to the substitution of service, the agent mentioned

in the 134th section is not agent in respect to the fund, but agent generally. The words are, a "copy of such order shall be served on the debtor, or his attorney or agent." In *Wright v. Miller* (1 Ir. Jur., N. S., 295), it was held sufficient that the agent had the power of discovering his principal's residence, although he swore that he had ceased to correspond with him.—*Cartwright v. Ball* (3 Ir. C. L. Rep., 31). The trouble which Thomas Hodgens, the attorney, takes here, is a proof that he is acting for the defendant. What interest has any other person? [*Monahan, C. J.*—They have displaced your statement that the settlement was executed. Your affidavit regarding the defendant's interest, though sufficient, is untrue.]

The motion stood over for an affidavit stating the real facts relating to the defendant's interest in the fund sought to be charged.

May 8.—*W. Sidney, Q.C.*, renewed his application, and stated that search had been made in the Court of Chancery, by which it appeared that a petition had been filed by the defendant under the Chancery Regulation Act, 1850, to enable him to draw out a portion of one of the sums the plaintiff was seeking to charge. That petition disclosed that the petitioner's mother had been put in possession, and had ever since continued so, that the Master in his report had found the marriage between the defendant's father and mother, and approved of the draft of a settlement by which the property was to be limited to the mother during her life, and to her children after her death, with a power to appoint the one-fifth of it to her husband. The petition disclosed that there was issue of the marriage, that a consent entered into by the petitioner and his mother that the Accountant General of the Court of Chancery should transfer a certain sum to the petitioner, was made a rule of Court. It disclosed the payment of three sums of money to the petitioner, with his mother's consent, and on that petition an order had been made.

Albert Hodgens (with him *Michael Morris, Q.C.*) contra.—The 134th section does not apply to this case at all; it must be read in connection with the 132nd. [*Christian J.*—The 132nd section is quite new; the section in Pigot's Act only gave a charging order, which made it necessary to go into Chancery, but the order under this section may be followed by an execution.] The 135th section deals only with vested interests. [*Monahan, C. J.*—It is very remarkable that the 135th section does not state whether the order is to be an attaching order or a charging order, and why? because it includes both vested and reversionary interests. *Christian, J.*—It was the custom for common law judges to make orders under Pigot's Act, charging funds in the Court of Chancery.] *French v. Balfe* (6 Ir. Chan. Rep., 69); *Hatchell v. Wyse* (4 Ir. C. L. Rep., 286). [*Monahan, C. J.*—What we thought in *Hatchell v. Wyse* was not that it would be more convenient to go into the Court of Chancery, but that we had not jurisdiction to make the order.]—The Court of Chancery can deal with the Master's report, but this Court will scarcely do so. It has been departed from in several instances since. In May, 1834, the Master of the Rolls directed that the defendant's father should be excluded from any in-

terest in the fund. In February, 1835, Sir Edward Sugden reversed an order of the Master of the Rolls, and his order was reversed by Lord Plunket, whose order was in turn reversed by the House of Lords. 2 Maddock's Chan. Practice, 685, lays it down that the Court of Chancery never acts upon a report until it is confirmed. This report is purely interlocutory. If the settlement had ever been executed, the order on the petition referred to could not have been made. [*Monahan, C. J.*—Why not upon consent?] There might be more *cestuis que trusts*. [*Monahan, C. J.*—Legally that is the presumption, but after a lady arrives at a certain age, there are not likely to be any more *cestuis que trusts*.] *Watts v. Porter* (3 El. & Bl., 743). [*Christian, J.*—*Watts v. Porter* has been since overruled, and the opinion of Erie, J., who dissented, held to be the right one.] The Court must be satisfied there is an interest which they can attach. [*Monahan, C. J.*—If there be no interest, there can be no injury. *Christian, J.*—It is enough for us that there appears to be a *prima facie* case. The Court of Chancery can act upon that if they think there is an interest.] As to substituting service, there was no litigation on the occasion of the petition referred to when Thomas Hodgens, the attorney, acted as solicitor. The father, mother, and son went in before the Chancellor one morning, and said that they were the parties entitled to the fund, and had agreed that a portion of it should be paid out. This transaction occurred two years ago. Acting once will not make a party an agent for his purpose. [*Ball, J.*—Does Thomas Hodgens swear that the relation of solicitor and client has ceased between him and the defendant.] He swears he did not act in any manner to induce the plaintiff's attorney to believe he was the defendant's attorney. The agent must be a person in whom there is a moral duty to communicate with his principal. *Reilly v. White* (6 Ir. Jur., N. S., 87). In *Guinness v. Armit* (3 Ir. Law Rep., 165), where the motion was made under Pigot's Act, the reputed attorney of the defendant was not allowed to be served.

H. Plunkett, in reply, was directed to confine himself to the question of substitution of service. Thomas Hodgens, the attorney, appears as the attorney in a number of affidavits which have been made in this case. If he is not the defendant's attorney, who is to pay him the costs of them?

MONAHAN, C. J.—We have no doubt that we have here an agent representing the absent gentleman, and shall make absolute the order charging his interest in this fund. We shall also make absolute the order to substitute service.

Order made absolute.

Court of Exchequer.

(REVENUE SIDE.)

THE ATTORNEY-GENERAL v. CULLEN.

[Reported by Oliver J. Burke, Esq., Barrister-at-Law.]

Charitable bequests—Exemption from legacy duty—Secret trusts—5 & 6 Vict. c. 82, s. 38.

B. F., the testatrix, by will bearing date the 10th Feb. 1829, after giving several legacies, bequeathed the

the price of the day would be equivalent to the sum of £6,500 each; and that in pursuance of said consent an order of the Court of Chancery in Ireland, bearing date the 16th day of November, 1861, was made directing the payment of said two sums of £6,500. That in pursuance of said order the said defendant, Thomas Walker Hodgens, executed and sent to his father, Thomas Hodgens, who resided No. 8 Beech-hill, in the county of Dublin, the power of attorney to draw a sum of £6,500 that the said Thomas Hodgens, on the 4th of 1861, under said power of attorney of said sum. That deponent was believed that Mr. Thomas Hodgens was informed and believed defendant in said Chancery solicitor in Ireland; and Abbeyville, Harold's-cro and believed, receive [Christian, J.—The 134th section, that any, shall state that the fund proceedings. previous proceeding we case for for the has no que:

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This was an information filed by Her Majesty's Attorney-General against the Most Reverend Doctor Paul Cullen, Roman Catholic Archbishop, &c., to obtain payment of the duty which had become payable to her Majesty in respect of a certain residue of personal estate, amounting to a sum of £4,700, and bequeathed by the will of one Bridget Fitzgerald, the testatrix, to the Most Reverend Daniel Murray, Roman Catholic Archbishop of Dublin, and to the Rev. Patrick Doyle, both since deceased, and to the payment of which the defendant is now liable, as administrator of the goods and chattels which were left unadministered of the said Bridget Fitzgerald, and also as executor of the Rev. Patrick Joseph Doyle, deceased, the acting executor under the will of the said testatrix. The information then stated that testatrix was, at the time of her making her will, and the several codicils thereto, possessed of personal estate, and by her will, dated 10th Feb. 1829, she appointed one Peter Locke, and the Rev. Patrick Joseph Doyle, executors of said will. She thereby bequeathed to the said Peter Locke the sum of £200, and to the said Patrick Joseph Doyle £100, and after various other bequests, she bequeathed the "rest, resi-

property, real and personal, whatsoever, to said Daniel Murray, and the survivor administrators, executors, and assigns, that the intentions expressed in her will be carried into effect." To this will there were two codicils, each dated 7th October, 1839, subsequent to the Act 1st Victoria for amendment of the laws relating to wills—the first confirming the will, and the second in the following terms, "to remove any doubt as to my intention as to the devise and bequest of my real, freehold, and personal estates, I declare that the same shall go to the said Patrick Joseph Doyle (therein called the Rev. Patrick James Doyle), and the Most Rev. Daniel Murray, named in my will, according to the directions therein, and that it is not intended that the same or any part thereof should be given or bequeathed to any other person." There was a further codicil, appointing Anne Carroll executrix in place of Peter Locke, deceased, and a further codicil 24th January, 1849, declaring Rev. Patrick Joseph Doyle the person named in the will as Patrick Doyle.

Testatrix died on 5th of May, 1850, without having revoked or altered the said residuary bequests. Probate was granted on the 18th June, 1850, to Anne Carroll and Rev. Patrick Joseph Doyle. Said Rev. Patrick Joseph Doyle thereupon took possession of the assets, either for his own or some other person's benefit, but did not pay legacy duty on the residue. The Most Rev. Daniel Murray died in Feb. 1852, and Rev. Patrick Joseph Doyle died in Dec. in the same year, having first made his last will in writing, whereby, after some pecuniary legacies, he bequeathed the residue to the defendant, for such religious and charitable purposes as he should think fit, and appointed defendant and Rev. Philip Dubey executors. Probate of said will was granted to the Most Rev. Archbishop Cullen, in Jan. 1853. Anne Carroll died intestate in 1853, never having interfered in the administration of the personal estate of said Bridget Fitzgerald, the testatrix. Administration *de bonis non* of the testatrix was granted to defendant on the 20th June, 1854, who then took possession of the assets, and retained same either for his own use and benefit, or for the benefit of some other person, to a large amount, comprising the remaining part of the residue bequeathed by said will of Bridget Fitzgerald, and also delivered and paid to certain persons, or otherwise satisfied and discharged the remaining part of said residue. The information averred that legacy duty, at £10 per cent. was payable by the said Patrick Joseph Doyle, and that there was and is payable by the defendants to her Majesty a duty of £10 per cent. upon the value thereof, the same having been bequeathed to strangers in blood; that application was made to said Rev. Patrick Joseph Doyle, who in his lifetime declined, and defendant now declines, to pay same, on the ground that certain charitable trusts were declared by letters written by testatrix to said Most Rev. Daniel Murray and Rev. Patrick Joseph Doyle, and that, therefore, the personal representatives of the testatrix were bound, as trustees, to apply said residue to purposes merely charitable, and as such, said residue is exempt from legacy duty; that such letters were not admitted to pro-

alluded to in the will or codicils. The prayer of the information was in accordance with the above, and that defendant might be chargeable with legacy duty at £10 per cent.

Information the defendant filed an answer, which admits the will and codicils, and which is correctly stated in the information. Defendant further says, that although the Archbishop Murray and Rev. Patrick Joseph Doyle appear upon the face of the information to be residuary legatees for the residue of the estate, and to benefit unaffected by any trust, yet the truth is that they took no personal interest in the residue, and defendant submits that, under the circumstances hereinafter mentioned, the said Most Rev. Doctor Murray and the Rev. Patrick Joseph Doyle were but trustees of the said residue for charitable purposes, they having accepted in testatrix's lifetime the trusts directed by her in relation to said residue in communications in writing made by her to them in her lifetime as hereinafter mentioned. That contemporaneously with the execution of her said will, that is to say on the 10th of February 1829, the testatrix wrote, signed, and sent to the Most Rev. Doctor Murray and Rev. Patrick Joseph Doyle respectively, three letters, the first of them to the Most Rev. Doctor Murray—the second directed to Rev. Patrick Joseph Doyle (therein termed the Rev. Patrick Doyle), and the third directed to the Rev. Patrick Joseph Doyle. That said first letter is as follows:—

“ 26 Temple-street, Dublin,
“ 10th February, 1829.

“ My Lord,—I have, on the 10th February, 1829, made my last will, &c. The high opinion I have of the Rev. P. J. Doyle has induced me to nominate him one of my executors, in order that certain intentions of mine shall be faithfully complied with. In my will I have left him absolutely £100, and I have left him and you, my lord, residuary legatees of my remaining property, after discharging my debts and legacies. I trust your grace will be aware, by my leaving the residue of my property to you and the Rev. P. Doyle, I do so merely as a trust that the property left to you may be disposed of in the manner and for the purposes I shall direct, thinking it better to do so than mention them particularly in my last will and testament (some part of them arising from a conscientious feeling). I desire that after my debts, legacies, and bequests are satisfied, money is to be given for Masses for my soul, and for different charitable institutions, all of which I have particularly specified in my letter to the Rev. P. Doyle, a copy of which I enclose you, that you may more fully understand my intention about what I wish to have done with the residue of my property. After what I have mentioned, I leave for you and the Rev. Dr. Doyle the remainder of my property. I wish it should be laid out towards the foundation of a convent for the education of female children of respectable parents reduced to poverty. I would prefer convents that would take children to live with them, of the order of the Visitation, provided they undertook to instruct the poor, and were bound to do so, and I would by no means leave my property to a convent

unless it benefited the poor, &c. I remain, my lord, your lordship's most humble servant,

“ BRIDGET FITZGERALD.”

That the second letter was of like date and import, addressed to the Rev. P. J. Doyle, also explaining the said trusts on which she appointed him and Most Rev. Dr. Murray trustees of her said will; and the defendant denies that he took possession, or retained any portion of the said personal estate for his own use and benefit, but claims to hold the same for the charitable purposes disclosed in the letters above mentioned, and therefore, for the reasons hereinbefore and after mentioned, defendant declines to pay said legacy duty of £10 per cent. in information claimed; and defendant now submits, as a matter of law, that inasmuch as the said Most Rev. Doctor Murray and Rev. Patrick Joseph Doyle did, in the lifetime of testatrix, receive from her directions in writing aforesaid to apply, and did in pursuance thereof consent to apply, the residue of her personal estate for the charitable trusts mentioned in the foregoing letter, the trust was one which a Court of Equity would enforce, and that, therefore, the bequest of the residue to the said Most Rev. Dr. Murray and Rev. P. J. Doyle was really and substantially a bequest thereof for charitable purposes, and that no duty is payable in respect thereof.

The Solicitor-General and Jebb appeared for the Crown.—The question for the consideration of the Court is whether, under the circumstances of the case, the residuary bequest is exempted from legacy duty or not by the 38th section of the 5 & 6 Vic. c. 82. It is submitted that the late Archbishop Murray and the Rev. P. J. Doyle were strangers in blood to the testatrix, and, as such, their legacies now in the hands of Abp. Cullen are liable to pay a legacy duty of £10 per cent; and that as the charities for which the trusts contended for were intended did not appear on the face of the will, same were not exempted by the proviso at the close of the 38th section of the 5 & 6 Vic. c. 82.

Sir Colman O'Loghlen, Q.C., and John O'Hagan, contended that a trust was created of the residue of Bridget Fitzgerald's estate for charitable purposes, which, in a Court of Equity, could have been enforced adversely against the late Most Rev. Dr. Murray and Dr. Doyle; that, if this were so, the residue was a legacy given to be applied for a purpose merely charitable within the meaning of the 5 & 6 Vic. c. 82, s. 38. The following cases were relied on in support of the defendant's case:—*Strickland v. Alderedge* (9 Vesey, 519); *Tee v. Ferris* (2 K. & J. 357); *Shary v. Garty* (2 L. C. 351); *Drakeford v. Wilks* (3 Atk. 539); *Sweeting v. Sweeting* (1 Draw. 331); *Attorney-General v. Nash* (1 M. & W. 237); *Walgrove v. Tebb* (2 Kay & Johnson, 313); *Attorney-General v. Dillon* (13 L. Ch. 127); *Hobson v. Neale* (17 Bear. 178.)

[The arguments on both sides are fully reviewed by the two members of the Court, who delivered judgment in the case.]

Pigot, C.B.—My brother Deasy is obliged to attend this morning in the Chancery Appeal Court, but he has authorized me to say that he fully concurs in the judgment of the Court, which I am now about to

deliver. The Solicitor-General, in opening the case on the part of the Crown, stated (very properly in my opinion) that he did not mean to contravene the proposition relied upon in the answer, viz., that the two residuary legatees of the residue bequeathed to them by the testatrix were trustees for the purposes indicated in the letters dated contemporaneously with the will, and transmitted to them by the testatrix. The cause was set down to be heard on the information and answer; the statements in the answer must, therefore, be taken as admitted—the statements not only that the two letters addressed by the testatrix to the Rev. Patrick Joseph Doyle, one of the residuary legatees, and the letter addressed to the Most Rev. Dr. Murray, the other residuary legatee, were transmitted to and received by them in the lifetime of testatrix, but that copies of the letters addressed to the Rev. Mr. Doyle were transmitted to the Most Rev. Dr. Murray, and that a copy of the letter addressed to the Most Rev. Dr. Murray was transmitted to the Rev. Mr. Doyle; that in the testatrix's lifetime both the residuary legatees accepted the trusts declared in those letters, and that those letters remaining in their possession after the death of the testatrix in 1850 were found among their papers after their respective deaths. The answer further states that after the death of testatrix, the Rev. Mr. Doyle, acted with the assent of Doctor Murray in applying the property bequeathed to them in conformity with those trusts, that they did not claim any benefit for themselves in reference to that property, and that the defendant, who is the executor of the surviving residuary legatee, and the administrator *de bonis non* of the original testatrix, claims no benefit under her said will, and admits that he possesses the remaining portion of the residue as trustee, and now claims exemption from the legacy duty on the ground that the residuary legatees took the property as trustees. Although some reliance was placed in the reply upon the codicil of 7th October, 1839, as a testamentary document annulling the trusts created by the letters, and by the acceptance of the trusts by the residuary legatees, it appears to me that the evidence conclusively establishes that the trust continued to be reposed by the testatrix, and to be accepted and adopted by the legatees after that codicil, and to have been wholly unaffected by it. It is hardly necessary to refer to authorities on the subject of trusts of this nature; almost all of them are collected in *Lover v. Ripley* (3 Smale & Giff., 48); *Walgrave v. Tebbe* (2 K. & J. 313); and *The Attorney General v. Dillon* (13 L. C., 127). The rule is thus enunciated by the Vice-Chancellor in *Walgrave v. Tebbe* (2 K. & J., 321)—“Where a person, knowing that a testator in making a disposition in his favour intends it to be applied for purposes other than for his own benefit, either expressly promises, or by silence implies, that he will carry the testator's intention into effect, and the property is left to him upon the faith of that promise or undertaking, it is in effect a case of trust.” In the codicil of the 7th of October, 1839, the testatrix, after indicating her desire to remove any doubt as to her intention as to the devise of her real, freehold, and personal estate, uses these words, “I hereby declare the same shall go to the Rev. Patrick James Doyle and the

Most Rev. Daniel Murray named in my will according to the directions therein, and that it is not intended to be bequeathed or given to any other person.” It appears strange enough that she misdescribed or inadequately named the Rev. Mr. Doyle in the will and in the letters addressed to him, she named him as the Rev. Patrick Doyle. In the codicil of the 7th of October, 1839, she designated him as Patrick James Doyle, and in a codicil of the 24th January, 1849, she corrected the error she had made, and stated that he should have been described as Patrick Joseph Doyle, which appeared to have been his true name, and she declared that he was the person whom she appointed as one of her executors and joint residuary legatees with the Most Rev. Daniel Murray, Roman Catholic Archbishop of Dublin. If I am to express an opinion as to the motive and purpose of the testatrix in making the codicil of the 7th of October, 1839, it would be that she intended to describe Patrick James Doyle as the person whom, under the name of Patrick Doyle, she had made by her will joint residuary legatee with Dr. Murray. Whatever might be her motive, the words she used had no further efficacy in disposing of the property than those of her will; the bequest in the will was to the Rev. Patrick Doyle and the Most Rev. Dr. Murray; that in effect was a bequest to him and to another person. The words of the codicil indicating that the legatees named, and they only, shall take under the will, are not stronger or more conclusive than the words of the will in *Shary v. Garty* (2 L. C. 351). The main object of the trusts was not to bestow any part of the fund on any specified person; it was to found and establish an institution of a specified kind, for the purpose of educating in a specific way a specified class of the poor; but independently of any criticism on the form of the codicil of the 7th of October, 1839, the fact that the testatrix, during the rest of her life, nearly eleven years, left the letters withdrawn in the possession of the residuary legatees, that they retained those letters until their respective deaths, and that they acted in the performance of the trusts which those letters purported to create, lead irresistibly to the inference that the trust was created after the codicil, as well as before, both by the testatrix and the legatees as imposing a continuing and binding obligation to take the property at her death, not for their own benefit, but upon the trusts of the letters which they so retained. The main question which we have to determine is, whether the legacy duty attaches to the bequest of the residue, or whether it is exempted by the proviso in the 38th section of the 5th and 6th Victoria, ch. 82, exempting charitable bequests from duty. It is contended on the part of the defendant that the legacy duty does not attach, because this is a bequest for a purpose within the scope of the proviso. On the part of the Crown it is not denied that the purposes are within the scope of the proviso; but it is contended that the legacy is not within the exemption created by this proviso, because the legacy is not given for a charitable purpose on the face of the will. The defendant's counsel, by whom this case has been argued with great ability, contended that the Court ought now to resort to matter *dehors* the will to ascertain the purpose of the legacy, with a view to determine whether it is at

all chargeable with duty, in the same way as we must resort to matters *dehors* the will to ascertain what is the amount of duty chargeable, for example, on determining whether the legatee does or does not stand in such a relation to the testator as renders him liable to duty less than what would be chargeable by a stranger, or to determine, as in *Sweeting v. Sweeting* (1 Drury, 331), whether a provision created by an appointment under a power given by a will was or was not chargeable with legacy duty as if given directly by the will. Cases have been suggested in which evidence extrinsic of the will must confessedly be resorted to for the purpose of determining with what duty the legatee shall be chargeable with respect to the legacy. If there be a bequest of £1,000 to A. B., who claims to be the testator's son, and it is disputed that he stands in that relation to the testator, the amount of the duty may depend upon the legitimacy of the legatee. If there be a legacy to C. D., who claims to be the testator's widow, the amount of the duty may depend upon the validity of the claimant's marriage. It is contended that the question whether the purposes of the legacy are within the proviso excepting bequests from duty, is an inquiry as much within the contemplation of the statute, as an inquiry whether the legatee is the legitimate son, or was the lawful wife of the testator, or whether the appointee under a power takes the legacy under the provisions of the Act of Parliament. I confess I have not come without doubt and hesitation to the conclusion that those analogies do not furnish a safe rule for construing the exempting proviso of the statute. The answer to the argument founded upon them appears to me to be furnished by the terms of the schedule to the 55th Geo. 3, ch. 184, and by the terms of the 38th section of the 5th and 6th Vict., ch. 82, and the 4th section of the 8th and 9th Victoria, ch. 76, indicating, though not exclusively defining what shall be deemed a legacy within the meaning of the Acts granting duties on legacies; the schedule to the 55th Geo. 3, ch. 184, extended to Ireland by the 5th and 6th Vict., ch. 82, where any such legacy or residue, or any share of such residue, shall have been given, to or have devolved to or for the benefit of the child of the deceased, &c., imposes a duty at or after the rate of one per cent., the amount or value thereon—then after several other sections comes this section—"When any such legacy or residue, or share of such residue, shall have been given, or have devolved to or for the benefit of any person in any other degree of collateral consanguinity to the deceased and as above described, or to or for the benefit of any stranger in blood to the deceased a duty at or after the rate of £10 per cent. on the amount or value thereof." The 38th section of the 5th & 6th Vict., c. 82, and the 4th section of the 8th and 9th Vict., ch. 76, correspond nearly in terms. The former enacts that every gift by any will or testamentary instrument of any deceased person, which by virtue of such will or testamentary instrument shall have effect, or be satisfied out of the personal estate of such person so dying, &c., shall be deemed and taken to be a legacy within the true intent and meaning of this Act. The fourth section of the 8th and 9th Vict., ch. 76, contains with others the provi-

sions in nearly similar terms applicable to all the several Acts granting or relating to debts or legacies in Great Britain and Ireland respectively. The proviso at the end of the 38th sec. of the 5th and 6th Vict. ch. 82, is, that nothing herein contained shall extend, or be construed to extend, to Ireland, to charge with duty any legacy given for the education or maintenance of poor children in Ireland, or to be applied in support of any charitable institution in Ireland, or for any purpose merely charitable. This provision contains in terms the following as express enactments of the Legislature—first, that a gift by will which, by virtue of a will, shall be payable out of the personal estate of the testator, shall be deemed to be a legacy; secondly, that the duty of £10 per cent. shall attach wherever any such legacies shall have been given or devolved to or for the benefit of any person who shall be a stranger in blood to the testator; thirdly, that the exemption provided at the close of the 38th section of the 5th and 6th Vict., ch. 82, shall apply where the legacy is given for some of the purposes mentioned in the proviso. What, then, is the true meaning of the words "given for" in connexion with the words that describe the purposes exempting the legacy from duty? Do they mean that the legacy, in order to be so exempted, shall be given for such purposes by the will, or did they mean that if the legacy be given by the will, the purposes may be shewn by matter extrinsic of the will? In other words, is it a legacy given for this purpose, unless the will by which it is given declares the purposes for which it gives them? I have come to the conclusion that such is the true construction of the Act of Parliament, and that the exemption does not exist within the proviso unless the purposes are so disclosed by the will itself as to shew that the legacy is given for this purpose. The statute deals with what is done by the will; that is a legacy within the meaning of the statute which is a gift by the will, and which is to have effect or be satisfied by virtue of the will, and though the interpretation of the term "legacy" given by the 38th section of the 5th and 6th Vict., ch. 82, and the 4th section of the 8th and 9th Vict., ch. 76, is not exclusive, and only purposes to include within that term what it describes; yet it shews that the Legislature contemplated, as, indeed, they obviously must have done, that the will is that which should determine what should be the legacy. I am sensible that the words are large enough, if not controlled by the context, to embrace a bequest for any of the purposes specified in the proviso, howsoever that purpose may be proved, and I am sensible also that the construction for which the Crown contend; may possibly furnish the means of avoiding duty by making bequests to relatives upon secret trusts for strangers under circumstances in which the Crown may not easily discover the trust, or may be unable to establish by legal evidence to deprive the Crown of the duty. It is quite possible, also, that the Legislature, having before them the established rule of the Courts of Equity, which formed in effect a part of the law of the land, may have intended to comprise trusts engrafted by that rule on legacies, to use the language of some of the judges; and the expressions in the several sections of the schedule, "where such legacy, &c., shall have been

given, or have devolved to or for the benefit of any person," must be considered large enough and sufficient to include the trust for a person not named in the will created by the undertaking from the legatee to the testator, to hold the legacy on trust for that person. This view may be considered as deriving some colour from the rule laid down expressly in some of the cases, that the legacy duty shall be payable by or at the expense of the person who is beneficially entitled to the legacy. *In re Wilkin* (1 Crompton, M. & R. Ex. Ch., 142). Notwithstanding this construction, which I mention for the purpose of shewing that they have not been overlooked, I feel constrained to hold that this is not a legacy given for a charitable purpose by the will, and that not being so given, it is not within the proviso creating an exemption from duty contained in the 38th section of the 5th and 6th Vict., ch. 82; the result, then, must be a decree in conformity with the prayer of the informations. I have not, as I have already intimated, come to the conclusion at which I have arrived without considerable doubt, and some fluctuation of opinion; I should, speaking for myself, not regret that some inexpensive mode might be adopted for reviewing our decision, if not acquiesced in. The case of *In re Wilkinson* (1 Crompt. M. Roa., 142), decided in the Court of Exchequer in England, was brought, I presume by consent between the Crown and the party claiming the exemption from the legacy duty, in the shape of a special verdict before the judges of the Court of Exchequer Chamber, and the decision from that Court is reported under the name of *The Attorney-General v. Nash* (1 M. & W., 237). In that case the exemption was claimed on the ground that the bequest, which was for charitable purposes, and was to be distributed under the will in small sums, was within the limits which, under the 55th Geo. ch. 184, legacies were not chargeable with duty, and the amount of duty claimed did not differ much from the amount claimed in the present case by the Crown.

FITZGERALD, B.—I am also of opinion that the gift of the residue contained in the will of the late Bridget Fitzgerald is subject to legacy duty. I wish to be understood as offering no opinion whether or not the trust with which it is alleged on the part of the defendant that such a gift was affected, could or could not be enforced. Even on the assumption that it could, and that it would be considered as a trust for the education or maintenance of poor children in Ireland, or for the support of charitable institutions in Ireland, or for purposes merely charitable, I am of opinion that that it is not a legacy within the Acts, because it is not a gift by a will or testamentary instrument; the only gift by the will or testamentary instrument is a gift of the residuary estate to the residuary legatees, and no trust as to the application of that residue is imposed, or can be gathered from the will. I wish further to be understood as offering no opinion as to the terms which a Court of Equity may or may not have in its power to impose on parties seeking through its aid to avail themselves of a secret trust of a legacy given by will, with a view of avoiding the higher amount of legacy duty, than that to which the *velut que trusts* of the legacies would be liable. It may be, but I am far from saying it is so, that a Court of

equity may have a right to say to such parties, you shall not avail yourselves of a secret trust to escape legacy duty. In the present case it is sufficient to say, that under the provisions of the statute a secret trust cannot be made available by the legatee for the purposes of exemption of legacy duty, and I cannot say I entertain any doubt on the point.

FOX v. BRODERICK.

Pleading—Motion to set embarrassing defence aside—Plea of privileged communication—Suspicion—Ground of suspicion not stated in plea—Hennessey v. Morgan (8 I. C. L. App. 66) doubted.

Motion to set aside defence.—The summons and plaint complained that the defendant used slanderous expressions imputing embezzlement to the plaintiff. Defence: privileged communication, that defendant suspected the plaintiff of embezzlement (without stating on the face of the plea the ground of his suspicion.) The court would not, on motion, set aside the defence, which, had they followed Hennessey v. Morgan, they should be compelled to do.

THIS was a motion to set aside the defences to the first and second paragraphs of the summons and plaint, inasmuch as same were calculated to prejudice, embarrass, and delay the plaintiff in the fair trial of the action. The summons and plaint was for slander, and stated "that the plaintiff was, before and at the time of the several grievances hereinafter mentioned, by trade and calling a shop assistant, and gained his living by that employment, and was, at the time of the grievances hereinafter stated, employed by and in the service of one Michael Broderick, as his shop assistant, and in that capacity had always conducted himself with honesty and rectitude; yet the defendant, well knowing the premises, but contriving, and wrongfully and maliciously intending to injure and destroy the good name and reputation of plaintiff in his said trade or calling of shop assistant, and to cause it to be suspected and believed that the plaintiff had been, and was guilty of the offence and dishonesty hereinafter stated to have been imputed to him by the defendant in a certain conversation which he, the defendant, had of and concerning the plaintiff, and of and concerning him with reference and in relation to the aforesaid trade and business of the plaintiff, in the presence and hearing of divers persons, falsely and maliciously spoke and published of and concerning the plaintiff, and with reference and in relation to his aforesaid trade and business, the following scandalous and defamatory words, that is to say, I (meaning the defendant) thought there was a till here (meaning the shop in which the plaintiff was employed), for the young men (meaning plaintiff and his fellow-assistants) to put money into, and not into their pockets; you (meaning and addressing the plaintiff) did not put the money (meaning a shilling received by the plaintiff in defendant's presence in payment for goods sold by the plaintiff then and there for his aforesaid employer) into the till. On the virtue of my solemn oath (meaning his, the defendant's); you (meaning the plaintiff) put it (meaning the said shilling) into your

pocket, meaning thereby, and giving it to be understood, that the plaintiff, in the course of his business, and in breach of the trust reposed in him by his employer, had been guilty of an indictable offence, to wit, embezzling, stealing, and fraudulently appropriating said shilling, or attempting to embezzle, steal, and fraudulently appropriate the same, whereby the plaintiff was injured in his character, reputation, trade, and calling, and the plaintiff claims £300 damages." Defence:—"That Michael Broderick, the plaintiff's employer, was and is a general merchant very extensively engaged in business, and having usually in his employment several young men as shop assistants and apprentices, and defendant says that on the occasion of the speaking and publishing of the words complained of, the defendant was in charge of the shop of the said Michael Broderick, the said Michael Broderick being then absent therefrom, and having during his absence confided the care and superintendence of said shop to the plaintiff, and the defendant says that in addition to the plaintiff there were divers other persons then employed and present in the said shop as assistants and apprentices of the said Michael Broderick, and it was the duty of the plaintiff, and of said other persons, on receiving any money from customers of the said Michael Broderick, in payment of goods sold to them, forthwith to place same in the till or money drawer of the said shop. And the defendant further says, that before and at the time of the speaking and publishing by him of the words complained of, the plaintiff had been and was *bona fide* suspected by the said Michael Broderick and the defendant to be guilty of dishonestly appropriating to his own use moneys of the said Michael Broderick, received by the plaintiff from customers of said shop; and the defendant says that while he was so in charge of said shop, he observed the plaintiff, immediately after getting cash from a customer in payment of some goods sold to him, put his hand into his pocket, and resume his duties, instead of going straight to the till, and depositing the money so received by him therein, as he ought to have done, and thereupon the defendant, in discharge of his duty to the said Michael Broderick, and for the *bona fide* purpose of protecting the interest of the said Michael Broderick, and with a view to admonition and guidance of the said other assistants and apprentices of the said Michael Broderick then present in the said shop, addressed to the plaintiff, in their hearing and presence, the words in the plaint mentioned in the defamatory sense therein imputed, the defendant *bona fide* believing same in the sense so imputed to be true and without malice, in fact as he lawfully might for the causes aforesaid."

Hugh McDermot in support of the motion.—First, this defence does not specify what were the facts and circumstances which caused the defendant to suspect the plaintiff as alleged. Secondly, that though purporting to be a plea in confession and avoidance, it does not confess, but, on the contrary, denied an averment in the summons and plaint, viz., that the plaintiff forthwith placed in the till the money mentioned in the said summons and plaint. Thirdly, that the occasion of speaking the words sought to be justified by the defence, is not averred to be the same occasion

as that mentioned in the said summons and plaint, and that said defence is ambiguous and uncertain in point of fact. The only defence is a plea of privileged communication, which admits the speaking of the words, and the defamatory sense imputed, and further it is alleged that the defendant and his brother, before and at the time of the speaking of the words complained of, suspected the plaintiff of abstracting the money of his employer, but it does not state a single ground for that suspicion. This plea is one of privileged communication, and there must appear, in the words of Baron Parke in *Twogood v. Spyryng* (1 C. M. & R. 181), a reasonable occasion to warrant a statement being made. *Hennessy v. Morgan* (8 L. C. L., Ap. lxix) was an action for slander, and is in point; there the defendant pleaded that he spoke the words complained of believing them to be true, and the defence was set aside as embarrassing, because it did not set forth the facts which the defendant relied on for the grounds of his belief.

M^cBlaine.—The case of *Hennessy v. Morgan*, relied upon on the other side is a decision founded on a mistaken application of cases, which have reference exclusively to actions of malicious prosecution. Defendant had a perfect right to state that he suspected the plaintiff of acts of dishonesty, without being obliged to set forth his grounds. Setting forth those several facts would be pleading evidence; a look or a gesture might lead to a suspicion, and it would be impossible to plead the act.

Pigot, C.B.—If we followed *Hennessy v. Morgan*, we should grant this application, as that case is in point; but the Court is not disposed to do so on motion from which the defendant could not appeal. At the same time, the objection for want of particularity might perhaps with propriety be taken by motion. The Court, however, is of opinion that in this instance the question ought to be tried on demurrer.

Motion to stand over. Costs to await the argument of the demurrer.

M^cCULLAGH v. M^cGARRY.

Case stated by the justices—Weights and Measures Act, 25 & 26 Vict., ch. 76—Practice—Right to begin—Order of counsel's address.

W. M. purchased a given weight of flax from *M. C.* for £14 17s. 6d., and only paid therefor a sum of £14 14s. 6d., being three shillings less than he ought to have paid for same, and having declined to pay the said sum of £14 17s. 6d., he was summoned to appear before the justices of the peace of the B. Petty Sessions District, under the 25 & 26 Vict. c. 76 (*Weights and Measures Amendment Act*). The justices of said district, having heard the complaint, fined said *W. M.* ten shillings and costs £1, to be paid within one fortnight. From this sentence an appeal in the shape of a case stated was brought. Held, that the conviction of justices was wrong, inasmuch as the Act was conversant with weights and measures alone, and not with the prices of the articles purchased.

Held also, that in the arguments of cases stated for the opinion of the court by the justices, the junior counsel for the appellant opens the argument.

CASE for the opinion of the Court from the justices of the Ballybay petty session district, Co. Monaghan, stated "that at a petty sessions held in and for the petty sessions district for Ballybay, in the County of Monaghan, on Monday, the 16th of February, 1863, before the undersigned justices of the peace acting in and for the said County of Monaghan, one William Magarry, the defendant, was summoned before us, charged in and by a certain complaint, namely, that the said defendant, having contracted with complainant for the purchase of a quantity of flax by weight, and the true weight of said flax having been ascertained pursuant to the Weights and Measures (Ireland) Amendment Act, 1862, and said quantity so ascertained having been delivered by the complainant to the defendant as such purchaser, he, the said defendant, under a certain pretext, claimed and made a deduction or allowance from said weight, same not being for the weight of any sack, bag, cask, firkin, or other covering of said flax, and defendant paid said complainant, James M'Cullagh, short, whereby the said defendant has incurred a penalty of £5, on the 17th day of January, 1863, at Ballybay, in said County of Monaghan, and the said parties respectively being then present with their respective attorneys, the said complaint was duly heard before us, and upon such hearing, an order was made to the following effect, viz., defendant to pay a fine ten shillings, and costs £1, to be paid by defendant within one fortnight. It appeared in evidence that William Magarry had purchased a quantity of flax at 8s. 6d. per stone from M'Cullagh, the complainant; that Magarry, when paying for the flax, paid £14 14s. 6d. instead of £14 17s. 6d., being a sum less than the sum he ought to have paid by three shillings, and that the defendant declined to pay the full sum on the ground that same was due for what was called storage, which was an old custom in that part of the country, though in point of fact there was no storage at all to claim allowance for."

Fraser was proceeding to open the argument for the appellant, when

Dowse, Q.C., interposed, and claimed the right to begin on behalf of the respondent, insisting that such was the practice in the Queen's Bench and Exchequer in England, although it is different in the Common Pleas in that country.

Fraser cited *Rea v. Brophy* (9 L. C. L., App. xi), in which the rule is laid down by the Queen's Bench in Ireland, "that in the argument of cases stated for the opinion of the Court by justices of the peace under the 20th and 21st Vict. c. 43, s. 2, counsel address the Court in the same order as in law arguments. There the junior counsel for the appellant opens the argument; then the junior on the other side opens the respondent's case, and is followed by his senior. The senior counsel for the appellant replies upon the whole case." [*Pigot, C.B.*, said that the Court would follow the rule laid down by the Queen's Bench in Ireland.]

Fraser for the appellant.—The conviction by the

magistrates was bad, inasmuch as the offence charged by the summons was that of making a deduction from the weight of the article sold; whilst the evidence set out in the case shewed that the deduction was not from the weight, but from the price agreed to be paid for the article sold, and that such deduction from the price did not come within the provisions of the 13th sect. of the Weights and Measures Act, 25 & 26 Vict., c. 76, whereby it is enacted that every article sold by weight shall, if weighed, be weighed in full net standing beam; and for the purposes of every contract, bargain, sale, or dealing, the weight so ascertained shall be deemed the true weight of the article, and no deduction or allowance for tret or beamage, or any other account, or under any other name whatsoever, the weight of any sack, bag, cask, firkin, or other covering, in which such article may be alone excepted, shall be claimed or made by any purchaser on any pretext whatever, under a penalty of not exceeding £5; and the preamble to part 2nd of the statute recites that it is expedient to abolish all local denomination of weights and so prohibit improper deductions in weighing, and otherwise to regulate the mode of weighing articles sold: be it therefore enacted, &c. No provision is made by this statute as to the paying or deduction of payments, but is merely conversant with vendors selling by false weights, while the justices deal with the vendee paying from and deducting from such payment. This is a penal statute, and must be construed liberally.

MacMahon (with whom was Dowse, Q.C.)—This case, if it be not within the letter, is within the spirit of the statute, and every statute ought to be expounded according to the intent of its makers.—4 Inst., 330; Plowden, 467, a. The mischief to be corrected by the statute must be considered.—Co. Lit. 246. The Weights and Measures Act was passed for the purpose of protecting both buyers and sellers. In the construction of statutes, the ends contemplated are to be considered.—Comyn's Dig., tit. Parliament, 319. And in *Vere v. Sampson* (Hardres, 208, 13 Car. 2.), it is said that what is within the intention of an Act, though not comprehended within the express words of it, is equivalent to what is within the express words, and as strong; and as to penal statutes, equity makes no difference between a penal statute and all others.—*Heydon's case* (3 Rep., 3 Hardres, 206, 7, 8). In the case of *Bywater v. Brandling* (7 B. & C., 660), Lord Tenterden says in construing Acts of Parliament we are to look not alone at the preambles, or at any particular clause, but, if we find any particular expression not so large and extensive in its import as those used in other parts of the Act, and if upon a view of the whole we can collect from the more large and extensive expressions used in other parts the real intention of the Legislature, it is our duty to give effect to the larger expression, notwithstanding the phrase of less extensive import in the preamble, or any particular clause.

Prior, C.B., (reads the preamble of the statute 25 & 26 Vict., c. 76, part 2nd, and also the 15th section of said 2nd part).—It is perfectly plain that the whole scope and tenor of the Act are conversant with the proper ascertainment of the weight of the article sold, and with nothing else. The Act contains ample

provision for protecting the buyer from any deduction in weighing the article sold by the seller as to weights and measures, and deals with the manner that weight is to be accurately ascertained; but it leaves both buyer and seller perfectly free to contract, or to make any deduction whatever that might suit them in the price of the article sold: the conviction, therefore, of the magistrates cannot be sustained.

Conviction of the magistrates quashed accordingly.

Court of Probate.

[Reported by W. R. Miller, Esq., LL.D., Barrister-at-Law.]

GOODS OF GIVENS.—June 28.

Renunciation—Probate Act.

An executor who, before the Probate Act of 1857, had renounced, was not permitted to retract and accept a grant of administration de bonis non with the will, &c.; but having become next of kin, he was allowed to take a grant in that character.

J. W. Harris moved that Thomas Bayley Givens might be allowed to retract his renunciation, and be allowed to take a grant of administration *de bonis non* of the goods of the deceased, with his will annexed. The will bore date the 29th of May, 1851, and appointed Thomas Bayley Givens, and a person named O'Kelly, executors. Both the executors renounced, and on the 24th of April, 1852, letters of administration of the goods of the deceased were granted to Mary Givens, the widow of the deceased. She had a power of appointment among her children, but did not exercise it, and the applicant was now the sole next of kin. *Goods of Morrison*, (2 S. & T. 129.) She died in November, 1862, and there was a sum of £444 yet to be realised, viz., a debt due to the deceased.

KEATINGE, J.—The Probate Act of 1857, in terms is confined to renunciations to be thereafter made; but I think the principle would equally apply to renunciations made before the Act, as it might materially interfere with the chain of representation which may have occurred. But here the executor has acquired a new character as sole next of kin, as in the case referred to; and though I will not allow him to retract, I think I may allow him to take a grant as next of kin.

Order accordingly.

IN THE GOODS OF ELIZABETH, COUNTESS DE CHATAUVILLARD, THE WIFE OF LOUIS ALFRED LE BLANC, COMTE DE CHATAUVILLARD, LATE OF ENGHEN, IN FRANCE, DECEASED; AND IN THE GOODS OF ROBERT BEEBY, DECEASED.

Husband and wife—Husband an alien—Property of wife—Will—Power.

The wife of an alien can by will dispose of her chattels real situate in the United Kingdom as a feme sole; and where probate had been granted to her

will limited to such property as she had power to dispose of, the same was, on motion amended, by making it a general grant irrespective of the power.

DAMES moved on behalf of Messrs. Charles Earl and Thomas Young, the executors named in the will of the first deceased, that the grant of a limited probate and of administration *de bonis non* which had heretofore been made in the two cases, be amended by making them general grants. It appeared from the affidavit of the solicitor, that Robert Beeby, the father of the deceased, was a native of Ireland, but had by residence acquired a French domicile, and was at his death possessed of three leasehold interests for long terms of years still unexpired in the city of Cork. Robert Beeby by his will, bearing date the 30th of November, 1826, in the French language, gave to the deceased, his daughter and only child, the "naked property" of what he died possessed of in Ireland, leaving to her the power of disposing thereof as she might think fit. Robert Beeby having died, his will was proved in the Prerogative Court in Ireland by his daughter, the deceased, as residuary legatee, the sole executor named in it having renounced. The deceased was at her father's death and still is married to Alfred Louis Le Blanc, Comte De Chatauvillard, who was and is an alien, and a native of France. The deceased had two children only, a son, Alfred Le Blanc, Viscomte De Chatauvillard, and a daughter, Louisa Le Blanc, De Chatauvillard, now the wife of a French nobleman. By her will, dated the 25th of May, 1854, executed in the presence of and attested by two witnesses, the deceased, being in fact a *feme covert*, appointed Charles Earl and Thomas Young executors and trustees of her will, and in pursuance of the power given to her by the will of her late father, and also of a power reserved to her in her marriage settlement, and of every other power, gave and bequeathed all her property in England and Ireland, over which she had a testamentary power of appointment, to the said Earl and Young, on trust to pay themselves £50 each, and to several other persons £50 each, and to hold the residue on trust for the benefit of her two children in equal shares for their own absolute use. The deceased made a codicil to her said will making some variations in the dispositions, but it is not necessary to detail them, and she died on the 4th of July, 1860. On the 23rd March, 1861, Charles Earl and Thomas Young obtained from the Court of Probate in Ireland, probate of the said will and codicil limited to the administration of such personal estate and effects as the said deceased by virtue of the will of the said Robert Beeby had a right to appoint and dispose of by her said will and codicil and had appointed and disposed of accordingly. A petition was presented by the said Earl and Young in the month of June, 1861, to the Court of Chancery in Ireland, against the son and daughter of the deceased and the daughter's and the deceased's respective husbands, in order to have the trusts of the will of Robert Beeby carried into execution, and the rights of all parties to the said three chattels interests, ascertained and declared and for the usual accounts. On the 18th day of November, 1861, Earl and Young obtained a grant of administration *de*

bonis non, to the goods of said Robert Beeby with his will annexed, limited to such property as his daughter had power to appoint under his will. In Master Litton's office, where the matter was referred, a difficulty arose on the grant of the 25th of March, 1861, and of the 13th of November, 1861, viz., that they would not include the leaseholds at all, as from the opinions of French advocates it was argued that the will of Robert Beeby gave the deceased the absolute interest in the chattels, and therefore her will operated not as an exercise of a power of appointment, but as an absolute bequest, and the probate and administration therefore should not have been limited. The deceased was in fact married, but her husband being an alien, she had all the rights of a *feme sole*, and his assent to her will was not necessary. That may be inferred from *Bac. Abr.* title Alien C., where it is stated, p. 176, that an alien woman marrying a subject shall not be endowed, because by the policy of the law all aliens are disabled from acquiring any freehold here; nor can an alien purchase or inherit any lands here (except as a merchant, he may a lease for years), and that if the eldest son be an alien, the younger brother shall inherit the father. The analogy of the wives of felons also applies, who are considered as *femes sole* and able to dispose by will of property acquired after the conviction of their husband.—*Goods of Martin* (2 Rob. 406); *Ex parte Franks* (1 M. & S. 1); *Atlas v. Hook* (23 L. J. Ch. 776) all cited in *Miller's Prob. Practice*, 124; *Deerly v. Duchess of Mazarine* (1 Salk. 116, 1 Jarm. Wills, 31); *Newcome v. Bower* (3 P. Wm. 37); *Portland v. Rodgers* (2 Vern.).

KEATINGE, J. having directed inquiries in the office, made the order reciting in it the opinion of the Court, that the husband being an alien, the deceased had power to dispose of her own property, and also that in the opinion of the Court she had, under her father's will, an absolute interest in the leaseholds. The grants were amended in preference to revoking them and giving new grants, in order not to prejudice the proceedings had in Chancery.

GUMLEY v. GUMLEY.

Practice—Amendment of pleadings.

At the hearing the Court will allow the pleading to be amended, by filing a further plea to meet the evidence.

THIS cause was at hearing, on the plea of undue execution only. The will was that of the late John Gumley, a barrister; and on cross-examination of one of the attesting witnesses, a son, it appeared that it was executed about two hours before he died, and that he never spoke afterwards. It was never read to him or by him, and had been prepared and engrossed in Dublin, from instructions given by another son, and the evidence of capacity was extremely slight and vague. The defendant was the heir-at-law, and the only next of kin who had pleaded, but the other next of kin had appeared in the cause.

Armstrong for the plaintiff.

C. Andrews, Q.C. and *Boston* for the defendant.

KEATINGE, J.—The defendant would not strictly be

entitled to leave to amend his pleadings, but the other next of kin have appeared in the cause, but have not pleaded or appeared at the hearing. The duty therefore I apprehend is cast on the Court to protect their rights, and the plaintiff would be obliged as against them to prove testamentary capacity, as well as due execution. I therefore think I may allow the defendant to amend his pleadings, by adding a plea of want of capacity.

[The plea was then added and the cause proceeded, and the will was condemned.]

RUSSELL v. RUSSELL.

Motion—Administration bond—Notice.

A notice of motion is required for a conditional order to assign an administration bond.

E. Beytagh moved that an administration bond should be ordered to be assigned. [*Keatinge, J.*—Have you given notice of this motion?] No; I only ask a conditional order, and we have the consent of all the next of kin.

PER CURIAM.—In England, I rather think it is the practice to make these orders behind the back of the sureties, but I do not approve of the practice. I always require notice to be given.

RUSSELL v. RUSSELL.—July 4.

Administration bond—Assignment of.

The assignment of an administration bond refused, where it appeared that the two persons sought to be made liable had, for payment, signed the bond as sureties, but on going before the officer, who explained the liability to them, they declined to act, and were rejected by the officer; but afterwards, a third person signed the same bond, and administration had issued.

Beytagh moved for an assignment of an administration bond.

T. Lowry, Q.C., for two persons who had signed the bond.—There was really no delivery here of the bond. These persons, it appeared by affidavit, were paid a couple of pounds each to sign the bond, which they did not understand the effect or nature of, until the officer explained to them the liability they were incurring. Then they declined to act, and in fact they were rejected by the officer, and never heard more of the matter until recently, when they discovered that a third person had been got to act as surety, and had signed the same bond. That was, besides, a material alteration in the bond.

Beytagh, contra.—There was no alteration at all in the bond. There was only an additional surety, which is for the advantage of the two who signed first.

KEATINGE, J.—This bond—the original I have before me—was manifestly prepared for only two sureties. It is dated the 4th August, 1858, when the two signed. The third signed on the 24th August, and his signature and that date are in a different ink. I think a *prima facie* case has been made to satisfy me that I ought not to make the order asked for. These persons were induced to execute this bond as a mere matter of form, as if they were incurring no liability, and then, when it is ex-

plained to them by the officer, they were treated as no longer liable. The addition of the third name to the bond, was evidently to save the stamp on a new bond. I therefore think that this a fair case to excuse these surties. I make no rule on the motion, and give no costs.

No rule.

Court of Bankruptcy & Insolvency.

[Reported by John Levy, Esq., Barrister-at-law]

[BEFORE BERWICK, J.]

RE WILLIAM BOURKE.—June, 1863.

Final examination—Suspension of certificate—Misconduct of trader—Case sent back from Court of Appeal—Amendment of schedule.

Where the examination of a bankrupt is adjourned sine die with a view to prevent him from getting into trade again, and on the ground that there are several patent errors in his schedule calculated to lead to the inference that he has not made a true disclosure, and he appeals from that decision; and upon the hearing of that appeal the fact of the errors in the schedule is not brought before the Court, and they decide the case upon the ground that, notwithstanding his misconduct as a trader, if he fully disclosed everything, the Court below was bound to pass his examination, and the trader entitled to get his certificate at the end of three years, and the case is sent back to the Bankrupt Court—the judge in bankruptcy will allow the schedule to be amended, and pass the examination, but will adjourn the certificate for three years.

Quære, no matter what the fraud and misconduct of a trader may be if he fully and truly states everything, is he entitled to have his examination passed, and to get his certificate at the end of three years?

The facts of this case appear sufficiently in the judgment of Judge Berwick.

J. B. Dillon was for the creditors, in opposition to the bankrupt.

Heron, Q.C. was for the bankrupt, and originally advised the appeal against the ruling of Judge Berwick, who, when the bankrupt came up to have his examination passed, adjourned it *sine die*.

The facts appear in the judgment of his Lordship.

Berwick, J.—In this case an order was made on the 7th of November last, adjourning the final examination of the bankrupt *sine die*, under the 140th section of the Bankruptcy and Insolvency Act of Ireland. The grounds for such order were therein set forth, namely—That it appeared to the Court that the bankrupt had not made a full discovery of his estate and effects, and that there was every reason to question the truth and fulness of the discovery professed to be made by him; and the Court conceived that, under the circumstances of the case, it ought not to certify that, having regard to the conformity of the bankrupt to the law of bankruptcy, and to his conduct as a trader, before as well after his bankruptcy, he was entitled to the certificate

of conformity set forth in the Act. From this order the bankrupt appealed, and the Court of Chancery Appeal having heard the case, discharged the said order, and remitted the case to this Court for reconsideration. From the report of the judgment of the Court of Appeal it would appear that the Court was of opinion that the bankrupt had made substantially a sufficient disclosure of his estate and effects, and that this Court had not, therefore, the right, on the final examination of the bankrupt, to enter into any inquiry with respect to his conduct with a view to adjourning the passing of his examination, but was bound to pass his final examination in case the disclosure made by him of his property and dealings was full and complete, even though that disclosure may have shown a course of misconduct in his trade irreconcilable with every principle of justice or fair dealing. As to that part of the case which relates to the disclosure made by the bankrupt of his estate and effects, I certainly think there has been some great neglect on the part of the assignees in the manner the case was presented to the Court of Appeal on this subject, for, although on the hearing of the case before me, my attention was called by the assignees to various errors and misstatements on the face of the schedule, which rendered it plain that the bankrupt had not made a true discovery of his estate and effects—errors which were so patent that since the case was remitted to me from the Court of Appeal the bankrupt has been obliged to obtain the leave of the Court to amend and correct his schedule in various particulars; yet no notice of these errors appears to have been taken in the answer of the assignees filed in the Court of Appeal, and, therefore, that Court was left under the impression that the discovery made was full and complete. I feel no doubt that if the attention of the Court of Appeal had been directed to the errors apparent on the face of the schedule, the Court would have at least refrained from expressing any opinion as to the truth and fulness of the discovery professed to be made. This, however, was a matter comparatively of trifling importance, and the Court of Appeal seems to have considered, as was no doubt the case, that the serious question involved in the appeal was this, whether, on the final examination of a bankrupt, this Court has any right to take the conduct of the bankrupt as a trader into consideration, with a view to adjourn or postpone the passing of the final examination, and, if I apprehend their judgment aright, they are of opinion that, on the final examination meeting, this Court is confined to the single question whether the discovery made by the bankrupt is full and true, and if it be so, then that the final examination be passed irrespective of any consequences which may result therefrom. Now, I have no report of the argument, and therefore cannot say how the case was presented to the Court, whether their attention was called to the serious results which would follow from their views of the case, but their decision would appear to involve results of serious importance to the interests of trade and commerce in this country, and to show the law to be in so defective a state as to call for and demand correction. By the 143rd section of the Act which regulates the proceedings of this Court, when once the final examination of a

bankrupt is passed it appears to follow as a matter of legal consequence that no matter what may have been the course of trading of the bankrupt, even though it may have been the most reckless, extravagant, and unprincipled, and though he may have involved himself and others in the wildest speculations, bringing ruin on all with whom he has dealt, and though he may have been over and over again before made bankrupt, under the most discreditable circumstances, and with the severest censure of the Court, yet this Court is bound to give him a certificate either at once, or, at the utmost, with a delay of three years, certifying under the hand of the Court that, "having regard to the conformity of the bankrupt to the law of bankruptcy, and to his conduct as a trader, before as well after his bankruptcy, the Court found him entitled to such certificate." This being the necessary consequence of passing the final examination of a bankrupt, it is plain that the only protection against such a result would be to adjourn the passing of the final examination *sine die*; and Judge Lynch and myself were of opinion that as the Legislature had, by the 140th section of that Act, given us the power and full discretion to adjourn the final examination of a bankrupt *sine die*, and had annexed no qualification, restriction, or limitation thereto; and as it was to be presumed that the law never intended to make this Court the instrument of giving a certificate which would operate as a passport to an unprincipled trader, to enable him again to embark in trade with what might be called a clean bill of health, and thus to renew the same course of systematic misconduct in which he had previously been engaged, we were at liberty to use, in a proper case, and, of course, with due caution, the powers given to us, so as to enable us to avoid so mischievous a consequence; and we were the more led to adopt this view because no other provision appeared to be made for such a case, and it could hardly be supposed to have escaped the attention of the Legislature, or to have been left wholly unprovided for. If the judgment of the Court of Appeal be that we are not at liberty to adopt this course, it cannot be too pointedly brought before the attention of those interested in the maintenance of morality and fair dealing among the traders of this country, with a view to the correction of so unsatisfactory a state of law, and placing it on the same footing as the law now stands in England, in which no such anomaly now exists. If it be the law in this country that no amount of delinquency, short at least of a successful prosecution under the statute, will deprive a trader of the right to get his certificate from this Court, and to embark in trade, and that the utmost power of the Court in the most dishonest case is to suspend the granting of the certificate for three years, it ought to be corrected. I certainly should have wished that the Court of Appeal had given its opinion more fully as to what is the proper course to adopt in such a case, and had defined the limits of our powers, and whether there is any course other than that which I had adopted to enable us to avoid the necessity, in cases of gross and repeated misconduct, of granting a certificate so contrary to the true state of the case, and so calculated to encourage dishonesty. But I have now only to consider, under

the present circumstances, what course I am to take in this case. The bankrupt having amended his schedule since the hearing of the appeal, so as to remove all patent errors therein, I will not now act upon any opinion I have hitherto formed on this subject, whatever doubts I may have as to the truth or fulness of his discovery. I am prepared, therefore, to pass his final examination. The ordinary course would be in such case for the assignee to enter his objections to the granting of the certificate, and the bankrupt would be obliged to take out a meeting for the consideration of that question. He has, however, through his counsel, requested of the Court to dispose of the case at once, and make an order adjourning the passing of the case, *pro forma*, for such period as I should, on the certificate meeting, conceive it my duty to adjourn the granting of the certificate, and, the assignees assenting thereto, I have now to consider what should, in my opinion, be the term of suspension of his certificate. The conduct of the trader before his present bankruptcy was this:—He had previously been a bankrupt in 1857, and under circumstances which led Judge M'Cann to declare that "his conduct was deserving of censure and suspension of his certificate for the longest period allowed by the law." His last trading extends over a period of only eight months. He began without capital, and in that short space of time incurred debts to the amount of £1,203 13s. 9d., while the only assets shown for the payment of his debts (irrespective of some goods in the hands of the bankers, Robert Gray and Company, and Messrs Bentley) are good debts, £36 2s. 6d., and bad debts, £10. He appears from the evidence to have obtained goods from, at least, two creditors by false representations. His style of living was such as to give the appearance of having a considerable income, and yet he alleges that the gross profits of his trade were only £26. He pledged goods which he got in the way of his trade almost immediately after he received them, and joined in accommodation bills when he was himself largely embarrassed, and applied some of the money raised by pledging the goods of his creditors towards the discharge of his acceptances. Under these circumstances I was of opinion, when his case was before me on the last occasion, that I ought not to allow him to enter into trading a third time, till at least he had paid off the debts now due by him. The judgment of the Court of Appeal makes it necessary for me to reconsider this decision, and, consistently therewith, I cannot see that I have the power to suspend the passing of the certificate for more than three years. On the best consideration that I can give to the case, I conceive that I am bound to suspend his certificate for the full period permitted by the law, and, therefore, I must make an order (the bankrupt, by his counsel in Court, agreeing to this form of order), adjourning the final examination, *pro forma*, for a period of three years; but as I have been reminded by his counsel that he has already suffered considerably, I shall allow the three years to run from the filing of the petition on the 1st March, 1862. Under this ruling he must verify his schedule at once, and his certificate will be granted on the day to which the final examination is thus formally adjourned.

Court of Appeal in Chancery.

[Reported by Edmund T. Bewley, Esq., Barrister-at-Law.]

SLOAN v. M'CALLIN AND OTHERS.—April, 27, 1863.

Practice—Rehearing before Master of the Rolls—Court of Chancery (Ireland) Regulation Act, 1850—Chancery Appeal Court (Ireland) Act, 1856.

Where a cause has been sent by the Lord Chancellor to the Rolls Court, and has been heard before the Master of the Rolls, semble no practice exists by which it can be reheard by the Master of the Rolls.

THIS was an appeal from an order of the Master of the Rolls made under the following circumstances:—The cause petition in this matter prayed—1. That an account might be taken of the profits of all coals taken by the appellants within two months before the filing of the cause petition out of the lands of Derry and Gortnaskea. 2. For payment by the appellants to George Sloan of what upon taking such account should be found due. 3. For an injunction to restrain the appellant from raising coals from the said pits, and from opening new pits within 300 yards of the pits of George Sloan. 4. For general relief. On the 24th Dec. 1861, an *ex parte* conditional order for an injunction in the terms of the cause petition was granted. Affidavits in answer to the cause petition were subsequently filed; and the matter having come on for hearing before the Master of the Rolls, on the 21st and 22nd of February, 1862, by a decretal order, dated the 27th of May, 1862, it was ordered, that an injunction should issue to restrain the appellants from sinking pits for coal, or raising coals, or opening pits within 300 yards of the pits of George Sloan, or continuing to work the pits already opened within 300 yards of the pits of George Sloan; and that the appellants should pay George Sloan the costs of the suit. On the 21st of June, 1862, George Sloan commenced an action in trover in the Court of Exchequer against the appellants, claiming damages for the coals raised by the appellants, as stated in the cause petition. On the 27th of June, the appellant filed a cause petition against George Sloan to restrain the action in the Court of Exchequer, on the ground that the subject-matter of the said action was the coal, in respect of which an account was prayed and not granted in the cause petition matter. On the 4th of July a motion was made before the Master of the Rolls for an injunction to restrain the action at law; and an order was made that the motion should stand over for the hearing of the last-mentioned injunction suit, the appellants (the petitioners therein) undertaking to set the same down to be heard for the second day of Michaelmas Term, and that the action should be stayed in the meantime. In giving judgment on this injunction motion the Master of the Rolls stated, that he had never decided, nor intended to decide, the question of George Sloan's right to an account in the former cause petition matter; and his Honor suggested that it was open to George Sloan to take such proceedings as he might be advised, to rehear that portion of the first stated cause petition, which sought an account; and that the same might be set down for hearing along with the cross-cause of *M'Callin v.*

Sloan. On the 7th of August 1862, this latter cause was set down to be heard. On the 27th of August the time limited for rehearing by the 19 & 20 Vic. c. 92, expired. George Sloane having proceeded to tax his costs, under the decretal order of the 27th of May, 1862, the same were demanded on the 8th, and paid on the 9th of October, 1862. No proceedings were taken for a rehearing of the first stated cause petition until the 29th of October, 1862, when notice of an application for a rehearing at the Rolls was served; and affidavits having been filed to support and oppose the motion, the same was heard on the 11th of November, 1862, before the Master of the Rolls, who, by an order dated the 16th of January, 1863, ordered that the said cause should be set down to be reheard before him on the list of causes for hearing at the Rolls, for Hilary Term, 1863, and that such rehearing should take place at the same time as the cause of *M'Callin v. Sloan* came on to be heard. From this order an appeal was now brought, founded upon the following reasons:—1. That the Master of the Rolls had no jurisdiction to rehear cause petitions, or cause petition matters. 2. That no practice existed of any such rehearing. 3. That by the 19 & 20 Vic. c. 92, the Master of the Rolls was precluded from rehearing causes heard before him. 4. That such rehearing was contrary to the spirit and policy of this Act. 5. That a suitor in the Court of Chancery could not claim a rehearing. 6. That it would be an anomaly that the transfer of a cause petition into the list of the Master of the Rolls should cause a delay in obtaining a final adjudication. 7. That in the present case there was no account given of the cause of delay. 8. That there were no substantial grounds for rehearing the cause. 9. That the respondents had enforced the performance of the original decree, and were therefore debarred from having it reheard. And lastly, that the action at law had not been discontinued.

Serjeant Sullivan (with him *Warren, Q.C., and Ince*), for the appellants.—The Master of the Rolls has no inherent jurisdiction to hear cause petitions himself. He has only a right to do so as delegated by the Lord Chancellor; and it would be inconsistent that the Master of the Rolls should have a power of rehearing, which the Lord Chancellor does not possess. The Master of the Rolls, indeed, suggested that the right to rehear might more properly belong to him, inasmuch as he is not a member of the Court of Appeal; but when a cause is directed by the Lord Chancellor to be heard before the Master of the Rolls, by virtue of the 13 & 14 Vic. c. 99, s. 10, it is natural that it should be subject to all the incidents which it would have been subject to in the Court of Chancery, and that the tribunal to which it is sent should have no more power than the tribunal which sends it. This rehearing must be either a rehearing under the "Chancery Appeal Court (Ireland) Act, 1856," or under the "Court of Chancery (Ireland) Regulation Act, 1850." By the last mentioned Act the time within which a hearing can be brought is one month, while the former Act provides that rehearings and appeals shall be brought, unless by special leave of the Court, within a period of three months from the date of the decision appealed from. But in the present case the respondent has allowed upwards of three

months to elapse, and has not attempted in any way to account satisfactorily for his delay. The three months expired on the 27th of August, 1862, and no application for a rehearing was made until the 28th of October. Moreover, when the time for bringing an appeal or rehearing, as a matter of course, has elapsed, the Court will not extend the time in the absence of a very strong case, nor unless substantial grounds for the delay are shown. Such is the decision of the Master of the Rolls in the case of *Nason v. Peard* (12 Ir. Ch. 41), where he contrasts the judgment of the Lord Chancellor in *Lysaght v. Lysaght* (5 Ir. Jur. 23) with that of Napier, C., in *In re Reilly* (8 Ir. Ch. 445), and holds that stricter principles of the former is more in accordance with the terms of the statute. Again, the order appealed from contains another manifest inconsistency. It directs that the present cause shall be reheard at the same time that the case of *McCallin v. Sloan* comes on to be heard; whereas it is quite possible that the latter cause may not be sent by the Lord Chancellor to the Master of the Rolls at all.

Brewster, Q.C. (with him *Chatterton, Q.C.*), in support of the order of the Master of the Rolls.—There was a slip in taking down the decrees of the Master of the Rolls; and it was solely in this way that the account was not included in the order. When the injunction was granted, the account should have followed as a matter of course. As to the question whether the Master of the Rolls has a right to hear causes, he has an original jurisdiction independent of any statute. The office and duties of the Master of the Rolls existed long prior to the 41 Geo. 3, c. 25, which was but an Act for the better regulation of that office, the judicial authority of which had for a long time been dormant. With regard to delay, all the expedition possible had been used by the respondent. The motion at the Rolls was heard on the 4th of July. The Master of the Rolls rose that day, and the notice to rehear was served on the 29th of October, which was the first day that a rehearing could have taken place. The lapse of time complained of had thus been satisfactorily accounted for. The Rolls Court is a superior court; and the jurisdiction of a superior court cannot be taken away without express words to that effect—*Byrne v. Byrne* (2 Dr. & War. 71); *The Attorney-General v. The Corporation of Poole* (4 Myl. & Cr. 17). The language of the 7th section of the 19 & 20 Vic. c. 92, is, that "All rehearings of decisions, decrees, or orders made, or to be made, by the Chancellor, shall be heard and determined by the Court of Appeal." But the question of rehearings by the Master of the Rolls is hereby left untouched.

Chatterton, Q.C., on the same side.—In *Nason v. Peard* (*ubi supra*), the same point was decided in reference to the Masters of the Court. It was settled there that the Masters of this Court have a right to rehear causes referred to them under the 15th section of the Chancery Regulation Act; and this is an answer to argument of anomaly put forward on behalf of the appellants. As to the alleged delay, in the first place there was not one day's delay; and in the next place, the Court will not review the decision of the Master of the Rolls on a matter that was merely discretionary. Having acted under a decree is no ob-

jection to its being reheard on the petition of the party having so acted under it—*Brophy v. Holmes* (2 Mol. 1); *Masterman v. Price* (1 Coop. Ch. R. [temp. Cott.] 358); *Phelps v. Prothers* (7 De G. M. & G. 722); *Brown v. Higgs* (8 Ves., 561); *Blackburne v. Jepson* (2 Ves. & Beam. 369).

Warren, Q.C., in reply.—The practice of rehearing causes in the Rolls Court never existed in the old state of the law, nor could it have existed, for as the Master of the Rolls had not a secretary, consequently no petition to rehear could ever be presented. The right of the Master of the Rolls to appoint a secretary was fully discussed in the time of Sir Anthony Hart, in *Ex parte F. Shaw* (Beatty's Rep. 24.) Applying the true principles of construction to the Chancery Regulation Act, 1850, and Chancery Appeal Act, and taking into consideration the existing state of the law, and the mischief to be remedied, it is evident that no rehearing before the Master of the Rolls was contemplated by the Legislature.—*Dobbyn v. Adams* (6 Ir. Ch., 170).

THE LORD CHANCELLOR.—The question about the Master of the Rolls ever having had jurisdiction to rehear causes, is a very difficult one, and one that would require a careful investigation to determine. If the parties wish, we shall have the records of the Court searched, but the nature of the present case would hardly warrant such delay and expense as would be thus necessarily incurred. My present impression, too, is, that if such a search were made, it would be found that no such practice ever existed. The fact that the Master of the Rolls had not a secretary, is a circumstance that would lead to the conclusion that no petition to rehear could have been presented in the Rolls Court. Under these circumstances, it is safer, I think, to discharge the order appealed from.

THE LORD JUSTICE OF APPEAL concurred, but wished it to be understood that he did not mean thereby to decide whether the Master of the Rolls had an original jurisdiction to rehear a cause or not.

Order below reversed.

Court of Queen's Bench.

[Reported by William Woodcock, Esq., Barrister-at-law.]

THE QUEEN AT THE PROSECUTION OF ANDREW COWAN v. JAMES RYND.—May 2, 4, 5.

Mandamus—Compensation—Lands not taken, but injuriously affected—Accommodation works.

The arbitrator appointed by the Board of Works having declined to give compensation to a party whose lands, though not taken, were injuriously affected by the works of a railway company, and having also refused to provide accommodation works, the Court granted a mandamus to him to compel him to entertain the questions.

This was a motion on behalf of Mr. Rynd to discharge a conditional order obtained by Mr. Cowan, that a mandamus should issue directed to John Rynd, Esq.,

the arbitrator duly appointed in that behalf by the Commissioners of Public Works in Ireland, in the matter of the Belfast, Holywood, and Bangor Railway, commanding him, as such arbitrator, to inquire into and adjudicate upon, the value of a certain piece or parcel of land, situate in the parish of Holywood, barony of Castlereagh, and County of Down, of the said Andrew Cowan, required for the purposes of the said railway, and specified in the maps and plans deposited with the Commissioners of Public Works by the said company, and included within the limits of deviation appearing on said map or plans, and the interest of the said Andrew Cowan in said land, and to assess the purchase money to be paid for said land, and also inquire into, and adjudicate upon, and assess the compensation to be paid to the said Andrew Cowan, by reason of any lands of the said Andrew Cowan being injuriously affected by the works of the said company, and to inquire and determine what works should be made and maintained by the said company for the accommodation of the lands of the said Andrew Cowan adjoining the said railway, and duly to make his award in relation to the premises pursuant to the statutes in that behalf. It becomes unnecessary to report the facts relating to the first branch of the mandamus, as the company disclaimed all intention of taking any portion of Mr. Cowan's lands, and that disclaimer was taken down upon the order made by the Court. As to the other points, the affidavit of Mr. Cowan stated that the Holywood and Bangor Railway Company were incorporated by an Act passed in the 23rd and 24th Victoria, entitled the "Belfast, Holywood, and Bangor Railway Act, 1860," by which Act the said company were empowered to make a railway from the Holywood branch of the Belfast and County Down Railway in the County of Down, to Bangor, in the same county; that deponent was then and still is the owner, under a lease for lives renewable for ever, of a piece of ground at Holywood, described in the original lease thereof as bounded by the sea on the north, by the road leading to the shore on the south, by a wall surrounding a disused meeting-house after-mentioned on the east, and by a field called William M'Cormick's field on the west; that by the maps and plans deposited by the company with the Commissioners of Public Works, the centre line of railway intended to be made by the company was shown to extend opposite deponent's said piece of land through Belfast Lough, or the slob-land thereof, and within ten feet of deponent's boundary; that it was also shown on the maps and plans that the said railway was intended to be constructed at this place upon an embankment of the height of twenty-three feet, and breadth of 110 feet, and which was of the height of twenty-five feet at the place where it was represented as passing said piece of land; that shortly after his appointment, the arbitrator published the usual notice in pursuance of the Railways (Ireland) Act, 1851, requiring all persons claiming to have any right to or interest in the lands required for the purpose of the railway, or to have compensation for any lands injuriously affected by the execution of the works of the company, or to have any works made by the company for the accommodation of lands adjoining the railway, to deliver to

him, on or before a day named, a statement in writing of the nature of such claim; that deponent's solicitor furnished such a statement to the arbitrator; that the arbitrator held his first meeting to hear the claims of parties interested in the lands required by the company at Belfast on the 7th July last; that the portion of land of which deponent was owner, was most valuable building ground, as it was situated in close proximity to the town of Holywood in the County of Down, which is a rising marine watering-place situate four miles from Belfast, on the shore of Belfast Lough; that said portion of land, before the railway was projected, and before it was contemplated to form said embankment, and to construct said railway across, and past, and touching same, was one of the most eligible building sites in or near Holywood, and was worth, as building land, at least 5s. per foot, frontage to the sea, having a free access to the sea, on which it abutted with an uninterrupted sea-view, and with most valuable easements appurtenant or connected therewith, inasmuch as deponent and his predecessors in estate were in the habit of bringing coals and lime, or other cargo, and did bring same over the strand up to said portion of land, and had the benefit both of a free and uninterrupted sea-view from said portion of land to and across Belfast Lough, and also of a free access thereto, an egress therefrom, by boats, inasmuch as the sea high tide flowed up to the edge thereof; that deponent's name did not appear on the maps, plans, schedules, or estimates deposited by the company; that his solicitor attended before the arbitrator on the 7th July, prepared to prove the value of the ground, and the injury deponent would sustain in respect of the said portion of land, which would be injuriously affected by the execution of the company's works, as well in respect of the destruction which the said intended embankment would cause to said portion of land by cutting off same, as it would do, from the uninterrupted sea-view it then enjoyed, as also by depriving the said piece of land, and the occupiers thereof, or any one building thereon, from the right of free and uninterrupted access and approach to and from the sea by boats, and other conveyances, and on foot, appurtenant to and enjoyed with said portion of land, and also by completely destroying the said portion of land as building ground, inasmuch as the said intended embankment would fence in and overlook same, and render same almost totally valueless for building purposes, for which alone it was valuable. The affidavit then stated that, at the meeting, the arbitrator referred to the company's engineer, who stated that it was not intended by the company, nor was it necessary to touch on or to take the deponent's small portion of land, whereupon the arbitrator refused to insert deponent's name. The affidavit also stated, as one of the injuries done to deponent, the darkening by the proposed embankment of the ancient and accustomed light, and obstructing the approach of the ancient and accustomed light to the said portion of land. It appeared from another affidavit that the only building upon the said portion of land was the old meeting-house already mentioned, which was altogether out of repair, and was now only used as a store, and was distant about 96 feet from the centre of the line of

railway. The upper windows of this building would overlook the proposed embankment; the view from the lower windows was already shut out by the wall of the meeting-house itself. Another injury which it was suggested would be done by the proposed embankment, was the interference with the now-existing facilities for bathing off the land. The final award of the arbitrator had not been published when the conditional order for the *mandamus* had been obtained, but it had been published before the present motion.

Brewster, Q.C., (with him *Dames*) for the defendant, Mr. Rynd.—With respect to the question whether a *mandamus* should issue to the arbitrator to assess compensation to be paid for lands of the prosecutor injuriously affected by the works of the company, although not taken or touched by the works, Mr. Cowan, in his affidavit, relies on five grounds—first, on the deprivation of light and air; secondly, on the loss of the prospect which his houses would have when built; thirdly, that his premises will be overlooked by the railway; fourthly, that at present he enjoys an opportunity of bathing off the brink of his land, and that in that respect his rights will be affected; 5thly, that his right of access to the shore and the water for purposes of boating and navigation, as for bringing lime and coal to the land, will be interfered with. His claim is made under two general Railway Acts, the 8 and 9 Vict., c. 18, sec. 68, and the 8 and 9 Vict., c. 20, s. 6. To what extent would an action have lain at common law, if there had been no statute? To what extent could Mr. Cowan have claimed against the party making the railway not on his land, in reference to injuries done to his land? 1. As to the deprivation of light, air, and prospect, it is a fixed principle of common law that the only right a man has as annexed to his land in respect of light, is a right to light at the highest level; he has no right to lateral light—in fact, he has no right to light as annexed to land merely as distinguished from light annexed to a house.—*Martin v. Goble* (1 Campb., 322); *Harbidge v. Warwick* (3 Exch., 352); *Roberts v. Macord* (1 M. & Rob., 230); *Attorney-General at the relation of Gray's Inn Society v. Doughty* (2 Ves., 453); *Morris v. Lessees of Lord Berkeley* (2 Ves. Sen., 452); *Fishmongers' Company v. East India Company* (1 Dick., 163); *The Attorney-General v. Nichols* (16 Ves., 338). The law will not regard a diminution of the value of property by reason of a building on adjacent land overlooking land, or intercepting the prospect. If so, it is not matter for compensation under the Act of Parliament.—*Squire v. Campbell* (1 M. & Cr., 459); *In the Matter of W. C. Penny and the South Eastern Railway Company* (7 Kil. & Bl., 660); *Chandler v. Thompson* (3rd Campb., 80). Then with respect to the deprivation of the right of bathing, that is not the subject of an action at all. In reference to compensation under these statutes, that is open to a different objection; it is not a right incident to or connected with the land—the injury is merely a personal one, and no personal injury gives a right to compensation under these statutes. Every subject of the Queen has a right to bathe in that place, although not to go on Mr. Cowan's land for the purpose. With respect to the facilities of access to the sea for the

purpose of boating, bringing lime and coal, and such matters, Mr. Cowan has no more right in the sea than any other of the Queen's subjects, and there being, therefore, no individual right, there is no such individual injury to him as would entitle him to bring an action.—*Hubert v. Groves* (1 Esp., 148); *King v. The Directors of the London Dock Company* (12 East., 429); *The King v. The London Dock Company* (5 Ad. & Ell., 163); *Wilkes v. Hungerford Market* (2 Bingh., N. C., 281); *The Queen v. The Eastern Counties Railway Company* (2 Q. B., 347); *James Glover v. North Staffordshire Railway Co.* (16 P. B., 212); *Caledonian Railway Co. v. Ogilvy* (2 Macq. H. of L., 229); *The New River Company, appellants; Johnson respondent*, (6 Jur., N. S., 374); s. c. (29 L. J., N. S., M. C., 93); *Moore v. Great Southern and Western Railway Co.* (10 Ir. C. L. R., 46); *Tuohey v. Great Southern and Western Railway Co.* (10 Ir. C. L. R., 98); *Chamberlain v. The West End of London and Crystal Palace Railway Company* (2 Best & Smith, 605).

Harrison, Q.C., for the prosecutor.—The 68th section of stat. 8 and 9 Vict., c. 18, and the 6th section of stat. 8 and 9 Vict., c. 20, apply in this case. The lands of the prosecutor, though not taken, are injuriously affected, and he is entitled to compensation. It is not necessary that the lands should be taken. *Chamberlain v. The West End of London and Crystal Palace Railway Co.* (2 Best & Smith, 605) shews that a liberal construction is to be given to the statutes. At first the Courts thought that a party was not entitled to any remedy, although his land was injuriously affected, if it was not taken.—*The London and North Western Railway Co. v. Smith* (1 MacN. & Gord., 216). But this was corrected in *The East and West India Docks and Birmingham Junction Railway Co. v. Gattke* (3 MacN. & Gord., 155); *The London and North Western Railway Co. v. Bradley* (3 MacN. & Gord., 336); *The Caledonian Railway Co. v. Ogilvie* (3 Macq. H. of L., 229). In these cases it is laid down that it is immaterial whether any portion of the land is taken or not. None of the cases cited on the other side are precisely analogous to the present. Then as to the loss of light, air, and prospect, there is a great difference between a man buying a plot of ground with houses about it, where he buys knowing the risk he runs of being built out, and the case of a man buying a strip of ground by the sea-shore, where he cannot expect that his view will ever be interfered with. Although we admit that there is no authority to shew that a party has a right, so far as land is concerned, to have lateral air coming in to him, still this is not a case of a neighbouring owner at all, but the case of a building under an Act of Parliament, and it is for the Court to say whether the Act of Parliament was not intended to include cases of the kind within the words "injuriously affected." In principle, the erection of this embankment has set up a nuisance, and the cases shewing that a man cannot on his own land set up a nuisance to his neighbour will apply here. The existence of the embankment makes the place less healthful.—*Gale on Easements*, 290; *Broadbent v. The Imperial Gas Company* (7 De G. M. & N. & Gord., 436); s. c., on appeal, (7 H. of L., 600). [*Lejroy*,

C. J.—To ground an action for the taking away of light and air, must it not appear that there has been an appropriation of the light and air? it is not sufficient merely to lay a claim by reason of the light and air of heaven having been intercepted.] As to the loss of prospect, it must be admitted that, in an ordinary case, the loss of a view is not a subject of compensation, but the observation made as to the loss of light and air will also apply here. This is a nuisance, legalised to some extent, but which ought to be paid for. With respect to bathing, Mr. Cowan is peculiarly injured as the owner of this land; he alone, and his licensees, could come here to bathe; the public have no general right to come on his land for that purpose.—*Blundell v. Catterall* (5 B. & Ald., 268). In one sense, the right of bathing is only a personal right, but it is a right which can only be exercised by the owner of the land. The bathing is an easement attached to his estate, which no one can exercise without his permission. Then as to the facilities afforded by the sea for bringing lime and coal to the prosecutor's land, the fact of a road being made less convenient, or the access to land being interfered with, has been held to be a fit subject for compensation.—*Moore v. The Great Southern and Western Railway Co.* (ubi supra); *Wilks v. The Hungerford Market Co.* (2 Bing., N. C., 281); *Ross v. Groves* (5 M. & Gr., 613).

DAMES in reply.—The case of *Chamberlain v. The West End of London and Crystal Palace Railway Co.* is opposed to the reasoning in the cases of *The Caledonian Railway Co. v. Ogilvie*, and of *The King v. The London Dock Co.* Section 17 of the statute 8 & 9 Vict., c. 20, sufficiently protects the rights of the public to access to the sea. *Iveson v. Moore* (1 Lord Raym., 486); *Webb v. Bird* (10 C. B., N. S., 268); *Jones v. Tipling* (11 C. B., N. S., 283), are important on the question as to the right to light and air. [Fitzgerald, J.—The last cited case has been questioned in a case which has gone to the House of Lords]. With respect to accommodation works, the prosecutor has lapsed his time; but if the *mandamus* goes for compensation, the arbitrator can provide accommodation works, and we will raise no objection to any traverse.

LENNOR, C. J.—In this case we are all of opinion to grant the order, making absolute the conditional order, that a *mandamus* should issue. It will be accompanied by an order that the parties will draw up to their mutual satisfaction in the way which was suggested originally by the Court, and to which the parties have acceded with respect to the difficulty as to title. We are of opinion to grant the *mandamus*, upon the ground generally that the lands of the party have been injuriously affected. We do not think it necessary to confine this right to cases where their use is taken, but we say that it belongs to a party in virtue of any injury to his own particular lands where those lands have been injuriously affected. Several grounds have been stated here in which the party insists as shewing that his land has been injuriously affected; but we do not think it necessary to decide upon any of those grounds, but rather more proper to leave them generally to be considered more solemnly and particularly, except as to the two instances

in which it appears to us that the party's lands have been injuriously affected in respect to his own particular right of enjoying those lands. Any other grounds will be open to him to insist upon before the arbitrator; and also as to the question of accommodation, what accommodation will be required, will be also open for the arbitrator. I have purposely expressed these views in this short manner; if I have omitted any point that is important my brethren will shew it.

O'BRIEN, J.—I concur in the views expressed by my Lord Chief Justice. I do not decide as to some of those topics which were urged. It will be time enough to raise them if the party be not satisfied with the award of the arbitrator. One important matter is this: It appears that the arbitrator acted under a misconception, namely, that because this gentleman's lands were not taken he was not to get compensation. That is a misconception.

HAYES, J.—I concur; and certainly this discussion will not be without its good effect. It will establish this principle,—that in this country, according to our act, though the lands of an individual be not taken, yet injuries done to them may be investigated, for which compensation may be granted to him. It was a cardinal error below to consider that this was not so; and perhaps our expression of our views will go far to enable the arbitrator to make reparation. Then as to what this compensation should be given for, it appears to me and to the rest of the Court, that so far as this gentleman is affected by the building up of the rampart, excluding him from access to the sea, he is entitled to compensation whether that access is for the purpose of bathing or of navigation. There are two or three other questions as to light, air, and prospect. Well, now, there has been some suggestion in the course of this discussion on principles which have not yet been very well considered, and which it will be better not to discuss at present, leaving them to be settled in the future. It appears to me that in some of the cases as to prospect, it has been laid down that an individual is not entitled to compensation for loss of prospect. I apprehend that the cases go on this, not that where a person has been injured in his most valuable property he is not to be compensated, but upon another principle, namely, that the person who has injured him did it in the lawful exercise of his territorial rights, and therefore it being so done for that reason, the party affected shall not be compensated. But a question arises to be considered, whether that principle can be held to apply in cases of this kind, for here the company has put itself in the position of the Crown, which held the shore along which the embankment runs only as a royal trustee; and it is not competent for the Crown to build a wall round a person's property; and that being so, it may be a question whether the grantees of the Crown could do it, or whether it was not an implied condition attached to that grant, that compensation should be given if such an act was done.

FITZGERALD, J.—I would desire to advert to the extent to which I concur in the decision of the Court. The question as to compensation for land taken is now out of the case, and we leave it to the counsel to settle the order in that respect. The Court allows the *mandamus*, leaving it to Mr. Harrison and Mr. Dames to

settle the precise terms of the order; and the question now is, whether a party is not entitled to compensation if his lands are injuriously affected, although the lands are not taken, and the railway does not touch his lands; and we are all of opinion that the party is entitled to compensation for that injury, and that leads me to the last question,—what is an injuriously affecting of lands. I am willing, for the purpose of this motion, but only for that, to adopt the argument that the test is whether an action would have lain for the injury irrespective of the statute. Adopting that test for the purpose of this motion it appears to me that in respect of the injuries Nos. 4 and 5, that Mr. Brewster stated an action would lie for those injuries, not in respect of the deprivation of a public right, but for the interference with the party's private right to get over his own land to the sea for those lawful purposes which were stated. It appears to me that an action would have lain for those injuries, and therefore that the party would be entitled to compensation for them. There are many injuries in respect of which a party cannot obtain redress; and I offer no opinion as to the questions with respect to the loss of light, air, and prospect; and as to the being overlooked, in fact I offer no opinion save as to Nos. 4 and 5. Then the order being made absolute for the mandamus, and it appearing that the arbitrator below declined to entertain the case on the part of the prosecutor because the lands were not taken, it follows that the mandamus must go to direct the arbitrator to settle the accommodation works as well as to assess compensation, both because the arbitrator declined to give accommodation works on this same ground of the party's land not being taken; and also because those works may go to reduce almost to nothing the damages to which the prosecutor may be entitled.

Order absolute.

Court of Common Pleas.

[Reported by J. Field Johnston, Esq., Barrister-at-Law.]

BENNETT v. SCOTT.—Jan. 22, 23.

Diversion of a water-course—Arbitration—Costs—Common Law Procedure Act, 1853, s. 243—Common Law Procedure Act, 1856, s. 97.

The plaintiff in the first count of his summons and plaint complained that being possessed of a mill, and in virtue of the mill, of a dam, the defendant removed the dam and caused the water of the adjoining stream to flow against the mill. The second count of the same summons and plaint complained that the plaintiff being possessed of a close and water-mill, the water of a certain stream had flowed and ought to flow in a smooth manner into the mill, and from thence in its usual channel; and that the defendant widened, deepened, and enlarged the bed of the river, and kept it widened, and thereby prevented the water from running in its smooth manner into and past the plaintiff's premises, and that

thereby the water flowed in a different direction, and with violence, against the plaintiff's premises; and quantities of it were collected against the wheel of his mill. The defendant pleaded (with other pleas) to the first of these counts that the dam was a wrongful obstruction; and that to allow the water to flow, as of right it ought, past the defendant's lands, he removed it, doing no unnecessary damage. To the second count he pleaded that to allow the water to flow, as of right it ought, past certain lands of the defendant, he removed a certain dam, weeds and stones, and other wrongful obstructions, and thereby necessarily somewhat widened, deepened, and enlarged the bed of the river, but not beyond what had previously been, and still of right ought to be, the width and depth thereof. The cause having been referred by consent, after the jury were sworn, to three arbitrators, to whom no power to certify for costs was reserved; and the arbitrators, several months after the reference, having found for the defendant upon the first, and for the plaintiff upon the second of these defences, with 50s. damages, and the Court having, upon an application by the plaintiff under the 97th section of the Common Law Procedure Act, 1856, determined that they were bound to follow the decision of a court of co-ordinate jurisdiction on the point, and to hold that there had been no trial within the meaning of the 97th s.; and the plaintiff now applying that the taxation of his costs might be reviewed, and full costs allowed to him under the 243rd s. of the Common Law Procedure Act, 1853, Held—(Christian, J., dissentiente) that the two sections in the two Common Law Procedure Acts being in pari materia, the Court was obliged, in consistency with their former decision, to hold that there had been no trial within the meaning of the 103rd General Order made under the 243rd section.

Held also, (Christian, J., dissentiente) that under the above circumstances the 243rd s. must be taken to intend some mode by which the plaintiff's right to full costs should be ascertained.

Held also, (Christian, J., dissentiente) that there was nothing on the record to connect the grievances in the two counts, and therefore that the findings of the arbitrators were not inconsistent; and there being a prima facie case of a right in issue more extensive than the sum sued for, that the case should be remitted to the taxing officer, whose duty it was to decide, in the first instance, whether there was or not.

Held, (per Christian J.) that the award of the arbitrators was tantamount to a trial within the meaning of the 103rd General Order.

That the inability of the judge to give the certificate directed by the General Order, supposing it to exist, is no reason for withdrawing the case from the operation of the order, and that the plaintiff is remediless.

That the 3 & 4 Vic. c. 24, s. 2, is, for the purposes of this question, identical with the 243rd section expanded by the 103rd General Order.

That, supposing the 103rd order out of the way, the grievance complained of in the first count was the same as that complained of in the second count, and that the taxing officer was right in allowing the plaintiff only half costs.

That a judge who concurs in holding obligatory on a court the decision of a court of co ordinate jurisdiction, which he believes to be erroneous, is not committed to the subordinate propositions embodied in such decision.

C. Pales, for the plaintiff in this case, the pleadings and particulars of which will be found reported in 7 Ir. Jur., N. S., 299, applied that the taxing officer might be directed to review his taxation and allow full costs to his client. The Court, in giving judgment on the motion for a certificate, under the 97th section of the Common Law Procedure Act, 1856, had expressly declined to say whether the costs should be half costs or full costs.* This is not an action of trespass as is shown by the sixth issue. Under the 243rd section of the Common Law Procedure Act, 1856, no certificate is necessary, but every case falling within it, and not falling within the 103rd General Order made under it, is properly dealt with on a motion to review taxation—*Rice v. D. & W. Railway Co.* (8 Ir. C. L. Rep. 166). [Monahan, C.J.—In that case we left the question open.] The 243rd section divides cases of costs into two classes, and is exhaustive; one part of it cannot apply if the other does. We are either entitled to full costs or to no costs; and the Court has no discretion to say half or whole, but must ascertain if we fall within a particular class. [Monahan, C.J.—Assuming that that section stood by itself, and that no general order had been made, such as was afterwards made, what do you say would be the consequence?] That the section would deal with the principle and not with the amount of costs. [Monahan, C.J.—Which is abstract phraseology.] The general rule applies only to the cases within it, and leaves the law where it was. A case in which there was no trial falls within the section. The general rules are made under the provisions of the Act and so are part of the Act; but if this 103rd rule were to be understood as will be contended for, it would have the effect of contradicting the intention of the Legislature expressed in the 243rd section. The latter words of the 103rd order show that it contemplates only cases in which there has been a trial. [Monahan, C.J.—If the order applied only to a portion of the cases coming within the section it would seem to follow that there must be some mode in the others of ascertaining if there was a right in issue to property more extensive than the sum sued for.] And then the taxing officer's decision is open in the usual way to the revision of the Court. This case is stronger than *Concannon v. Kelly* (7 Ir. C. L. Rep. 133), which was a motion to refer the costs for taxation, and in which the defendant did not negative the plaintiff's right. Lefroy, C.J., says,—“A question might arise whether, under this loose form of pleading, the defendant would not be entitled to say at the trial, ‘I did not do the act

wrongfully and injuriously; because I had an older title than the plaintiff I was entitled to pen up the stream.’” But in this case we have the counter averment on the defence. [Christian, J.—We made our former order on the ground that a question of right was involved in the case; and that although the parties lived within the barrister's jurisdiction, the plaintiff was entitled to costs.] [Monahan, C.J.—If one brought an action against a party for destroying game on his lands, that would be trespass only; but if the defendant set up a right to destroy the game, then there would be a right in issue more extensive than the sum sued for.]

P. Martin (with him F. MacDonogh, Q. C., for the defendant.—On the former argument the English cases were cited. Christian, J., in assenting that the Court had jurisdiction to entertain the motion, said he did so solely on the authority of *M'Allister v. Callan*. [Christian, J.—I considered there was a clerical error in the report of that case, though I was not satisfied with the decision of the Queen's Bench.] A decision in the defendant's favour on this motion, will not conflict with the previous decision of the Court. That did not conclusively pronounce that any right was in issue between the parties, but that the case was fit to be tried in one of the Superior Courts. The Court determined that, under the 97th section of the Act of 1856, they would give such order as is there specially provided. The statutable jurisdiction there vested is limited. “Trial,” in the 97th section, having been held to mean a trial at which a judge was present to give the certificate required, we are not precluded from saying, that though there has been no trial within the 97th section, there yet has been a trial. The record tests this on the view of it, stating that the jury disagreed, and that in that trial in which they disagreed, we are to pay half costs. Can it then be said this case does not come within the 243rd section? There was a judicial interpretation put upon the 243rd section by the making of the 103rd General order, prior to the passing of the 97th section of the Act of 1856. To hold with the plaintiff, would be to repeal that which the Legislature did not repeal when they passed the latter section. The authority to certify was not taken from the judge who tried the case, nor was there anything to prevent the plaintiff from applying to him.—*Burgess v. The Guardians of The Mitchelstown Union* (4 Ir. C. L. R., 566); 175th General Order. The proper time for ascertaining if there was a right more extensive than the sum sued for was when the plaintiff served his notice in January, 1862. A party is not to be heard in a court of justice, who brings forward one part of his case at one time, and another at another time. What would be thought of a plaintiff who to-day should apply to set aside a portion of a defence, and at a future time apply to set aside another portion? [Monahan, C.J.—The answer to that is, that under the 97th section the Court are required to make the order, and the taxing officer would not be able without that order to proceed, but under this section there is no such jurisdiction given to the Court. They have only to set the taxing officer right. That was the view we took on the former argument; we thought the present question could be raised only on

* See *Bennett v. Scott* (7 Ir. Jur., N. S., 304.)

appeal from the taxing officer, and we thought the same in *Rice v. The D. and W. Railway Co.*] I refer also to *Reid v. Ashby* (13 C. B., 897); *Cooper v. Pegg* (16 C. B., 254); *Perry v. Dunne* (12 L. J., Q. B., N. S., 351). The record is an estoppel on the question of a right.

C. Palles in reply.—[*Monahan, C. J.*—It is contended that we may hold there was a trial under the 243rd section, though we decided there was none for the purposes of the 97th section. *Christian, J.*—Also that the record is conclusive to show there was no right in issue.] It must be admitted that under the 97th section, no trial has taken place, and it must be shown that the word "trial" has a different meaning in the 103rd order from what it bears in the 97th section. *Cooper v. Pegg* and *Reid v. Ashby* would equally be authorities to show that there was a trial here under the 97th section, and the contrary of this the Court has already decided. The words in the 3 & 4 Vic., c. 24, s. 2, upon which these cases were decided, are, "judge or presiding officer." Costs dealt with by the 97th section, are necessarily the subject-matter of the 243rd section. I do not say the sections are co-extensive, but the latter is at least as extensive as the former. It is said the General Order is a judicial interpretation of the 243rd section, but it is not. Even if it were a section in the Act, it contains no words which cut down the effect of the 243rd section. By "case," in the commencement of it, it clearly means such cases as are particularized in the end of it—such cases as admit of the thing directed being done. It deals with a particular class within the section. It makes an exception, and in that particular exception transfers the jurisdiction from the taxing officer to the judge. As to the record being an estoppel, we must look out of the record to find whether there was a right more extensive than the sum sued for. [*Christian, J.*—You must look out of the record to find how valuable was the right, but not to find if there was a right.] There is nothing in the pleadings which identifies the dam mentioned in the second plea to the second count with the dam mentioned in the first count. The second plea to the second count says the rightful flow of the river was what the defendant had reduced it to by what he did. If that plea had been proved, we should have been obliged for ever, as long as the river flowed, to have allowed it to so flow. It does not appear upon the pleadings that the right was not more extensive than the sum sued for.

Cur. adv. vult.

May 30.—*MONAHAN, C.J.*—This case comes on an application by Mr. Bennett, that under the 243rd section of the Common Law Procedure Act, 1853, he be declared entitled to full costs. The circumstances are these:—The action was brought for the diversion of a water-course. The injury consisted in too much water going to the plaintiff's mill. The case came before the Chief Justice, and a jury was called. It was arranged by consent that, instead of trying the case at Nisi Prius, three of the jurors should be selected by lot, and the matter be referred to them, and that the issue-paper should be filled up by the three, or two out of the three. The case was before the ar-

bitrators several months. It was remitted to them, and ultimately the issue-paper was filled up from the findings of the arbitrators. The verdict was for the plaintiff, with £2 10s. assessed as damages. An application was made to the Court. The parties resided within the same civil bill jurisdiction. It was properly argued that the plaintiff was not entitled to any costs at all, unless the case came within the 97th section of the Common Law Procedure Act, 1856. That section enacts that "if, in any action for any wrong brought in the Superior Courts, when the parties reside within the jurisdiction of the Civil Bill Court, the plaintiff shall recover a sum not exceeding five pounds, he shall not be entitled to any costs, unless at the trial the judge shall certify either that the case was one which could not have been tried in the Civil Bill Court, or that it was a fit case to be tried in one of such Superior Courts, or (in case there shall be no trial) unless the Court or a judge shall make an order to the like effect." It was contended for the defendant that we had no jurisdiction to make any order. It was stated that if we took the trouble of reading the record, it would appear that there was a trial and a verdict, and that the case was disposed of by the words of the 97th section. It was not pretended that the judge had certified. It was confessed that we would have had jurisdiction in the case of a demurrer, and other cases. We had to consider if we were estopped by the record, or were at liberty to inquire into the fact of there having been a trial. Several cases were cited on corresponding Acts of Parliament, in which it was held that where the parties, by consent, allowed a verdict to be entered up, there was a trial, and that if, by an oversight, the parties had not applied to the judge to certify, they were denied their costs. The plaintiff referred us to *M'Allister v. Callan* (4 Ir. Jur., N. S., 4). The report was insisted on as inaccurate, because it appeared by it that both parties had agreed to give up the point; but I procured the affidavit myself from the Court of Queen's Bench, and it appeared that there was no difference between that case and the present. The Court of Queen's Bench thought the trial mentioned in the 97th section was a trial at which a judge presided, who could properly give a certificate, and that the case came within the other part of the Act, and that the Court ought to give the certificate which the judge would have given if he had been applied to. The report of *Bennett v. Scott* in the IRISH JURIST is substantially accurate. What I considered, however, was this, that it was a matter of practice in which we were bound to follow the decision of a Court of co-ordinate jurisdiction. My brother Ball and my brother Keogh both acquiesced in my judgment that we had no occasion to consider whether this decision of the Queen's Bench was right or wrong. My brother Christian, on the other hand, expressed his opinion that the order made by the Queen's Bench was not right, but he acquiesced in holding that the case must be followed. His opinion, therefore, is really more of an authority in this particular, because he acquiesced in following the decision, though differing from the decision. The question now to be decided is one of half costs or full costs. The former question arose upon the Act of 1856; this, upon the Act of 1853, and upon its 243rd

section. The words of that section appear to me to be substantially the same as those of the 97th. It enacts that "in case the plaintiff in any action for any wrong or injury shall recover a sum not exceeding five pounds, he shall be entitled to no more than one half of the ordinary costs, unless the action has been brought for the purpose of trying a right to property more extensive than the sum sued for." Here we have a general provision; no more than half costs shall be awarded in actions of a certain description. But the section is silent as to how to determine if the matter in dispute be more extensive than the sum sued for. If that Act had rested there, and the mode had not been fixed by a general rule, it would have been for the taxing officer to decide as he does any other matter of fact. The defendant is not estopped by the residence alleged in the summons and plaint, or there may be two residences, and then there is an appeal. The judges made the 103rd General Rule under the Act, and it is substantially a portion of the Act of Parliament. This rule is as follows: "In cases falling within the 243rd section of the Common Law Procedure Amendment Act, 1853, the judge shall, upon the application of the plaintiff, determine whether the plaintiff is entitled to full costs; such application to be made at the conclusion of the trial, or during the sittings or assizes, and the order of the judge shall be endorsed on the record." It is plain that "judge" here does not mean judge of the Court. Suppose a case arose where there was no trial. Suppose a demurrer. Suppose an action brought to recover a toll, and that there be no trial but a demurrer taken, and the Court be of opinion that there is no exemption, and give judgment for sixpence, and that the party go to the Court of Error, or to the House of Lords, is the plaintiff to get his costs? I entertain no doubt but that in such a case he should get his costs, and that the judge would have no right to deprive him of them. I do not doubt, nor does any member of the Court doubt, that in a clear case like that, the Court would have a right to award full costs instead of half. The question remains—Has there been a trial here? The majority of the Court are of opinion that where there is no trial at all there must be a mode for the party to get his costs. The majority are also of opinion that we must hold there has been no trial here, unless we stultify what we laid down a twelvemonth ago. These acts are *in pari materia*. The rule is a provision of one of these Acts. Having already decided that we had jurisdiction to inquire if there had been a trial, we think that according to the rule if there was no "conclusion" of the trial at the "sittings or assizes," there was no "trial" within the meaning of the rule. If we are not estopped by the record from inquiring when the trial took place, when, I ask, could the plaintiff have applied for the certificate? It was impossible, till it was known upon what issues the plaintiff recovered and on what he did not. There was no opportunity then to apply. The assizes had passed months before. But it is said that where the order is to be made at the sittings or assizes, there is no power to make an order after the assizes or sittings are over. Unless we overrule the decision of the Queen's Bench, and what we have already done ourselves, we must

hold this to be within the same words, the same principle, and the same mischief—must hold that we have jurisdiction to make an order for full costs, if we think the case comes within the 243rd section. We are obliged to look to the pleadings to see if, irrespectively of law, it does come in point of fact within that section. There are, I may say, two counts. There are four, but two of them are abandoned. We shall deal with the case as if there were only two. The first count complains that the plaintiff was possessed of a certain mill and premises, with the appurtenances, near unto a certain stream of water running near the said mill and premises, and by the side and bank of which said stream there was, and of right ought to have been, and still of right ought to be, a certain dam or barrier for the purpose of preventing the water of the said stream from running to the said mill; that the defendant, well knowing the premises, but contriving to injure and aggrieve the plaintiff, cut open, destroyed, and removed the said dam or barrier, and thereby and otherwise caused divers large quantities of the water in the said stream to flow to the said mill, and caused and procured quantities of the water of the said stream to be penned and forced back against the wheel of the plaintiff's mill. The plaintiff claims to be entitled to the mill, and, therefore to a dam or barrier. This is the only right. The second count is, in my judgment, a totally different one. The first alleges a right to a dam; it says nothing of the course of the stream. The second count alleges that the plaintiff was possessed of a certain close, and of a water-mill, with the appurtenances, in which mill he had used, and still of right ought to use, the trade of a miller; that the water of a certain stream, from time immemorial, had flowed, and still of right ought to flow in its usual or regular course, or its usual calm, moderate, and smooth manner, into the mill of the plaintiff, and from thence in its usual channel; that the defendant wrongfully widened, deepened and enlarged the bed or channel of said river, and kept and continued the same widened, deepened, and enlarged, and thereby unlawfully prevented the water of the said stream from running and flowing along in its usual and regular course, and in its usual calm, moderate, and smooth manner, into and past the lands of the plaintiff, and that thereby the water flowed in a different direction, and with increased violence against the premises of the plaintiff, and that divers quantities of the water were penned and forced back, and collected in great quantities against the wheel of the plaintiff's mill. It appears to me on reading these two counts, that there is no connection between them. The first count says, "I have a right to a dam; you have taken away my dam." This is not necessarily widening the stream. The stream might remain of the same width. I do not know at this moment that the two grievances in the two counts have anything to do with each other. The one complains of lowering the dam, the other of widening the river. The defendant has pleaded to the first that the plaintiff had no right to the dam, and that the dam was an incumbrance. It is true he says he did no unnecessary damage, but he says nothing, as the count says nothing, of the widening of the stream. There is also an allegation in the first count of a large quantity of water being

sent to the mill. The issue upon the first count respecting the dam, has been found for the defendant by the jury, who say that the plaintiff had no such right to the dam. How they came to that conclusion, I know not—on what grounds, whether that the dam in its existing state was not the plaintiff's right. But I take it to have been rightly found. The first defence* to the second count states that the defendant did not widen, deepen, and enlarge, as alleged, and the jury have found that he did widen, deepen, and enlarge, and has kept the bed of the river so ever since. The second defence to the second count is that, for his lawful purposes, the defendant, to prevent the penning up of the water, and to allow it to flow, as of right it ought to do, by his lands, cut open and removed a certain dam, weeds, and stones, and other obstructions, and thereby necessarily widened, &c., the bed of the river, but not beyond what had previously been, and still of right ought to be, the width and depth thereof. It is very probable that the dam is the same dam, and if we were at liberty to go into all the facts, we might find that the defendant had a right to remove it, it being the same dam. "I removed the dam, I admit; I deepened, widened, and enlarged the bed of the river, I admit, but not beyond what it had previously been, and still of right ought to be." That is a most excellent defence, provided it be true; but one essential part of it is this, "I did not widen, deepen, or enlarge, a particle more than I had a right to do, in order to restore the bed of the river to its original condition." Then the jury have found that that plea is not true in substance and fact. They say you did deepen and widen more than you ought, and find 50s. damages against you. Are we at liberty to inquire if their finding is inconsistent with the finding on the second defence to the first count? I, for one, do not see any inconsistency between the two findings. I take no judicial notice of the fact that eminent counsel assisted upon these issues. It may be perfectly true that the dam had no right to be where it was, and also that the defendant did no unnecessary damage in taking it away; but we are of opinion that, upon the second count, there is a *prima facie* case of a right in issue more extensive than the sum sued for. We think the jury have decided that the defendant had not a right to keep the river in its altered state, but in its ancient state. If the right to keep this river in the state it originally was in be more extensive than the sum sued for, the taxing officer will so determine; and if he be of this opinion, he will allow the plaintiff full costs.

CHRISTIAN, J.—I am of opinion that the costs have been properly taxed in this case. The case has been fully stated, and the points involved in it, and I will, therefore, only give my reasons. I will first consider it exclusive of *M'Allister v. Callan*, and our own decision on the former occasion, and I will then consider how far I am trammelled by these decisions. I do not think that the 103rd order narrows the terms of the 243rd section, and so far the plaintiff is right. I think that demurrer and other cases are left as they were before, and in this I concur with the

Chief Justice. But in the one case to which this order does apply—where the damages have been recovered by a verdict in a trial, neither the taxing officer nor anyone else has a right to interfere with this order, which I consider the same as part of the section passed by the Legislature. Let us place ourselves in the position of the taxing master. The present motion differs from one under the 97th section of the Act of 1856. There we have an original jurisdiction. Here we have only to determine if the officer was right. He takes up the record, finds the plaintiff has recovered only 50s., sees that *prima facie* the case is one for half costs. "I am about," says the plaintiff, "to show that the case is one for full costs." Says the taxing officer, "I must know how this 50s. was recovered." He reads upon the record, "Before the Chief Justice, &c., and the jury also come, who being duly, &c., and they assess the plaintiff's damages, &c. (Signed) Thomas Lefroy." "True," says the plaintiff, "but I will show you by extrinsic evidence that this was not so; in fact there was no trial before a judge so as to bring the case within the 103rd General Order." I doubt if the officer ought to receive that foreign evidence against the record. But I do not rest upon that. Suppose he did receive it, and had the facts as they occurred. The jury were sworn; they were not merely called—they were sworn, and had viewed the premises. A consent was entered into. Long subsequently the three jurors gave in their findings, which were treated as an award by the plaintiff, who moved the Court to enter a judgment, but the Court refused to do this, and did as if the twelve jurors had found the issues on an ordinary *postea*. These facts, I am clearly of opinion, do show that it is to be taken to all intents and purposes as if the case had been tried before the judge. I am not aware of any right the Court possesses capriciously to set aside the solemn consent the parties enter into. It is bound to follow it, whatever the consequences be. The case is, therefore, within the class for which the 103rd order was made. It is said the judge could not have given the certificate. I will give no opinion as to whether he could or not, but assuming that he could not, I demur altogether to the conclusion of the plaintiff, that, therefore, the case is out of the General Order. The case being within the General Order, the plaintiff, by his own act, has debarred himself from the advantage. He should have refused to consent to the reference, or made terms about this at the time. Otherwise he is as if the case was tried before the judge, i.e., he is within the General Order. He cannot be listened to in averring what is contradicted by the record. The English authorities are doubly important, first, as showing that what took place here was a trial; secondly, as showing that the inability of the judge to give the certificate does not take the case out, but leaves the plaintiff remediless. The Act on which these decisions were made, differs, no doubt, from ours, but it is impossible to make any distinction between the 243rd section of the Act of 1853, expounded by the General Order, and the section in Lord Denman's Act. That section (the second of the 3 & 4 Vict., c. 24,) enacts, "that if the plaintiff, in any action of trespass, or of trespass on the case, shall recover, by the verdict of a jury, less damages than

* See the pleadings in *Bennett v. Scott* (7 Ir. Jur., N. S., 299), where the first and second defences to the second count are described respectively as the fifth and sixth defences.

forty shillings, such plaintiff shall not be entitled to recover or obtain from the defendant in respect of such verdict any costs whatever." There is the general enactment; then comes the saving and the certificate the plaintiff is to get (far better expressed in that Act than in ours), "unless the judge or presiding officer before whom such verdict shall be obtained, shall immediately afterwards certify on the back of the record, or on the writ of trial or writ of inquiry, that the action was really brought to try a right besides the mere right to recover damages for the trespass or grievance for which the action shall have been brought." Here the English Act is analogous to ours, and not as on the former motion. *Reid v. Ashby* (13 C. B., 897,) was an action for injury to the plaintiff's party-wall. At the trial a verdict was taken for the plaintiff subject to an award, but no power was reserved to the arbitrator to certify for costs. He directed a verdict to be entered for the plaintiff, with damages 20s., and the taxing master having refused to allow the plaintiff any costs, an application was made precisely similar to the present. The taxing master was held to be right. There, as here, it was contended that the damages were recovered by award, and not by the verdict of the jury. *Jervis, C. J.*, says, "The plaintiff here has recovered by that which is by the consent of the parties substituted for the verdict of a jury, viz., the award of the arbitrator, less than 40s." No one there contended for what is urged here, to wit, that we are bound to carry out the Act of Parliament, since this case was withdrawn from the judge too soon to grant the certificate. In England they hold a case to be within the general rule, unless it be within the saving, and that the way to bring it within the saving is pointed out, and that if that be not followed, the party must go without the certificate, and so go without his costs. The Court have no more right to supply the want of the certificate than the judge has if the party omits to ask for it at the trial. In *Cooper v. Pegg* (16 C. P., 264,) the plaintiff claimed to be entitled to his costs, because the sum was recovered by the award of an arbitrator. *Jervis, C. J.*, held that the defendant was entitled to have the *postea* made up according to the finding. *Williams, J.*, says, "The arbitrator having directed a verdict to be entered for the plaintiff with one farthing damages, it is the same as if it had been so originally found by the jury;" and *Crowder, J.*, says, "Where a cause is referred, and a verdict taken in this way, the act of the arbitrator in dealing with the verdict is the act of the jury." These are two precise authorities upon a precisely similar Act of Parliament, and precisely similar applications to show that the award of an arbitrator taking the case from the judge is tantamount to a trial. *Asley v. Joy* (9 A. & E., 702,) was decided before Lord Denman's Act. The rule which deprived the plaintiff of full costs contained this saving, "Provided that in case of trial before a judge of one of the Superior Courts, or judge of assize, if the judge shall certify on the *postea* that the cause was proper to be tried before him, and not before a sheriff or judge of an inferior court, the costs shall be taxed upon the usual scale." The case was referred to an arbitrator, who certified for a sum below £20, but also certified that the cause was a proper one to

be tried by a judge. The plaintiff thought the power to certify upon this last point was not delegated to the arbitrator, and that his certificate was of no value, and to make it good he did what, perhaps, the plaintiff here might have done. After getting the arbitrator to certify, he went to the judge, and endeavoured to get him to certify. The judge was ill, and ultimately died, and was never able to give the certificate, but otherwise it seems he probably would. The plaintiff moved the Court to direct a certificate to be entered on the *postea*. Lord Denman interrupts and asks, "Did the order of reference here give the arbitrator power to certify?" and another judge pronounces, "We have nothing to proceed upon here but the arbitrator's opinion." These are all clear authorities upon the two questions which arise upon this motion—1. Whether the parties can be let out of their agreement that the arbitration should be to all intents a trial before a judge and jury. 2. Whether, because a judge is unable to give the certificate, the Court or the Master has any jurisdiction to allow more than half costs. Thus far, on reason and authority, if nothing else had occurred here. But it is argued we have already made an order. The plaintiff did not choose to rest on an estoppel, but went into the merits. I admit I would not make an order contradictory to a former one, if I so thought it. This is an appeal from the taxing officer. The 97th section gives two modes of obtaining the certificate; the 243rd gives only one. The difficulty is much greater under the Act of 1856 than under the Act of 1853. The certificate under the 103rd order is what the judge might determine to give upon view of the record, and from his knowledge of the case. It does not follow that because I erred in an order before so different from this, I am bound to adopt the subordinate propositions embodied in a decision I concurred in while I considered it erroneous. I deny that I am bound to make two mistakes. Consistency in error is a poor style of consistency. The acts are different; the modes pointed out are different. The Irish precedent is wretchedly reported; the English authorities are clear—they are all in favour of the result the taxing master has arrived at. There is the view expressed by the Chief Justice, which takes us clear from any conflict. Suppose the 103rd General Order had never been made, the taxing officer should be required to hold the case within the saving of the section, and therefore within the general enactment. Is the case within the saving? What does it mean? The words "sum sued for" plainly mean "sum recovered." The "sum recovered" must be in connection with the right. What if he cannot plainly connect the sum with the damage to the right? Can he do so upon this record? We might examine it with considerable care. It is perfectly impossible to connect these damages with the right. Fairly speaking, there are only two counts in the summons and plaint. As I read these two counts, the injury complained of is the same. The second differs from the first only in being more general, as is the custom of pleaders. The first defence to the first count is, that "there was not of right, nor of right ought there to have been, nor of right ought there to be, the said dam or barrier." The first issue is in the terms of this defence. The

second defence to the first count is, that the defendant "was, during all the time in said plaint mentioned, and still is, seised in his demesne as of fee of and in certain closes of land on the bank of and down the opposite side of said stream, from plaintiff's said premises, and next adjoining to the said stream in the plaint mentioned, and also entitled to one of the banks, to wit, the left bank, and half the bed of said stream, and that the said dam or barrier in the plaint mentioned had been wrongfully erected and made, and was at said time standing and being in and across the said stream, and pent up the water of said stream, and hindered the said stream from running and flowing in its usual and regular course, and with its usual body and volume of water, and in a manner as of right it ought to have done, and still ought to do, from and by the said lands of the defendant. Wherefore, the defendant, in order to prevent the penning up and obstructing of the water of the said stream, and to allow it to run and flow in its usual and regular course, and with its usual body and volume of water, and in manner as of right it ought to do, from and past the said lands of the defendant, without any intention of injuring the said plaintiff did cut open, destroy, and remove, that portion of said dam or barrier, which was so placed, and rested upon the bank and bed of the stream to which defendant was so entitled, doing no unnecessary damage thereby." The only question here is the right to remove the dam. It is first complained that the dam had no right to be there—that it caused the water to flow as it ought not. It is then stated that the effect of the defendant's removal of the dam was to restore the water to the course it ought to flow in, and that the defendant did no unnecessary damage thereby. This exhausts and covers the whole question between the parties, and if the defendant succeeds in this, he succeeds on the whole. The arbitrators have found these propositions all in his favor. The fourth defence to the first count is, that the defendant did not cause or procure large or any quantities of water in the said stream to flow to the said mill, and the issue upon that defence is properly found for the plaintiff because, no doubt, the defendant did cause water to flow against the mill. The issue on the first defence to the second count is properly found for the plaintiff because the defence is a traverse. The second defence to the second count is simply a repetition of the averments in the second defence to the first count, varied only by some alterations in the language to meet the second count instead of the first. It states "that for his lawful purposes, and without any intention of injuring the plaintiff, in order to prevent the penning up of the water of the said river, and to allow of same running and flowing in its usual and regular course, and with its usual body and volume of water, and in manner as of right it ought to have done, and still of right ought to do, from and by certain adjoining lands of the defendant, he cut open and removed a certain dam, weeds, and stones, and other obstructions, which had been wrongfully placed in and across said river, and a portion of which were placed and erected upon the said lands of the defendant, and thereby necessarily somewhat widened, deepened, and enlarged the bed or channel of said river beyond the width and

depth of said river, at the time in said second count mentioned, but not beyond what had previously been, and still of right ought to be, the width and depth thereof, as he lawfully might." That he did not alter beyond what had previously been the width and depth of the river is the same averment as that in the former plea that he did no unnecessary damage. What have the arbitrators done? Found that this defence to the second count is not true. One of the three (one is not surprised to find it so) differed from the other two. I think the findings on these pleas are capriciously contradictory. If we prefer words to things, they may not be so, but if otherwise, the findings on the first count carry with them *ex necessitate* the new words inserted into the second count. "In manner as of right it ought to do"—in other words, the defendant says he did not in any respect whatever alter the previous channel of the river from what of right it should be, were it not for the unlawful obstruction of the dam. In the name of all that is natural, how can the findings on this record upon the second defence to the first count, and the second defence to the second count, be reconciled? As to saying they are not conversant with the same subject matter, it is too plain they are. The one juror who concurred in giving damages on the first count, could not have intended to give those damages for a right which he would not recognise upon the second count. The right is not found upon the record at all. There is no case for the saving to operate upon. There is no occasion to send the parties, at considerable expense, further to pursue this question. I regret the course the case has taken. I regret that the decision of the taxing officer should be disturbed. I think he did what he ought to carry out the Act. Take this case as you will, look at it as you may, the existence of the dam is the material question here. The right to that dam has been negatived. From first to last the plaintiff has been wrong; but by some mystification which I cannot comprehend, he has got fifty shillings.

The other members of the Court concurred in the judgment of Monahan, C. J.

Rule accordingly. Each party to abide his own costs.

BAILEY v. MARQUIS OF CONYNGBAM.—Jan 26, 27; April 30.

Landlord and Tenant Law Amendment Act, 1860, ss. 3 & 4—Incorporeal tenement.

The Marquis of Conyngham, by his agent, by parol, agreed to let to the plaintiff a fishery for a year at a rent of £150. Held (Christian, J., dissentiente) that, though an incorporeal tenement, the interest passed to the plaintiff under the 3rd & 4th sections of the Landlord and Tenant Law Amendment Act, 1860, so as to enable him to sue for the disturbance.

Held also (Christian, J., dissentiente) that the 3rd section of that statute impliedly repealed the 2nd section of the Statute of Frauds, 7 Wil. III. c. 12.

And per Christian, J., that the 2nd section of the Statute of Frauds is not repealed by the 3rd section of the Landlord and Tenant Law Amendment Act, 1860.

And that that section being in full force, the 3rd section of the new Act was, in any event, inapplicable, since this latter requires an agreement between the parties to constitute the relation of landlord and tenant; which agreement, by the 2nd section of the Statute of Frauds, must be in writing.

And that the 4th section was, by its very terms, inapplicable.

And that the effect of the 3rd section of the Landlord and Tenant Law Amendment Act is simply this: that wherever there is a transaction which, but for certain technicalities, would have created the relation of landlord and tenant, that relation shall be deemed to have been created.

And that there is nothing in the law of England which can be called codification.

F. Macdonogh, Q.C. (with him J. T. Ball, Q.C.), showed cause against making absolute a conditional order for turning the verdict had in this case for the plaintiff into a verdict for the defendant. The first count of the summons and plaint complained that the defendant had let to the plaintiff the Glenties shootings, and the fishery for one year; and that he interrupted and hindered the plaintiff from the enjoyment of it before the expiration of the year. The contract was stated in four different ways. The plaintiff had seen an advertisement from the Marquis of Conyngham through a Mr. Russell, and he communicated with the latter, who replied to him, "You have herewith particulars of the Glenties shootings and the fishery, to be let on lease for three or five years, at £150 a year. The services of the housemaid go along with the shooting. I cannot say I have power to let on lease for twenty-one years, but if let again after the five years are expired, you will have the first offer." They subsequently agreed for a period of three years. While the grant was being prepared the plaintiff and his sons went out and found that the sport was very indifferent; and it was then agreed that the tenancy should be for one year, beginning with the 12th August, at a rent of £150 per annum. £75 was paid. The jury found that it was a tenancy for a year. The Marquis of Conyngham had brought a cross-action for £75. [Monahan, C.J.—The jury, considering you had virtually succeeded on the cross-action, found for you in this, but with one shilling damages.] We showed there was a contract for a fishery; that there was a tenancy; that an action for use and occupation would lie; that ejectment would lie. But the judge thought the Landlord and Tenant Law Amendment Act, 23 & 24 Vic. c. 154, was relevant, and reserved liberty to turn the verdict into a verdict for the defendant in case it should appear that an instrument under seal was necessary. The 4th section enacts that "every lease or contract with respect to lands whereby the relation of landlord and tenant is intended to be created for any freehold

*estate or interest, or for any definite period of time not being from year to year or any lesser period, shall be by deed executed, or note in writing signed by the landlord or his agent thereunto lawfully authorized in writing." If that stood by itself it would relate to corporeal hereditaments only, but the glossary shows that this section will include incorporeal hereditaments. "The word 'lands' shall include houses, messuages, and tenements of every tenure, whether corporeal or incorporeal." This section therefore exempts from the necessity of being under seal contracts relating to incorporeal hereditaments for a certain period. Wherever a freehold interest or interest beyond a tenancy from year to year is given, a deed or note in writing is necessary, but where a tenancy from year to year no writing is necessary. Similarly the word "land" in the glossary of the Statute of Limitations, 3 & 4 Wil. IV. c. 27, is made to include certain incorporeal hereditaments. A corporation cannot in general contract but under seal, yet there are a number of contracts which they can enter into without seal—*Finlay v. Bristol and Exeter Railway Co.* (7 Exchequer Rep. 416). [Christian, J.—I doubt very much if the word "lands" in that section includes incorporeal hereditaments; but even if it does the section is conversant with interests higher than tenancies from year to year. The words in the glossary are "unless there be something in the subject or context repugnant thereto." The object of the 4th section is to impose the necessity of a writing in certain cases where parol contracts would previously have sufficed. It provides they shall be by deed executed or note in writing. But your argument is that the object of the section is to take away from the solemnity of the transaction instead of adding to it.] The object of the statute is to consolidate and amend the law of landlord and tenant—see Darris on Statutes, 2nd ed. pp. 552 & 567, as to construing Acts of Parliament like this. If tenancies from year to year, or for any lesser period, be not included in this section it will follow that a fishery might be let for ninety-nine years by note in writing, but not for two days without a deed. [Christian, J.—A strong reason for confining the word "lands" to its original meaning is this,—that otherwise it will follow that a lease for lives renewable for ever might be made of an incorporeal hereditament by a note in writing.] A fishery is a tenement. Trespass will lie for an injury to it. It may be recovered in ejectment—*The King v. Old Alresford* (1 T. R. 361); *Adams on Ejectment*, 18. Use and occupation will lie for a fishery—2 Chitty on Pleading, 7th ed. 39. In *Doe dem Pennington v. Taniere* (12 Q. B. 1013), the corporation were not allowed to rely on the point that they could not contract except under seal. [Monahan, C.J.—The pleading was upon a demise, not upon an executory contract.] *Jones v. Reynolds* (4 A. & E. 805); *Taylor on Evidence*, a. 899.*

Serjeant Armstrong (with him James P. Hamilton) contra.—The only serious question is the alleged effect of the Landlord and Tenant Law Amendment Act. The 4th section of that Act contrasted with the 1st section of the Statute of Frauds, 7 Wil. III., c. 12, makes the substitution of one year for three. In nothing else is any change made; whereas leases for three years are excepted in the old statute, one

year is made the limit in this. "Tenements" and "hereditaments" do not occur in the 4th section of the new Act; they do in the 1st section of the old Act, the Statute of Frauds. "Tenement" is a large word and will include everything that can be holden, whether corporeal or incorporeal. Did it ever occur to anyone that the effect of the Statute of Frauds was to alter the old common law?—*Duke of Somerset v. Fogwell* (5 B. & C. 875); *Bird v. Higginson* (2 A. & E. 696). This 4th section simply repeats the 1st section of that statute, only shortening the term. [Christian, J.—Was it ever suggested that under the old statute an incorporeal tenement could have been granted without deed?] Never. [Monahan, C.J.—Suppose the words "incorporeal tenement" were in terms in the 4th section instead of being only included in the word "lands," by the glossary?] The words are to be taken distributively. [Christian, J.—I do not think the word "lands" means incorporeal hereditaments in the 4th section for the words in the beginning of the glossary are "unless there be something in the subject or context repugnant."] That was a wise rule of the old common law, that an incorporeal tenement could not be granted without a solemn instrument, for without such an instrument the evidence of many of these rights, which are not used for a long time, would be lost. The cases have all arisen where there was possession under some informal instrument, but no one ever dreamed of filing a bill in Chancery to compel specific performance of a parol agreement to let an incorporeal tenement. The object of the Landlord and Tenant Law Amendment Act, instead of relaxing, was to make more stringent the principles of the common law. [Monahan, C.J.—To say that begs the whole question. Christian, J.—There is a subject-matter here which by the common law required a deed, and therefore the context is repugnant.] On the construction of statutes I refer to the judgment in *Arthur v. Bekenham* (11 Mod. 161), cited in Dwarria on Statutes, 568. Express words only can repeal a principle of the common law. [Christian, J.—The 3rd section does include incorporeal tenements; but that section means to dispense with the necessity of actual demise. It seems to me we are involving ourselves in unnecessarily nice considerations if we travel out of the grammatical construction of the 4th section, which, as it were in terms, says it has nothing to do with anything but freehold corporeal hereditaments and leases for years.]—*Wood v. Leadbitter* (13 M. & W. 838); *Holford v. Pritchard* (3 Exch. Rep. 793).

J. T. Ball, Q.C., in reply.—The new statute made this transaction equivalent to a lease for a year of the right to fish and shoot. I will first consider the principles in construing statutes. This is not the case of a statute passed to repeal another; it is a statute of a new code. It commences by saying it is expedient to consolidate and amend the laws relating to landlord and tenant. The whole law must then be taken to be contained within it. If this were not held upon the criminal Acts what confusion would follow? The expression "consolidate" in this method of legislating by codes is new; it was not to be found formerly. [Christian, J.—These statutes were passed to consolidate, but not to supersede, the common law

but to operate along with the common law.] The opposite doctrine was held in the *Bishop of Limerick's case*. The Criminal Act includes the whole of the criminal law as far as it is yet published. In *Heydon's case* (3 Coke, 7) it is laid down, that for the interpretation of statutes four things are to be considered. 1. What was the common law? 2. What was the mischief and defect? 3. What was the remedy? 4. What was the reason of the remedy? This rule is applicable to the present day. The grammatical construction is to govern unless at variance with the intention to be collected from the statute, or unless it leads to absurdity; and it is not to be further modified than so as to avoid such inconvenience.—*Warburton d. Loveland v. Ivis* (1 H. & B. 648); adopted by Parke, B., in *Berke v. Smith* (2 M. & W. 196); Bacon's Abridgm. tit. Statute, p. 459. There are sweeping alterations made in this Act without even a recital, as, for instance, in reference to the law of apportionments. The 1st section of the Statute of Frauds is, on the face of it, inapplicable to incorporeal tenements. The words excluded them because they were not capable of being granted by livery of seisin. Again, there was a mischief in the old law; the old law was preposterous, as appeared in *Wood v. Leadbitter* (13 M. & W. 838); Year Book, 11 Henry VII. Why should there be any anxiety to uphold the policy of requiring a deed where the period is a short one? The 3rd section of the new statute meant to create the relation of landlord and tenant in respect of incorporeal tenements. It says that "a reversion shall not be necessary to such relation." In two instances the ecclesiastical code has been extended simply by the construction of the statute. So in one of Mr. Napier's ecclesiastical statutes perpetual curate was held to mean incumbent. The old ideas of feuds are intended to be abolished. "Tenement" is the largest word, and will include a right of fishing, shooting, &c.—Coke Littleton, 19b. The statute has operated in two ways. 1. By altering the law of landlord and tenant, by declaring that the relation shall not depend upon tenure. 2. By making a new subject-matter of the law of landlord and tenant. If only the 3rd section existed, then the relation of landlord and tenant was created between the Marquis of Conyngham and the plaintiff by this transaction. There was a legal letting, for by the common law an agreement did not want writing. Therefore under this 3rd sec. (if it had stood alone) an incorporeal tenement might have been let for lives renewable for ever by parol; and the limitation which prevents this is to be found in the 4th section, which declares that bad in the great but good in the small. The object was to bring everything exercisable within the land within the same rules as the land itself. Assuming that the right to shoot might be conveyed by writing, then if it be given for a year for £100, and the owner be willing to give the enjoyment, and the other party does not go on and enjoy, he may sue for the £100, not upon the enjoyment but upon the contract; upon the relation of landlord and tenant, which is created by this Act; and *per contra*, it enables the other party to sue for the breach. It is not true that the case is wholly denuded of a written document. [Monahan, C.J.—If that be your contract your lease

is expressed.] The contract is not the writing; the writing is evidence of the contract.

The Court desired to hear *Serjeant Armstrong* upon the point made with reference to the 3rd section.

Serjeant Armstrong.—The plaintiff's counsel has confounded tenure with the evidences of tenure. The 4th section is inserted, because the 1st section of the Statute of Frauds is repealed; and were it not for it we should be remitted to the common law. The 4th section is no exception out of the 3rd section. "Agreement" in the 3rd section means a legal agreement. The books are full of authorities, telling us that fundamental principles of the common law are not to be repealed by implication. The argument of the plaintiff's counsel cannot be meant to be seriously offered to the Court.

Cur. adv. vult.

April 30.—*MONAHAN, C.J.*—This question arises upon a recent Act of Parliament. The case is one of considerable difficulty. I am delivering the judgment of the majority of this Court. The action was brought by Mr. Bailey against the Marquis of Conyngham, alleging in the first count of the summons and plaint the letting and the disturbance. The second count is substantially the same. The question was, if the marquis, by his agent, had agreed to let the fishery in a binding manner. It was agreed between the parties that the letting, which was originally intended to be for five years, should be for one year, from the 12th Aug. in consideration of £150. £75 was paid, and the remainder unpaid. The jury found that the letting was for a year. It was argued that this was an incorporeal hereditament, and could not pass but by deed; and I was asked to nonsuit the plaintiff. It was said (and this is the question we have to determine) that the Landlord and Tenant Act makes a difference; and that this interest, not exceeding a year, can be passed without a deed. The majority of the Court think the interest would pass. We must consider the common law, and what alteration was made in it by the Statute of Frauds. In relation to incorporeal hereditaments no estate could be created but by grant. No freehold estate could be created in lands save by livery of seisin or by deed; no freehold estate could be created by mere writing unless it had what implied a deed. But it is equally certain that a valid agreement could be made, either by parol or by writing, without seal, for the sale of a patent; and I doubt not that a contract for sale of a fishery or shooting might equally be created by parol. The Statute of Frauds provided that no estate in lands and tenements should be granted but by writing, except leases which did not exceed three years; and an agreement under that statute needed to be signed by the party to be charged thereby. Under that Act an agreement by parol was not binding, but an actual lease was binding if not exceeding three years. The first observation on the new Act is, that it is entitled "An Act to Consolidate." All the Acts in Schedule B. are repealed except so far as may be necessary to support or enforce any lease made or contract entered into before. That schedule includes the 1st section of the Statute of Frauds. The first enactment in this new Act is, that "in the construction of this Act the

following words and expressions shall have the force and meaning hereby assigned to them." Then the word "lease" shall mean any instrument in writing whether under seal or not, containing a contract of tenancy in respect of any lands in consideration of a rent or return. The word "lands" (that is material) shall include houses, messuages, and tenements of every tenure, whether corporeal or incorporeal. The word "tenant" shall mean the person entitled to any lands under any lease or other contract of tenancy. The word "rent" (that is material) shall include any sum or return in the nature of rent payable or given by way of compensation for the holding of any lands. The question is, is there anything in the Act which enables such an estate or interest not exceeding a year to be created without a deed? What is the effect of the third and fourth sections? The third section says, "The relation of landlord and tenant shall be deemed to be founded on the express or implied contract of the parties, and not upon tenure or service; and a reversion shall not be necessary to such relation, which shall be deemed to subsist in all cases in which there shall be an agreement by one party to hold land from or under another in consideration of any rent." The Act makes this revolution in the law that the relation of landlord and tenant, such as entitles the tenant to hold the lands for the term, shall be created by the mere agreement of the parties. If the matter stood there, what is there to say that this relation is only to be created by an agreement in writing? Here there was an express contract between the parties, and in the third section there is nothing which requires this to be in writing. But couple the 4th section with it. (His Lordship read the 4th section.) Is it inconsistent with the nature of an incorporeal hereditament that it should be conveyed by writing? Is it not clear, that under the 4th section, under the 3rd and 4th together, wherever the relation is to be created it may be done by an agreement; and that whether the agreement relates to incorporeal or corporeal hereditaments for more than a year? If so, why may not this relation for a year be created without a writing? If we can give any effect to the glossary, which includes incorporeal hereditaments in the term "lands," we must so construe the 3rd and 4th sections. The 3rd section is an implied repeal of the 2nd section of the Statute of Frauds. It has been held several times that the express repeal of one section of an Act does not prevent the implied repeal of another section if the terms of the Act imply it. The Act is very difficult in many respects; we think it puts incorporeal and corporeal hereditaments on the same footing.

CHRISTIAN, J.—I agree that there is very little magic and very little use in the distinction that incorporeal hereditaments lie in grant, and others in grant and livery of seisin. The question is if the Act, however, has made the alteration contended for. It appeared to me that Mr. M'Donogh began by laboring the point upon common law principles. It was not till the plaintiff's second counsel came to address us that the 3rd section was mentioned. The argument upon the 4th section, as I understood, was this,—that it is to be implied that estates might be granted for a year or

lesser period without either deed or writing. But from this section these small estates are completely excluded; therefore, to deal with these smaller estates we must go somewhere out of the 4th section. If to the common law, the answer is clear enough. But, says Mr. Ball, the 3rd section has altered the whole of that. We are in a difficulty. We have got little or no answer on the part of the defendant to this new argument. Serjeant Armstrong treated it as too trifling to answer—a most dangerous mistake, as the result of this case shows. I therefore, without an argument, have come to a conclusion; it turns upon the words at the close of the 3rd section. The argument is, that the 4th does not take this case out of the 3rd section. It is true that the 4th section does not apply to this case; but I say the 2nd section of the Statute of Frauds is not repealed by this Act. The Legislature draws the line, and declares that such and such parts of such and such Acts are to be repealed as are set forth in the schedule to the Act annexed, but not otherwise. And am I to be told that where the 1st section is expressly mentioned to be repealed, the 2nd, which is not mentioned, is repealed? I deny this. I say the 2nd section of the Statute of Frauds is in full force and is not repealed. One of its provisions, as we all know, is, that no action shall be brought upon an agreement unless the agreement, or some memorandum or note thereof, shall be in writing. It is trifling to say that that section is repealed. There is here no valid agreement; and *ex vi terminorum*, this 3rd section is inapplicable. The counsel knew if the Court looked out of the Act his point must perish; and he did not say there was an implied repeal of the Statute of Frauds, but resorted to one of the wildest arguments used in a court of justice. He called the Act a code. This must mean that this Act has superseded the whole body of landlord and tenant law, written and unwritten. A code means a different thing from consolidation. I have yet to learn that we have got the length of codification. It has been talked of much, but there is nothing in the law of England that can be called codification. Subject to the partial alterations it makes, this Act leaves, I think, the whole law of landlord and tenant where it was. Even the consolidation is partial; it repeals the 1st section of the Statute of Frauds; it leaves the 2nd section unrepealed; it remedied two evils. Its effect is simply this,—that wherever there is a transaction between landlord and tenant carried out which but for certain technicalities would have created the relation of landlord and tenant, that relation shall be deemed to have been created. We have nothing here left to look to but the common law, which requires a deed, and the 2nd section of the Statute of Frauds, which requires a writing. Here there was but a parol agreement, and it is therefore void. It was argued that under the 4th section a long lease for years of an incorporeal tenement could be granted by note in writing. We cannot have recourse to a fanciful mode of supplying the inconvenience if it exists; but I do not say that this incongruity or inconvenience follows; but it is better to be cautious in expressing an opinion of this new Act, and so I shall say no more on this. If there be any case in which the common law requires a writing the new Act leaves it as it was; and in this way the Statute of Frauds was

construed. It was never argued that that Act exempted from writing what required it by the common law. It is strange to me if the present argument be well founded how all the lawyers who flourished in both countries for the last two centuries were blind to this very point which must have arisen equally upon the Statute of Frauds.

Rule discharged.

M'KENNA v. SEXTON.—Jan. 30.

Action for false representation—Demurrer.

An action for a false representation, in a summons and plaint, of the residence of a party to an action, by which the taxing officer is induced to allow to the successful party half the costs of the action, is unsustainable while the judgment remains in full force and effect.

THIS was an action brought to recover damages for having in Oct. 1861, in a summons and plaint served to recover a debt of £10 10s., falsely described the plaintiff as having a residence in the county of Dublin, while the defendant knew that he had a residence within the city of Dublin and had no residence within the county, the defendant also residing within the city of Dublin, whereby the taxing officer was induced to allow the defendant in the present action half the costs of the former action. There was judgment by default in the former action, upon which the plaintiff in the present action was arrested. The defendant pleaded that the judgment referred to still remained in full force and effect, and not in the least annulled or set aside. The plaintiff demurred.

W. Ryan, in support of the demurrer.—The exact point involved in this demurrer though often glanced at in the authorities, seems never to have been decided. [*Monahan, C.J.*—There is no doubt that the taxing officer may inquire where in fact the party lived, and that the present plaintiff was not estopped from having that done by what the defendant did.] The fact of having a collateral remedy is no bar to maintaining an action. Where a plaintiff has over-marked a judgment the defendant may apply to a judge to be discharged from custody on payment of the sum really due, or he may file a bill in equity; but he has also his action for the over-marking. The facts set out in the summons and plaint give a cause of action—*Spencer v. Thompson* (6 Ir. C. L. R. 537); *Churchill v. Siggers* (3 Ell. & Bl. 929); *Saxon v. Castle* (6 A. & E. 652). [*Monahan, C.J.*—In *Saxon v. Castle* the execution was all wrong, because the defendant had no right to issue it until the costs were properly taxed. It is the judgment in your case that is wrong, if anything.] [*Christian, J.*—Does not the judgment in giving costs virtually decide that the case is not within the 97th section of the Common Law Procedure Act, 1856? As long as it stands must it not be assumed that the case is out of that section?] I think not. This was a judgment by default. [*Christian, J.*—Suppose the plaintiff in an action serves a notice of an interlocutory motion, and the defendant does not appear, and the plaintiff makes a false statement in his affidavit to support the motion and gets the costs of the motion and afterwards gets

judgment, can the defendant bring an action for the false statement? *Monahan, C.J.*—Is there any case in which an action was brought, not for over-marking a judgment, but for obtaining a judgment for too large a sum? *Christian, J.*—While the judgment is there, is it not an estoppel? *Monahan, C.J.*—Suppose a defendant does not attend on a taxation of costs, and the plaintiff untruly swears that he gave briefs to counsel, which he did not give, and had fourteen witnesses at the trial when he had only one, will an action lie for this? This judgment was obtained by a false statement upon the record of what could not have been given in evidence.

E. Beytagh, for the defendant, was not called on.

MONAHAN, C.J.—As long as the judgment stands it is an adjudication that the costs were properly due.

Demurrer overruled

Court of Probate.

[Reported by W. R. Miller, Esq., LL.D., Barrister-at-Law.]

FINN v. GORMAN.—July 9.

Practice—Administration pendente lite.

It is not necessary to present a petition in order to have an administrator pendente lite appointed. It may be done on motion grounded on affidavit.

Griffin applied to the Court *ex parte* to fix a day specially to hear an application he wished to make on behalf of the defendant, for the appointment of an administrator *pendente lite*. The plaintiff, he alleged, was converting all the assets into cash, and was about going to America. He claimed as executor under a will, which was impeached by the defendant. A petition would be presented stating all the facts.

KEATINGE, J.—In England a petition is generally adopted; but here I will not put parties to that unnecessary expense. Give notice of motion, and file an affidavit, and I will dispose of it on an early day.

BERRY v. BERRY.

Decree—20 & 21 Vict., c. 79, s. 66.

Where the defendant, on consent, withdrew his pleas, the Court, under the 66th section of the Probate Act of 1857, made an order in the nature of a decree, declaring the validity of the will to be proved, without further proof.

E. M. Kelly, for the plaintiff, moved to make a consent a rule of Court, to the effect that the pleas of the defendant should be withdrawn.

KEATINGE, J.—I will make it a rule of Court, and if you desire it, I will now make an order in the nature of a decree, declaring the will proved, which, under the 66th section of the Act of 1857, will, in my opinion, be as valid as if you went regularly to a hearing.*

Order accordingly.

* Section 66—"Where probate of such will is granted after such proof in solemn form, or where the validity of the will is

IN THE GOODS OF JOHN LINDLEY, DECEASED, INTESTATE.

Survivorship—Presumption.

Where the father of the deceased had not been heard of for 26 years, and was believed to be long since dead, and the deceased died recently, the Court allowed administration to the son's goods to issue without extracting a grant to the father.

Ince moved, on behalf of Maria Banfield, the sister of the deceased, for a grant of letters of administration of the goods of the deceased, without first taking out a grant to the goods of his father. It appeared by the affidavit that George Lindley, the father, had emigrated to America 26 years ago, having left his wife and the deceased, their only child, behind him. He arrived at New York, and went thence to Florida, whence he corresponded with his wife regularly for six years; but then his letters ceased, and though several were written by his wife, she got no answer, and he never was heard of since. His last letter complained of his bad health, the result of yellow fever and ague. The deceased, John Lindley, was by trade a compositor, and when he was 32 years of age, he also went to America, chiefly to search after his father. He remained there six years, and then returned to Dublin, without having found any trace of his father. The deceased, John Lindley, died on the 26th of May last, intestate, without wife or child: his mother was dead. The applicant was one of the next of kin, and the assets were very small, only £58 19s. 6d. in a savings' bank. In the *Goods of Astell* (31 L. J., Prob., 38,) a similar order was made.

KEATINGE, J.—I will make the order. Your client may swear to the best of her belief that George Lindley died before the deceased.

Order accordingly.

Court of Bankruptcy & Insolvency.

[Reported by John Levy, Esq., Barrister-at-law.]

[BEFORE LYNCH, J.]

RE PATRICK O'BRIEN.—June, 1863.

*Proof of debt by trustees of marriage settlement—
Wife's future interest.*

A wife's fortune upon her marriage is advanced

otherwise declared by the decree or order in such contentious cause or matter as aforesaid, the probate decree or order shall enure for the benefit of all persons interested in the real estate affected by such will; and the probate copy of such will, or the letters of administration with such will annexed, or a copy thereof respectively, stamped with the seal of Her Majesty's Court of Probate, shall in all courts and in all suits and proceedings affecting real estate, of whatever tenure (save proceedings by way of appeal under this Act, or for the revocation of such probate or administration), be received as conclusive evidence of the validity and contents of such will, in like manner as a probate is received in evidence in matters relating to the personal estate; and where probate is refused or revoked on the ground of the invalidity of the will, or the invalidity of the will is otherwise declared by decree or order under this Act, such decree or order shall enure for the benefit of the heir-at-law or other persons against whose interest in real estate such will might operate, and such will shall not be received in evidence in any suit or proceeding in relation to real estate, save in any proceeding by way of appeal from such decrees or orders."

to the husband upon his bond with interest at six per cent., the bond is put in settlement and vested in trustees for the benefit of the wife. The conditions of the settlement with regard to the payment of interest are, that it shall not be payable except in the event of death, bankruptcy, insolvency, or a reasonable apprehension of insolvency. Bankruptcy takes place. Interest is proveable by the trustees of such settlement from the advance of the money to the husband up to the date of his bankruptcy.

THIS case came before the Court upon charge and discharge; the facts appear in the judgment.

Kernan, Q.C., was for the assignees.

Campion for the trustees of the marriage settlement of the bankrupt's wife.

The question at issue was the right to prove for interest.

Ex parte Branchley (2 Glynn & Jam. 174); *ex parte Cooke* (8 Ves. 353); *Re Meehan* (1 Sch. & Lef. 119), were cited.

JUDGE LYNCH, in giving judgment, said—This case is before me on proof of debt by the trustees in the marriage settlement of the bankrupt, to which a discharge has been filed by the assignees. The point raised appears to be a simple one, but it is, nevertheless, an important one, as the marriage settlements of traders who become bankrupt are very frequently the subject of discussion in this Court. By the marriage settlement in this case the fortune of the wife, £300, was secured by the bond of the bankrupt, and that bond secured to the trustees the fortune of the wife, together with interest at six per cent. thereon from the date of the bond, and the trustee now claims to prove for the amount due according to the terms of the bond. Two questions are raised by the assignees. First, that by the contract of the parties the bond, or any judgment thereon, could not be enforced except on the conditions therein stated, one of which was bankruptcy; and therein it was agreed that no interest was to accrue until this event happened. In my opinion the agreement is quite plain and explicit, namely—that the wife's fortune was advanced to the husband on the express contract that he gave there for his bond, with six per cent. interest from the date of the advance. That the enforcement of repayment was postponed to the events stated therein; but that the repayment when enforced was to be with interest thereon from the date of the bond,—that is, from the date of the advance to the husband. In my mind the contract is plainly to pay this sum with interest from the date of the bond in the event of bankruptcy. The second question raised is, that such a contract is void to the extent of the interest thereof contracted to be paid, as in effect being a settlement of so much of the bankrupt's own assets to be paid to the trustees in the event of bankruptcy. No cases in point have been cited to me. Mr. *Campion* has argued the point with great clearness and precision, and has convinced me that I overrule no principle in deciding with him, and that the allowance of interest in this case does not violate the rule in such cases. The wife's fortune was given to the bankrupt to be repaid with interest from the date of the loan. This interest was the reasonable accretion from the

holding of the money advanced, and would have resulted from its possession in the hands of the trustees, therefore I cannot hold that this contract is any agreement to pay any sum out of the trader's property in the event of his bankruptcy. Cases were stated of interest at ten per cent. being contracted for; and it was asked how the Court would act on such a contract? These cases, fairly put in argument, seem to me to be answered by saying that, if under the pretext of interest or otherwise the reality of the transaction is to make over the assets of the trader in the event of bankruptcy, that the contract is void; but if the contract is fairly to secure the wife's fortune with its natural accretion, the fair value of the money advanced, that it does not violate the principle admittedly applicable in cases of this nature. In my judgment, therefore, the wife's fortune in this case was advanced to the husband on the express contract that it was to be repaid with interest from the date of the advance to the trustees, and that this contract is a fair and legal one now to be enforced; and consequently that this proof shall stand for the original sum and the interest claimed.

[BEFORE LYNCH, J.]

RE THOMAS M'ILROY.*—July, 1863.

Final examination—Reckless trading—Forgery—Fraudulent preference—General misconduct of bankrupt—True disclosure of his estate and effects—Public prosecution.

Although a bankrupt may make a full and true disclosure and discovery of his estate and effects, still if he be guilty of reckless trading, forgery, and fraud upon his general creditors, the Court is not bound to pass the final examination, for if that were done, the bankrupt would, at the end of three years, at most, be entitled, under the 143rd sect., to his certificate, no matter what crimes he may have committed. The Court has perfect jurisdiction, under any state of facts, to adjourn the examination sine die under the 140th section.

Where the only evidence of a bankrupt having committed crimes that would subject him to a public prosecution, has been obtained by his own admissions when under examination, the Court will not order a prosecution against him.

THE bankrupt in this case was a seed merchant, and had been several times before the Court for final examination.

Kernan, Q.C., was for the creditors; and

Sidney, Q.C., for the bankrupt.

The facts appear in the judgment of the Court.

HIS LORDSHIP said:—This case is now before me on the last examination of the bankrupt, and the real question I am to determine is, whether I am bound to pass the final examination, and thereby to entitle

* See *In re Bourke* (p. 199).

the bankrupt to a certificate, after, at the latest, a three years' suspension thereof. The case, in its facts, is a very simple one. The bankrupt traded largely and recklessly, and matters appear in his accounts to show that property was sacrificed by him, and certain creditors had preference given to them in a manner destructive to fair trade. An explanation of such conduct, of course, was required; and upon such explanation it now appears admittedly that these goods were sacrificed, and these preferences were given because the creditors were the holders of bills of exchange drawn by the bankrupt, without authority, from the parties whose names he used; and, accordingly, that to protect himself from the consequences resulting from forgeries uttered by him, he sacrificed his property and made payments in fraud of the law. Upon these disclosures, made here in Court, am I bound to pass the final examination, and thereby to establish his title to a certificate from this Court, in which certificate I must expressly state my opinion and judgment, "that having regard to his conduct as a trader before, as well as after his bankruptcy, the Court did then and there find the bankrupt entitled to such certificate?" If I am bound to give that certificate, I am then bound to put my hand and affix the seal of this Court to a statement which is totally false—and a statement which, coming from this tribunal, meant to be protective of trade and commerce, must bring scandal on the administration of justice, is forgery, accompanied by fraudulent acts, to escape its penalties, conduct in a trader entitling him to obtain the privileges conferred by this certificate? Let me push the case to the height of absurdity to which this proposition may ascend. Suppose the bankrupt is a convicted felon, suffering penal servitude for his offence, am I bound to forward to him in the Mountjoy Prison, or other convict depot, my certificate under the seal of this Court, approving of his conduct as a trader—conduct which, while approved of by this Court, has brought him through the Criminal Courts to be a convicted felon? Such a principle no one could say is right—that such a thing could happen could only be by the lamentable blundering and negligence of the legislation on this subject. No such monstrous principle can arise in England, Scotland, or anywhere else but here. It would be a peculiarly Irish state of the law, which enforced a false and immoral judgment from the Bankrupt Court of Ireland. A case has been referred to, as decided by the Court of Appeal—*In re Bourke*—in which, as counsel argue, this point was decided, namely, that no matter what crime is disclosed by the bankrupt—no matter how far his accounting may be, by the confession of criminal acts—yet that this Court must accept such accounting as sufficient, and must pass the final examination. I altogether refuse to accept this as a true interpretation of the judgment in *Bourke's* case. I have not seen any authorised report of that case, but I know that in that case no criminal offence was charged upon or admitted by the bankrupt, and my brother judge (Berwick) dealt with it as the mere ordinary excesses of a trader pushing his trade beyond his means, and incurring responsibilities beyond his ability to discharge them. There may have been sundry reasons influencing the Court in reversing the

judgment in that case, without thereby establishing such a principle as is here stated. For myself I must say that, as long as the question is of the propriety of my decision in arriving at a conclusion on the facts before me, or the propriety of the exercise of my discretion in awarding punishment or affixing disabilities on traders, it is always to me a gratification to see my judgments brought for review to the Court of Appeal. But the case is quite different when the proposition advanced is, not that I am wrong in my conclusions—not that I have exercised too harshly the powers with which I am intrusted—but that by the statute law of Ireland I am bound to outrage my sense of what is right in adjudging the case, and that I must, under compulsion of law, pronounce a false judgment, and accredit it by the seal of this Court, committed to my charge for the intended benefit of the public. But let me now see if our Irish Statute is so framed as to compel us to charge upon it this monstrous absurdity. In speaking here and in deciding this case, let me not be misunderstood as speaking of any decision of the Court of Appeal with other than the due respect attaching to it. I bow with full obedience to its controlling decisions, and adopt, as I am bound to do, its rulings; but I protest against certain deductions made from its rulings, and I refuse to accept them at present as any part of its considered judgment, even if counsel accurately report to me some observations made therein. The passing of the last examination in this Court is generally the completion of the vouching of the accounts of the bankrupt, and the final review of his disclosures, in order that the judge may be satisfied that the bankrupt has fully, satisfactorily, and truly made disclosures of all his estate and effects, and has made full discovery of all matters inquired into respecting his trade and business. The statutable provisions as to the last examination are contained in the 138th and three following sections of our Act, 20 & 21 Vict., cap. 60. There is in the statute no mandatory clause as to the passing of the last examination; the provisions are only as to the materials to be prepared for it, and there is no distinct provision or direction as to the judges dealing with it. Of course, in practice, the last examination in ordinary cases is only a procedure for affirmance of the vouching already made; and the ordinary complaints against traders, viz., the not keeping books, overtrading, preferences to particular creditors, and objections of this sort, are properly most generally dealt with at the certificate meeting, where the conduct of the trader is peculiarly considered, and at which meeting, by the express direction of the statute, the judge must allow the certificate, the judge having only the discretion as to its suspension for a period not exceeding three years. This is the ordinary course of procedure, right and proper, and convenient in all the usual cases arising here. But if the last examination, by its necessary and enforced disclosures, shows conduct in a trader fraudulent and criminal to a degree which makes it an immoral act to declare that such trader is, by reason of his conduct as a trader, entitled to the certificate, I ask most respectfully, where is the provision in section 138, or elsewhere, which makes it imperative on me to do an act, the necessary consequence of which

is, that I must pronounce a false judgment? In my judgment, the next section but one, still conversant about this very subject, the last examination, actually in very terms provides for this very case. Section 140 is—"It shall be lawful for the Court, at the time appointed for the last examination of the bankrupt, or at any enlargement or adjournment thereof, to adjourn such examination *sine die*." The adjournment of the last examination *sine die* is thus expressly declared to be lawful; no limit is stated—no state of facts under which it may be done is stated, but without limitation in the very sections conversant with the last examination this power is expressly conferred on this Court. Much confusion may arise in the mind by looking at the course of English procedure (adopted under an entirely different code in this respect) as any means whereby to construe out of its plain meaning such simple language as this; and even in the same direction, though in less degree, may arise confusion by regarding the reasonable ordinary procedure of this Court as compulsory in all possible cases, even when it appears and is admitted to lead to results so absurd and so scandalous as I have shown it must do in a case like the one now before me. Ought we to be astute to find out reasons by construction for enforcing a false judgment from a court of justice under pressure of the Legislature? I can see no foundation for the astuteness which would construe this Act to so monstrous an exercise of authority over the conscience of the judge as to compel him to certify what he knows, and what everyone admits to be false and immoral. Why should this be said by way of construction of words which plainly themselves say exactly the contrary? Is the proposition contended for here this—that the judge of this Court must by this statute, affirm that a person guilty of forgery (nay, even if under sentence therefor), is, having regard to such conduct, entitled to the certificate, which was meant as a protection for the unfortunate, and not as a false character for the criminal; and express words, which, simply read, prevent such a result, are, by construction, to be made out as enforcing this scandal on the administration of justice? I have had, unfortunately, on former occasions to use this power conferred on me by section 140. Hitherto my decisions have been unquestioned. It is only in extreme cases I have ever so used this power, and, indeed, very rarely, except in cases where forgery was established. The crime of forgery I regard as the greatest crime against trade and against the well-being of society at large that can be committed. Until within a recent period it brought the penalty of the life of the offender; and although the extreme rigour of its punishment is mitigated, yet that has been done, not because of any different views now entertained of its enormity, but that its repression might be more certain, by reason of the greater certainty as to the prosecution of its perpetrator. Is, then, the Irish Court of Bankruptcy to be placed in the ridiculous position of affirming to the traders of Ireland that forgery is conduct entitling a bankrupt to the certificate of this Court? Now, in giving my judgment adjourning this last examination *sine die*, of course I do so on the ground that in my opinion so heavy a penalty on this trader is a fair and reasonable judgment on

the facts disclosed in this case. Of course the Court of Appeal will most properly consider whether I have arrived at my conclusion reasonably, and I will be pleased, indeed, if under their sanction and on their responsibility I am able to deal more leniently with this bankrupt. If, on a review of the facts, they are able to come to the conclusion that forgery was not sufficiently proved as against the bankrupt (though here, in passing, I must say that this was not disputed here, and the able counsel of the bankrupt only claimed at my hands that I should not direct a prosecution, inasmuch as the only knowledge I had of the forgery was derived from the examination of the bankrupt); but, of course, if this be doubted, the very foundation of my judgment will be in question. Again, if the Appellate Court thinks that this punishment is too great for the offence, and that I am wrong in thinking that forgery deserves the adjournment of the last examination *sine die*, I will, with becoming respect, receive from them and make it their act, the measure of punishment in this Court for such an offence. But if the Appellate Court should agree with me, thinking that my decision is right in principle, that forgery committed by a trader called for this and even for greater punishment—that the adjournment *sine die* is right if it is lawful—that it would be a scandalous act in any Court to give a certificate of character to one stained by such guilt, then I do earnestly entreat that great deliberation may be given to the matter before it is fixed, as the opinion of so high a tribunal, that by the statute law here I am bound to do an act of such iniquity as falsely to affirm what they know as well as I do is untrue. But I say most confidently that I expect no such decision; and I now adjourn this last examination *sine die*. Another matter in this case yet remains—namely, whether I should direct a prosecution. As to this, I was for some time doubtful as to the course I should take. Mr. Sidney, on behalf of the bankrupt, submitted to me that, as my knowledge was obtained from the bankrupt himself, and through means of questions put to him, and to which he gave answers freely and openly, I should not use these disclosures now against him by directing such a prosecution. The assignees have also asked me not to direct this prosecution on knowledge thus obtained, for reasons stated by them, and the cogency of which I feel. I also myself feel that it might be a wrong done to this bankrupt to use the examination here, taken without any caution given, and without apprising him of the consequences that might follow from his disclosures, by acting on it now, to direct a prosecution. But in addition to these reasons, I must add that, while the question chiefly considered by me in this judgment is depending, I would be slow to direct a prosecution, inasmuch as it would add very considerably to the absurdity of the law so construed if I was to direct a prosecution—and while it was pending that I was to give my certificate of approval of the act for which I had directed him to be criminally prosecuted. I, therefore, do not direct any prosecution, but adjourn the examination *sine die*.

Court of Appeal in Chancery.

[Reported by Edmund T. Bewley, Esq., Barrister-at-Law.]

[BEFORE THE LORD CHANCELLOR AND THE LORD JUSTICE OF APPEAL.]

PENNEFATHER v. BOLTON.—June 15th.

Practice—Wilful default—Agent—Reference.

In a petition praying a reference, on the ground of wilful default on the part of a land agent, held, that the rule which requires some specific instance of wilful default to be charged was not sufficiently fulfilled by a reference in the petition to certain accounts put in evidence, on the face of which such wilful default was alleged to be apparent.

Pennefather v. Bolton (8 Ir. Jur. N. S. 45) reversed.

THIS was an appeal from a decretal order of the Master of the Rolls. The cause petition in this matter was filed by Mrs. Jane C. Pennefather as administratrix of Major Kingsmill Pennefather, against Edward J. Bolton, who for many years had been the land agent of Major Pennefather. The petition prayed that it might be declared that Edward J. Bolton was bound to furnish the petitioner with an account of the rents received by him during the period while he was such agent, and of his disbursements and payments; and that an account might be taken of the rents which he might, without wilful default, have received during the said period; and that he might be declared to be chargeable with such rents; and that he might be bound to pay to the said petitioner the balance, if any, which, upon taking such accounts, should appear to be in his hands as chargeable against him. Affidavits having been filed by Edward J. Bolton in answer to this petition, and on behalf of the petitioner in support of the petition, the matter came on to be heard before the Master of the Rolls, and by an order of his Honor, bearing date the 27th of January, 1863, it was ordered that it should be referred to the Master of the Court in rotation, to take an account of the rents and profits of the estates of Major Kingsmill Pennefather received by the respondent, while he was the agent and receiver of the said Major Kingsmill Pennefather, or by any other person, by the order or for the use of the respondent, and how the same rents and profits had been applied and disposed of; and also an account of the payments that had been made during such agency by the respondent to or for the use of the said late Major Kingsmill Pennefather; and that the Master should give the respondent all just credits and strike a balance. And it was further ordered that the said Master should inquire and report whether the arrears of rent appearing on the accounts marked "A," "B," and "C," given in evidence in the said matter, and referred to in the said cause petition, which accrued while the respondent was agent of the said Major Kingsmill Pennefather, or any and what part thereof, were remitted by the said Major Kingsmill Pennefather, or by his authority; and whether any and what part of the said arrears of rent had been lost by the wilful neglect and default

of the respondent.* The respondent, admitting the right of the petitioner to an account of the rents and profits of the estate, now appealed from so much of the foregoing order as directed a reference as to whether the arrears of rent appearing in the above mentioned accounts were remitted by Major Kingsmill Pennefather or by his authority, and whether any part of the said arrears was lost by the wilful neglect or default of the respondent. In 1848, Major Kingsmill Pennefather, being then resident on the Continent, appointed Edward John Bolton his land agent, to receive the rents of the lands of Golden and Knockinglass. In 1851 Major Pennefather went with his family to reside in Australia, where he continued to reside until 1858, when he died there, leaving his widow (the respondent in the present appeal) and three infant children him surviving. The respondent having returned from Australia, was informed by Messrs. Winter & Williams, solicitors, London, that in August, 1850, they had obtained, on behalf of a creditor of Major Pennefather, an account of the receipts of Edward J. Bolton as such land agent, from the date of his appointment in 1848 up to May, 1850. This account had been seen, though not settled, by Major Pennefather before his departure for Australia, and was the account referred to as "A," in the cause petition, and in the order of the Master of the Rolls. Messrs. Winter & Williams also informed the respondent that subsequently they were furnished by Edward J. Bolton with a second account, signed by him, and dated the 26th of April, 1862, being an account of the receipts from May, 1850, up to November, 1851. This was the account marked "B," and it had never been communicated to Major Pennefather in any way. The respondent having obtained letters of administration with the will annexed to Major Pennefather's estate, applied to Edward J. Bolton for his agency account; and upon the 2nd of December, 1861, he furnished an account referred to as account "C," purporting to include the whole period from September and November, 1851, up to the death of Major Pennefather.

The Solicitor-General (with him *Serjeant Sullivan* and *Owen*) for the appellant.—No specific instance of wilful default is stated in the cause petition or proved in this matter, and, therefore, the portion of the Master of the Rolls' order appealed from is unsustainable. The only statements with respect to wilful default in the cause petition are the following, viz:—In the 21st paragraph it is stated "that the said account, 'C,' omits to bring forward a large portion of arrears of rent shown to be due by account 'B;' and your petitioner believes and charges that a large portion of such arrears have been lost by the wilful default of the said Edward John Bolton, and that he should be charged with the same." In the 22nd paragraph it is stated "that the said account 'C' shows a large amount of arrears of rent to have been allowed to accumulate during the period comprised in said account, especially upon the lands of Knockinglass, upon which two years of rent are shown to be due by the tenants. And your petitioner charges that the accumulation of such arrears was owing to the wilful default of the

* *Pennefather v. Bolton* (8 Ir. Jur. N. S. 45).

said Edward J. Bolton, inasmuch as the lands were set at reasonable rents, which the tenants were well able to pay; and your petitioner submits that the said Edward J. Bolton should be charged with these arrears." And in the 27th paragraph it is stated "that your petitioner submits that the said Edward J. Bolton is bound to account with your petitioner for the rents which he received, or which, but for his wilful default, he might have received out of the lands during the whole period while he was Major Pennefather's agent. And your petitioner charges that the said Edward J. Bolton was guilty of gross and wilful default in allowing the large amount of arrears to remain uncollected, which appears by all the said accounts; and also in omitting to bring forward arrears of rent, and in taking upon himself to remit arrears; and your petitioner refers to the separate items in said accounts as evidence of such wilful default." Here there is not any instance of wilful default or neglect alleged, nor any item stated of rents alleged to be lost by wilful default or neglect. The evidence in the matter, too, shows that the arrears of rent appearing in the accounts were remitted by Major Pennefather, or by his authority. The account "A" shows several instances of arrears of rent forgiven; and although this account was seen by Major Pennefather, he never objected to it; but, on the contrary, after he had seen it, he expressed himself to be perfectly satisfied with the rental and account, and with the management of the estate. The following letter was written by Major Pennefather to Richard Bolton, the appellant's father, who was then joint agent with the appellant:—

London, Feb. 7th, 1851.

My dear Sir,—I have only time to write you a few lines to tell you I leave here to-morrow, at 10 o'clock, for Gravesend, then to embark and sail with the afternoon tide. During my absence I place the greatest confidence in you, and expect you will exercise your abilities in the management of my estates in my far distant abode as you have during my nearer residence. Whatever money you can put together for my use, send me a bill for it, and direct it under cover to Messrs. Winter, Williams, & Co., 16 Bedford-row, London, who will forward the same and other letters to me. I remain, my dear Sir, your obedient servant,

Richard Bolton, Esq. **KINGSMILL PENNEFATHER.**

This letter was proved and given in evidence in this matter, and it shows the degree of confidence placed in his agents by Major Pennefather. The following letter written by Major Pennefather to Richard Bolton was also proved and given in evidence:—

"Onchy, Nov. 16, 1849.

"My Dear Sir,—I have just received your letter of the 10th inst. I congratulate myself on my good luck in having obtained a man of your abilities and firmness as my agent. I really feel very grateful to you for all your exertions on my part, for you have saved myself and my family from ruin. My confidence in you has already been fully justified, besides which, I have heard you very highly spoken of in several quarters. I pity poor James Ryall. I will

leave the matter in your hands, to do what you think fit and fair, knowing, as you do, the state both of us and of our unfortunate country. If possible, I should like to accede to his request, for he has been a good tenant hitherto. Next year, please God, these pressing difficulties will be all over. . . . I remain, my dear sir, your obedient servant,

"KINGSMILL PENNEFATHER."

The principle that specific instances of wilful default must be charged in the cause petition is now well established.—*Bond v. M'Watty* (7 Ir. Jur., N.S., 315; 13 Ir. Ch., 174); *Brooke v. Elliott* (6 Ir. Ch., 310); *Lambert v. Lambert* (10 Ir. Ch., 500); *Coope v. Carter* (2 De G. M.N. & G., 297); *Sleight v. Lawson* (3 K. & J., 298)—the last case showing that Lord Eldon's rule was not intended to be relaxed by *Coope v. Carter*; *Massy v. Massy* (11 W. R., 19; 13 E. J., N. S., Ch. 13); *Jones v. Morrell* (2 Sim., N.S., 241).

Brewster, Q.C., (with him *Chatterton, Q.C.*, and *Twigg*,) for the respondent.—Account "A." shows that, at the time that Edward J. Bolton became agent to Major Pennefather, less than a half year's rent was due on Golden, and a little more than a half year's rent on Knockinglass. Accounts "A." and "B." show that a very large amount of arrears was allowed to accumulate upon Golden and Knockinglass, and a very large portion of the arrears known to be due by account "A." is not brought forward into account "B." James H. Ryall, in the rental of Knockinglass, appears, by account "A.," to be the largest tenant upon the land, holding at a yearly rent £267 13s. 1d., and it appears further, by the same account, that no rent whatever was due by him at the time when Edward J. Bolton was appointed agent. Account "A." returns Ryall as £194 4s. 1½d. in arrear up to the 1st of May, 1850, the period at which the account closes, and in the observation annexed to the account, Edward J. Bolton says of Ryall, "This is an excellent and respectable tenant, who laid out a large sum in improving his lands, which were mostly of a light, poor description, and deserves to get a temporary abatement." In account "B." the arrear of £194 4s. 1½d. is brought forward, but Ryall is charged with an abated rent of £222 a year only; and this account returns him as £254 10s. 8½d. in arrear up to the 1st of November, 1851. The observation appended in this account states in reference to Ryall's rent—"This rent was reduced 20 per cent. by Major Pennefather himself, when last on the lands—it is still too highly rented." Account "C." continues to debit Ryall only with the abated rent of £222 per annum, and wholly omits to bring forward the arrear of £254 10s. 8½d. shown to be due by account "B.," and in an observation Edward J. Bolton states—"This was a very old tenant on the estate; his rent was always far too high, therefore, the arrears in last account were forgiven, and the abatement of 20 per cent continued." The arrears accordingly on Knockinglass, which are shown by account "B." to be £558 6s. 1½d., are returned in account "C." as only £303 16s. 3d., being less, by £254 10s. 8½d., than the amount of arrears forgiven to Ryall. The case of Ryall was one of the grossest instances of wilful

default, inasmuch as the lands were let at reasonable rents, which had been abated 20 per cent., and which the tenant was able to pay, and inasmuch as Edward J. Bolton had no authority to forgive such arrears, and this case was selected by the petitioner as a specific instance of arrears of rent lost by the wilful default of Edward J. Bolton. Accordingly, in reference to it, the following clause was inserted in the cause petition, viz., paragraph 21—"That the account of 'C.' omits to bring forward a large portion of arrears shown to be due by account 'B.," and your petitioner believes and charges that a large portion of such arrears has been lost by the wilful default of the said Edward J. Bolton, and that he ought to be charged therewith." The only arrears omitted to be brought forward from account "B." to account "C." are Ryall's arrears, and therefore this is a specific instance of wilful default charged in the cause petition. Again, in paragraph 27, the petitioner charges Edward J. Bolton with gross and wilful default, and in allowing a large amount of arrears to remain uncollected, and also in omitting to bring forward arrears of rent. The accounts were referred to, and an examination of them was sufficient to show the truth of these charges.

[*The Lord Chancellor.*—You refer in the cause petition to the accounts as *evidence* only of wilful default.] There is no evidence in the case to show that Edward J. Bolton had any authority to remit arrears, while these accounts acknowledge, in several instances, that arrears were forgiven by him. [*The Lord Chancellor.*—Do you charge, in any part of the petition, that Mr. Bolton had no authority to remit rents? Are these charges in your petition equivalent to an allegation that in every instance where the appellant states he remitted arrears, he had no authority to do so? If so, your general charge would be too large if there was any instance of remission that was right under the peculiar circumstances.]

Serjeant Sullivan in reply.—This Ryall, whose case is the foundation of the charge of wilful default, is not even once mentioned in the whole cause petition. In fact, there is not a single instance of wilful default charged in the petition.

THE LORD CHANCELLOR.—I think the order of the Master of the Rolls is not justified under the circumstances of the case. Speaking in the first place of the general merits, when I consider the great responsibility, the great authority that appears to have been placed in the hands of Mr. Bolton by Major Pennefather, I can hardly come to the conclusion that, so long as Mr. Bolton's conduct was honest and *bona fide*, he could be fairly held chargeable with the arrears of rent alleged to have been lost. I asked the counsel for the respondent whether it was maintained that Mr. Bolton had acted in collusion with this tenant Ryall, and whether, in abating the rents or remitting the arrears, he was doing so in any way for his own benefit. No such case, however, was attempted to be put forward. When we go now into the facts, it seems to me that it would be too strong to hold that even in the case of Ryall, there was that default which would properly be called wilful. It was a mere remission, and when we consider the many circumstances which, in the unfortunate state of the country at that time, might have caused this remis-

sion to be made, we cannot look on this as wilful default or neglect on the part of an agent in Mr. Bolton's position, especially, too, when we are ignorant whether this remission may not have been directly authorised by Major Pennefather, or at least allowed by the general discretion and authority vested by him in Mr. Bolton. But this is not the question upon which the case depends. We must decide whether the allegation of wilful default is sufficiently specific within the well-known rule which requires a specific instance of wilful default to be charged and proved. All the Courts have long since decided that such a course is necessary, that you should, in fact, lay your finger on some particular item by which your case should stand or fall. Now here is a reference to certain accounts, which, if supposed to refer even to all the items of the accounts, can be considered nothing more than a general charge of default. It is impossible to say that in several instances, when the matter went before the Master, the remissions might not be held to be perfectly justifiable, and unless wilful default was proved in every case, this charge would amount to nothing. All this shows the necessity for selecting some particular instance, which admittedly might have been done with perfect ease in the present case. Under such circumstances the order of the Court below must be reversed.

LORD JUSTICE OF APPEAL.—The respondent here has not complied with the rule now so well established. It is admitted that a specific charge might have been made, while this reference to the accounts is just as general as can well be. The accounts themselves are vague and general, and to hold that wilful default was satisfactorily charged, would only be to depart from a rule, whose justice, wisdom, and policy, are now well recognised.

Order below reversed.

[BEFORE THE LORD CHANCELLOR AND THE LORD JUSTICE OF APPEAL.]

WEST v. LAWDAY.—June 16.

Will—Construction—Falsa demonstratio.

M., being seized of the lands of B., F., G., and C., by virtue of a lease of lives renewable for ever, made a will to the following effect:—"Being possessed of a lease of lives renewable for ever of certain lands in the Co. of K., which said lands are denominated B., C., and F. . . . I hereby require that the aforesaid lands should, as soon after my decease as possible, be sold in the Incumbered Estates Court, and, after the payment of all my just debts, be equally divided between X. and Y. as tenants in common . . . and I appoint the said X. residuary legatee of all my real and personal estate." The testator did not possess any real estate, except the lands of B., F., G., and C., and all of these, including the denomination of G. not specifically mentioned in the will, were alike subject to the payment of the testator's debts. Held, that

the lands of G. passed by the specific devise, and not by the residuary devise in the will.

THE cause petition in this matter was filed on the 24th of July, 1861, and prayed that the trusts of the will of St. John Mason, the testator in the petition named, might be carried out under the directions of the Court, and that the real and personal estate of the testator might be administered under the orders of the Court, and proper accounts taken, and that it might be ascertained and declared what the petitioner, James West (the appellant in the present appeal), and Susannah Lawday were respectively entitled to under the said will, and particularly what the said James West was entitled to under the residuary bequest and devise contained in the said will; and the appellant named the said Susannah Lawday as respondent to the said petition. It appeared that the testator, St. John Mason, being seised, by virtue of a fee-farm grant of the lands of Ballydowney, Farranaspig, Groyne, and West Cliny, in the Co. of Kerry, and being possessed of no other real estate whatever, made and executed his last will, dated the 16th of March, 1858, which will, after revoking all former wills, was as follows—"Being possessed of a lease for lives renewable for ever of certain lands in the County of Kerry, Ireland, which said lands are denominated Ballydowney, Cliny, Farranaspig, all situate in the parish of Aghadoo, near Killarney, in the said County of Kerry, and being also induced to requite the services of those persons who have shown me an unbounded regard during a long period of time up to the present moment, among whom are Mr. James West, of No. 10 Dorset-place, Charing Cross, London, and Mrs. Susannah Lawday, of No. 4 King's Mead Town, from Bath, widow of Frederick William Lawday, late of Bath, I do, therefore, hereby require that the aforesaid lands should, as soon after my decease as possible, be sold in the Incumbered Estates Court in Ireland, and after the payment of all my just debts, be equally divided between the said James West and Susannah Lawday as tenants in common, and not as joint tenants . . . and I appoint the said James West residuary legatee of all my real and personal estate." The testator died a few days after the date of this will, and the will was subsequently duly proved by the appellant and Susannah Lawday. Proceedings were then taken in the Landed Estates Court, by virtue of which the said lands of Ballydowney, Farranaspig, and Cliny, were sold under the orders of the Court, and the debts of the testator, together with the legacies bequeathed by the will, were paid out of the produce of this sale. Differences, however, arose between the appellant and Susannah Lawday as to their rights to the lands of Groyne, not named in the above-mentioned will, the appellant alleging that the same passed to him under the residuary clause of the will, while Susannah Lawday contended that these lands, being held under the same title as the other lands of the testator, passed by the specific devise in the will, and that, therefore, she was entitled to one-half of the said lands. By an order of the Court of Chancery, made on the 23rd of November, 1861, it was referred to Master Brooke to proceed on this petition, and the matter having been

investigated by the Master, a decretal order, dated Jan. 6, 1862, was made by him in this matter, whereby he declared, amongst other things, "that according to the true construction of the will of St. John Mason in the said petition mentioned, the lands of Groyne therein mentioned did not pass to the said petitioner or respondent under the specific devise therein contained, but the said lands passed to and became the property of the said petitioner under the residuary clause in the said will contained." The respondent, Susannah Lawday, having appealed from this order to the Master of the Rolls his Honor, by an order bearing date the 17th of April, 1863, was pleased to order that the said decretal order of Master Brooke should be varied, and the Court declared that, under the true construction of the will, the lands of Groyne passed under the specific devise in the will contained, and that the respondent was, therefore, entitled to a moiety of these lands. From this order of the Master of the Rolls James West now appealed.

Serjeant Sullivan (with him *Brewster, Q.C., and Hickson*) for the appellant.—The lands of Groyne, and those of Ballydowney, Farranaspig, and Cliny, were always in the time of the testator and his predecessor treated as separate and distinct, and set to separate tenants and at separate rents. On the Ordnance Survey they are all marked as distinct and separate townlands. By an indenture dated the 16th of July, 1840, the lands of Groyne had been demised by the testator to Richard S. Gorham, for three lives, with a covenant for perpetual renewal, at a rent of £70 per annum, leaving the testator in substance only a rent or annuity out of the lands. The whole of the lands of the testator were held by him under a renewal of an original lease for three lives renewable for ever, bearing date the 10th of October, 1764, and in the memorial of the original lease (the lease itself had been lost) the lands are described as "All That and Those the town and lands of Ballydowney, with its sub-denominations, and Farranaspig and Groyne, with the three Gneeves of West Cliny, situate, lying, and being in the barony of Magoniley and County of Kerry, with their rights, members, and sub-denominations and appurtenances. The question, however, in this case, really depends on the construction to be given to the language of the will. Can it be said that if the lease comprised one hundred denominations of land instead of four, by an enumeration of three, the remaining ninety-seven would pass? This is a fair test of the case put forward by the respondent. [*The Lord Chancellor.*—The testator says that he is possessed of a lease of "certain lands," meaning all the lands held under the lease, "which said lands" are denominated Ballydowney, &c. Is it not a case of *falsa demonstratio*?] On the contrary, we maintain that the use of the word "certain" shows that the testator only intended by this devise to pass some of the lands contained in the lease. He then proceeds specifically to point out the lands devised. The principle of "*falsa demonstratio*" is one that requires great caution in its application.—1 Jarm. on Wills, 749. In *Hall v. Fisher* (1 Coll., 47), Vice-Chancellor Knight Bruce asks, "Is there any case in which, there being a subject to which the

words of the will properly and correctly apply, they have been held to apply also to another subject?" and he decided that that case was not one of *falsa demonstratio*, although he thought it likely that thereby he was defeating the intentions of the testator.—*Quennell v. Turner* (13 Beav., 240); *Goodtitle v. Southern* (1 M. & S., 299); *Slingsby v. Granger* (7 H. of L. Ca., 273; 28 L. J. Ch., 616); *Abbott v. Middleton* (7 H. of L. Ca., 68); *Pullin v. Pullin* (3 Bing., 47; 10 J. B. Moo., 464); *Stanley v. Stanley* (2 John. & Hem. 491); *Webb v. Byng* (1 K. & J., 580); *Harrison v. Hyde* (4 H. & N., 805).

The Solicitor-General (with him Osborne) in support of the order of the Master of the Rolls.—The testator plainly intends to devise all the lands in the lease, but not having the lease before him, the denominations are misplaced, and one is accidentally omitted. That all the lands were to be included in the devise to the respondent and appellant, is evident from the fact that in a subsequent part of the will, the testator refers to the lands specifically devised as those subject to his debts, these debts being judgments affecting all the lands, including the lands of Groyne. Again, the lands specifically devised are directed to be sold for the payment of the testator's debts, while all the lands, not excepting Groyne, are alike subject to one common head-rent, and to the payment of these debts.—*Llewellyn v. Jersey* (11 M. & W., 183).

Osborne, on the same side, cited *Roe d. Conolly v. Vernon* (5 East., 80); *Bodenham v. Pritchard* (2 Dow. & Ry., 508); *Doe d. Cumpston v. Carpenter* (16 Q. B., 181); *Cunningham v. Butler* (3 Giff., 37).

Brewster, Q.C., in reply.—Upon the construction contended for by the respondent, the residuary devise will lose its effect. The testator had no real property except that held under the lease. By interpreting "certain" as "some," which is the meaning to be found in Johnson's Dictionary, Class 7, every word of the will can bear a strictly accurate and legal construction. The question put by the Vice-Chancellor in *Hall v. Fisher* (ubi supra) is the true test to be applied.—*Morrall v. Fisher* (4 Exch., 591); *Doe d. Ryall v. Bell* (8 T. R., 579); *Doe d. Tyrrell v. Lyford* (4 M. & S., 550); *Doe d. Browne v. Greening* (3 M. & S., 171); *Griffiths v. Penson* (9 Jur., N.S., 385). The conditions to be fulfilled by the lands devised are expressed to be these:—1. They are included in a certain lease. 2. They are subject to the testator's debts. 3. They are situate in a certain parish. The three denominations of Ballydowney, Farranaspig, and Cliny, fulfil all these conditions.

THE LORD CHANCELLOR.—It is difficult, where so many contrary opinions exist, to feel satisfied that the judgment one arrives at is perfectly right. However, as judges have differed, so judges will differ, and upon considering the language of the will, it appears to me that the construction given to it by the Master of the Rolls is the correct one. The question lies within a very narrow compass, being in fact a question as to which of the contending parties is the devisee of the lands of Groyne under the will of St. John Mason. Proceeding to an examination of this will, the first words to look at are those whereby the testator directs that "the aforesaid land should be

sold." Going back from these to the last antecedent, to ascertain to what "aforesaid" refers, we come to the expression, "which said lands are denominated Ballydowney," &c., and as this brings us back to another antecedent, we find then that the lands are first referred to in the following manner, "being possessed of a lease for lives renewable for ever of certain lands in the County of Kerry." Now, if the testator had said, "being possessed under a lease of certain lands," &c., the construction contended for by the appellant might be more easily sustained; but as the expression is, "being possessed of a lease," when we come to consider what is meant by this language, the *prima facie* signification would appear to be, "I am possessed of certain lands," ("certain" being equivalent to "that which can be ascertained by reference to the lease.")—"I hold all the estate I derive by that lease," or, as giving a description of his property, these words would mean, "I have property in all that is demised by the lease." If the will then had stopped at "County of Kerry, Ireland," no doubt could have arisen as to the lands referred to; but then next is a statement which, in fact, is merely a description of the lands, and which, as it omits one of the denominations and transposes others, manifestly shews that the testator was giving this description, not from a document before him, but from memory. Groyne having been omitted from the lands enumerated, was omitted either by mistake or as a restriction. We must look then to the whole scope of the will to ascertain whether the testator meant this as a restriction or a mere enumeration of the lands held by the lease. We find that, subsequently, he speaks of the lands devised as subject to certain debts, and all parties agree that these lands of Groyne were liable to his judgment debts as well as the other denominations. He makes no provision for the payment of the head-rent of Groyne, nor for the exoneration of it from the payment of his debts, and thus we are led most naturally to the conclusion that this enumeration is not intended as a limitation or restriction of the estate demised by the lease. The testator probably had either forgotten the names of the denominations, or was mistaken in reference to them, and, therefore, I cannot find anything that would warrant me to say that the Master of the Rolls' judgment was wrong. The argument founded on the residuary devise is but weak. Very often the residuary devise is thrown in only *ex majori cautela*, and it is impossible to say that it should cut down or control any previous devise. The order of the Master of the Rolls must, therefore, be affirmed.

LORD JUSTICE OF APPEAL.—I also am clearly of opinion that the judgment of the Master of the Rolls should be affirmed. The testator speaks of "the aforesaid lands," and when we look to the next passage of the will, we find that the debts affecting these lands are specified. Now, these debts are found to affect all the lands, and this makes it necessary for us to conclude that the benefit to be conferred was co-extensive with the liability to the testator's debts. When he states that he is "possessed of a lease of certain lands," he may very reasonably be supposed to refer to "all the estate and interest" that he derives by the lease. *Order below affirmed.*

Court of Chancery.

[Reported by Edmund T. Bewley, Esq., Barrister-at-Law.]

BRERETON v. BARRY.—May 28.

Practice—Privilege—Junior counsel.

When a case comes before the Court for hearing on report, exceptions, and merits, junior counsel must be instructed on both sides.

THIS case having been set down for hearing on report, exceptions, and merits,

P. Keogh (with him *The Solicitor-General* and *Brewster, Q.C.*) for the petitioner, on behalf of the Junior Bar, objected to the case being proceeded with without junior counsel for the respondent, who was represented only by *Warren, Q.C.*, and *Lawless, Q.C.*

THE LORD CHANCELLOR held that junior counsel should always be employed on both sides in such cases, and postponed the hearing until junior counsel for the respondent should be instructed.

PHIBBS v. O'DONEL.—June 11, 12.

Practice—Decree of dismissal—Privileged communication—Adverse possession—Statute of Limitations.

A former decree dismissing a bill on the hearing for want of the plaintiff's appearance is not a bar to another suit for the same demand.

Confidential letters written before the commencement of a suit by one of the parties to his solicitor, in reference to the subject matter in dispute, are privileged, and cannot be given in evidence at the hearing by the opposite party.

A., being entitled by settlement to a life interest in a charge of £800, with interest, at the rate of £50 per annum, in accordance with the provisions of the settlement, entered into possession of the lands of O., for the purpose of carrying out the trusts of the settlement. It appeared, however, that at the same time he also took possession for the same purposes of the lands of T., other lands of the settlor, which were not mentioned in the deed of settlement, but which, from the earliest times, always went together with the lands of O. The rents and profits of O. and T. together amounted to about £50 per annum, and no claim for any balance of interest was ever made by A. A. having continued in occupation of the lands for more than twenty years, in a suit instituted by the representative of the settlor for redemption of the lands of O. and T., Held, that A. was estopped from contending that the lands of T. were not comprised in the settlement, and from relying on the Statute of Limitations as a bar to the redemption of the lands of T.

By indenture dated the 17th of June, 1802, Mervyn Archdall, for the considerations therein mentioned, conveyed the town and lands of Ohambeg, and a plot in Tubbercorry, all situate in the County of Sligo, to-

gether with all houses, buildings, and improvements thereon, with the appurtenances, unto John Phibbs, his heirs and assigns, for ever. By another indenture, bearing date the 21st of August, 1802, John Phibbs, in consideration of natural love and affection, conveyed these lands of Ohambeg and the plot in Tubbercorry to his nephew, Richard Phibbs, grandfather of the petitioner in the present case. Richard Phibbs being so seised of the lands of Ohambeg and of the plot of Tubbercorry, and being also seised of the lands of Sweetwood in the County of Leitrim, by an indenture, dated the 28th of March, 1818, made between Richard Phibbs and Mary Napper Phibbs, his daughter, of the first part, Con O'Donel of the second part, and Richard Phibbs Irwin and James Johnston, trustees, of the third part, reciting, amongst other things, that a marriage was about to be solemnized between Con O'Donel and Mary Napper Phibbs, and that Richard Phibbs, her father, had agreed to charge the lands of Ohambeg with the sum of £800, being her marriage portion, Richard Phibbs, in consideration of the intended marriage, and for the purpose of securing unto Con O'Donel this sum of £800, together with the sum of £50 per annum interest thereon, granted, released, and confirmed unto the trustees and their heirs the lands of Sweetwood and Ohambeg, upon trust, to permit Con O'Donel, his heirs or assigns, to receive the rents and profits of the lands of Sweetwood for and during the life of Richard Phibbs, in discharge of £40 per annum, towards the liquidation and payment of £50 per annum, the interest on the above-mentioned sum of £800, and on further trust to levy and raise, by sale or mortgage of the said premises, the sum of £800, for the sole use and benefit of Mary Napper Phibbs; and Richard Phibbs thereby covenanted to pay to Con O'Donel, his heirs and assigns, the sum of £10 per annum, being the residue of the interest on the sum of £800; and in case this sum of £800, and all interest due thereon, should not be levied and paid over before the death of Richard Phibbs, then that all the lands and premises before mentioned should be liable to the payment not only of £800, but also of the entire interest, until the same was raised and paid. Upon the execution of this indenture, Con O'Donel (called "the elder") entered into possession and receipt of the lands of Sweetwood, and continued in such possession until the death of Richard Phibbs, which took place in month of August, 1822. Richard Phibbs, having died intestate, left his eldest son, Richard Phibbs the younger, a younger son named John Phibbs, and four daughters, him surviving. On the death of Richard Phibbs the elder, Con O'Donel lost the possession of the lands of Sweetwood, John Phibbs, the second son of Richard Phibbs, being entitled thereto. Con O'Donel then entered into possession and receipt of the rents of the lands of Ohambeg, and the plot of ground in Tubbercorry, for the purpose of receiving payment of the interest upon the said charge of £800, and continued so in possession until August, 1825, when he died, leaving Mary Napper O'Donel, his widow, and Con O'Donel the younger, his only child and heir-at-law, him surviving. Mary Napper O'Donel then entered into possession of the lands of Ohambeg, and houses and plot in Tubbercorry, for the purpose of

receiving payment of the charge of £800, and the interest due thereon, and from that time up to the date of the present suit she and her son, the respondents in the present cause, continued in possession exclusively. On the death of Richard Phibbs the elder, the lands of Ohambeg and Tubbercorry descended upon Richard Phibbs the younger, his eldest son and heir-at-law, and Richard Phibbs the younger having intermarried with Rose O'Donel, there were issue of the marriage Richard Phibbs the eldest son, the petitioner, and two younger children. In July, 1840, Richard Phibbs the younger died, and the petitioner thereupon became entitled to all his father's estate and interest in the lands of Ohambeg and Tubbercorry. On the 23rd of July, 1846, the petitioner filed a bill in the Court of Chancery against Mary Napper O'Donel and Con O'Donel the younger, praying that the trusts of the indenture of the 28th of March, 1818, might be carried into execution, and that an account might be taken of what was due for principal and interest on foot of the charge of £800, and of the rents received by Con O'Donel the elder during his lifetime, or by Mary Napper O'Donel or Con O'Donel the younger since his decease. In the answer filed by Mary Napper O'Donel and Con O'Donel the younger to this bill, it was admitted that Con O'Donel had been, and that they then were, in possession of the lands of Ohambeg (the annual rental whereof they stated was only £28), for the purpose of paying so far the interest upon the charge of £800, but as to the houses and plot in Tubbercorry, they alleged that they were distinct and separate lands, not charged with the £800 by the deed of the 28th of March, 1818, or at all, and that Con O'Donel had been, and that they were, in adverse possession of the said houses and plot in Tubbercorry for more than twenty years, and they relied upon the Statute of Limitations as a bar to the relief sought by the petitioner; and they said that even if they were to enter into an account of the rents and profits of the said houses or plots of ground in Tubbercorry, which had been received from time to time, the whole of the said sum of £800, with a large arrear of interest, would be found justly due. Exceptions having been taken to this answer for insufficiency, and a further answer having been filed, as the respondents insisted that the arrears of interest due, together with the whole charge of £800, should be redeemed before delivering up to the petitioner the possession even of the lands of Ohambeg, the petitioner, not having means to redeem them, did not bring this suit to a hearing, and the respondents having set down the cause for dismissal, the petitioner not appearing, a decree was made on the 31st of May, 1849, dismissing the petitioner's bill for want of prosecution. The petition now alleged that, since the dismissal of the former bill, in the month of August, 1861, he for the first time discovered that Constantine O'Donel the younger, in November, 1845, furnished a rental and an account of the rents of the lands of Ohambeg and Tubbercorry to Thomas Mostyn, and also wrote to Thomas Mostyn two letters, bearing date the 1st and 11th of November, 1845, respectively, in which rental and letters he described and mentioned the houses and plots of Tubbercorry as being held by him under the same title as Ohambeg, and liable to, and

as security for, the charge of £800. The petition, having stated the foregoing facts, prayed for a redemption of the lands of Ohambeg and Tubbercorry. The answering affidavit of Mary Napper O'Donel and Con O'Donel the younger, after admitting the principal facts as set forth in the cause petition, denied that Con O'Donel the elder had entered into possession of Tubbercorry for the purpose of receiving payment of the interest on the charge of £800, and the respondents maintained, as in their answer to the former bill, that the lands of Tubbercorry were not comprised in the settlement of the 28th of March, 1818, and relied on the Statute of Limitations as a bar to the relief sought by the petition in reference to the lands of Tubbercorry. With respect to the rental and letters sent to Thomas Mostyn, the respondents stated that Con O'Donnell the younger, for his own private purpose to obtain a small loan of money, and without the knowledge or sanction of Mary Napper O'Donel, wrote the letters mentioned in the petition to Thomas Mostyn, his solicitor, and did so regarding Thomas Mostyn, as his professional and intimate friend and adviser, in whom he placed the greatest confidence; and the respondents submitted that the letters and rental should not be received in evidence as being privileged and confidential communications between solicitor and client. The respondents further alleged that the statements contained in these letters were wholly inaccurate and untrue.

The Solicitor-General (with him *Lawless, Q.C.*, and *White*) stated the case for the petitioner, and was proceeding to read the letters from Con O'Donel, the respondent, to Mr. Mostyn, referred to in the cause petition, when

Serjeant Sullivan, on behalf of the respondents, objected to their being received in evidence, on the ground that they were privileged communications.

The Solicitor-General.—*Black v. Galnworthy* (2 Giff. 453), a recent case before Vice Chancellor Stuart, decides that communications made before the commencement of a suit by a client to a solicitor concerning the subject matter in dispute, are not generally privileged. [*The Lord Chancellor*.—I thought this point had been carefully considered in England by the judges, and that there was a rule laid down by Lord Denman to the contrary effect. However, I shall receive the evidence for the present *de bene esse*, subject to my own objection to its admissibility. My present impression certainly is that it cannot be received.] It will be urged, no doubt, on the other side that the former decree in this matter is a bar to the present suit. Such, however, is not the case. In *Joly v. Swift* (11 Ir. Eq. 410) it is laid down that a former decree dismissing a bill if not enrolled and pleaded, is not an absolute bar to another suit for the same demand. With regard to the question of adverse possession the present case resembles a Welsh mortgage, and the Statutes of Limitation accordingly do not apply. Time is no bar to redemption in the case of a Welsh mortgage unless twenty years after principal and interest have been paid by the perception of the rents and profits.—*Fenwick v. Reed* (1 Mer. 114); *Fisher on Mortgages*, p. 88.

Serjeant Sullivan (with him *Brewster, Q.C.*, and *Dames*), for the respondents.—We contend in the

first place that the former decree of dismissal is a bar to the present suit. *Joly v. Swift* was under the old system of pleading. Then this objection could only be taken advantage of by plea; now the same may be done by the answering affidavit. The fact of the decree not being enrolled is of no moment; an unenrolled decree is good until altered. In *Jones v. Nixon* (1 Young Eq. Exch. 359) a plea of a former suit and decree signed and enrolled in the Court of Chancery in respect of the same matters was allowed, although the bill in the Court of Chancery was dismissed, not on the merits, but for want of evidence. [*The Lord Chancellor*.—The matter is not a *res judicata*. In 2 Maddock Ch. Pr. 403, you will find—"If a cause is not heard on the merits and the circumstances discussed, but is dismissed on the hearing for want of the plaintiff's appearance, such decree, it seems, could not be pleaded, for such dismissal is not *res judicata*; it is not an absolute determination of the Court that the plaintiff has no title." You must proceed with your case.] Tobbercurry and Ohambeg have always been regarded as distinct and separate denominations; and by no legitimate construction can the former be held to be included in the indenture of 1818. That being so, there is nothing to prevent the Statute of Limitations from running as to the lands of Tobbercurry, of which the respondents and Con O'Donel the elder have indisputably held adverse possession for more than twenty years—*Kirkwood v. Lloyd* (11 Ir. Eq. 561). The case of the petitioner must come to this,—that if a man enters into possession of lands for the payment of interest on a mortgage debt, he cannot acquire any title by the Statute of Limitations to any other lands, even in another county, if they happen to belong to the mortgagor. It cannot be contended that Tobbercurry passed as one of the "appurtenances" of Ohambeg, though this case was endeavoured to be made in the former bill. [*The Lord Chancellor*.—It is singular, however, that in all the old deeds these two plots appear always to go together, and are always mentioned together.]

Lawless, Q.C., for the petitioner.

June 12.—*Brewster, Q.C.*, for the respondents.—

A grant of a sub-denomination cannot include the principal denomination; nor can this be regarded as a Welsh mortgage. [*The Lord Chancellor*.—It is a trust estate.] If so, as a direct trust cannot be created by parol, it must be a constructive trust; and if a constructive trust, then then the statute runs and it is barred—3 & 4 Will. 4, c. 27, s. 25.

Dames, for the same parties, cited *Petre v. Petre* (1 Drew, 371).

F. White in reply cited *Waterpark v. Fennel* (7 H. of L. Ca. 650), and Lord Wensleydale's judgment in it at pp. 684 & 685; *The Attorney-General v. Drummond* (1 Dr. & War. 368); *Lincoln v. Wright* (4 De G. & J. 16); *Kirkwood v. Lloyd* (12 Ir. Eq. 585); *Burrell v. Lord Egremont* (7 Beav. 237); *Fallon v. Dillon* (2 Sch. & Lef. 20); *The Life Association of Scotland v. Scottish* (3 De G. F. & J. 58); 3 & 4 Will. 4, c. 27, s. 7.

THE LORD CHANCELLOR.—I am very strongly inclined to hold that the case is not affected by the Statute of Limitations. Having regard to the facts, from the earliest times, it appears that these two denomi-

nations of Ohambeg and Tobbercurry went together, Ohambeg being originally a sub-denomination of Tobbercurry. In all the old deeds they are spoken of as Ohambeg and "a plot," or "the plot," in Tobbercurry; and by annexing them thus to one another it might be easily understood that in course of time they came to be looked on as a single denomination. It was first contended that in point of legal construction the plot in Tobbercurry did not pass by the deed of 1818. Now, the words of the deed are of significant importance; the language employed is very unusual and unnecessary if Ohambeg alone was intended to pass. First, there is the following recital:—"And whereas the said Richard O'Donel is seised of, and entitled to, and possessed of the lands of Ohambeg, situate in the barony of Liney, and county of Sligo aforesaid, together with the houses, offices, and tenements and appurtenances thereunto belonging." And afterwards when describing the parcels the deed proceeds:—"All that and those the said town and lands of Sweetwood and Ohambeg, together with their and each of their respective appurtenances thereunto belonging or in any way appertaining." Such language is rarely found in a recital; and though, of course, it is a mere presumption to suppose that Tobbercurry was intended to be conveyed by this deed, yet we find that this deed is in itself rather ambiguous. The lands, however, were held together by the same party from a very early period down to the present time. This common possession of them has always continued too from the year 1818; and the question now is in what right has it existed. By the deed of 1818 the lands were conveyed to trustees; and it is very important to consider the limitations to which they were thus made subject. (His Lordship stated the principal provisions of the indenture of settlement.) Con O'Donel's right to the charge of £800 for his life, with remainder to his son, would explain the subsequent dealings of himself and of the respondents with the lands. In 1822 we find Con O'Donel the elder going into possession of the lands in question when the property of Sweetwood fell out of the settlement; and we find also that the lands of Ohambeg produced only an annual rental of £28, while the rents and profits of Tobbercurry would make up the difference between this £28 per annum and the interest payable on the charge of £800. There was never any complaint made on the ground of deficiency, nor any claim made by the parties in possession for any balance of interest due; and that being so, can there be a stronger case for coming to the conclusion that when Ohambeg was entered upon in accordance with the provisions of the settlement, Tobbercurry was also taken possession of at the same time for the same purpose. Now, if the trustees had done this, could they have set up this case of the Statute of Limitations? They would be estopped from contending that the plot did not in some way or another pass; and if they took it as a part of trust premises they would be held express trustees of it for the purposes of the settlement. Here the *cestui que trust* takes possession for the purpose of carrying out the trust. His possession was the possession of the trustees, and it comes round in a circle to the former position. As the trustees would be estopped from making this case, so is he

estopped also. There is no tenancy at will as between the trustees and the *cestui que trusts*; that is the express saving of the 7th section of the Statute of Limitations. At the time that Con O'Donel entered on Tobbercurry no tenancy existed; it is at most a parol mortgage—an agreement acted on ever since by the parties. Here possession is given under the full belief, I suppose, that Tobbercurry formed a portion of the premises included in the deed of 1818. Such is the construction put upon this deed by the acts of the parties, or by their acquiescence and concurrence. That being so, I cannot refuse the petitioner the relief he seeks. I have read the case before Vice-Chancellor Stuart, *Black v. Galsworthy* (ubi supra), and find that it regards a question of a totally different nature. It is a good case, but quite unconnected with the point before me.

Decree for redemption accordingly.

Rolls Court.

[Reported by J. L. Whittle, Esq., Barrister-at-law.]

FITZGERALD v. MASSY AND OTHERS.—April 27th.

Partition—Occupying owner.

Where the Commissioners' return to a writ of partition varied in some respects from the directions given in the Master's report; and also made no provision for the allotment to an owner in own possession of portion which he had purchased pendente lite, the Court refused to set aside the return, the other owners not objecting to the allotments made to them, and no misconduct on the part of the Commissioners being proved.

MOTION to set aside return to writ of partition.—The petition had been presented Jan. 4th, 1857. The order of reference bore date the 18th June, 1857. By the Master's report of 21st July, 1859, it was found that five sisters—Margaret, Henrietta, Barbara, Helena and Anna Maria Hickman—were seised as tenants in common of the lands in the four schedules annexed to the report set forth. The lands in each of the schedules were held upon different tenures: and the Master had directed that the respective representatives of each of the sisters should have a portion of the lands contained in each of the four schedules; and where one sister had more than one representative, that the several representatives of such sister should be allotted adjacent shares. Margaret's portion was to be allotted as follows:—One tenth of each of the schedules to Rebecca Goldwin, another one-tenth of each of the schedules to Ash and Mulcahy, who had been respondents to the original suit, but were now represented by the respondent, James Shannon, who had purchased from them after the writ of partition had issued, and had been made a respondent by suggestion. This respondent held part of the lands of Caheraderry, one of the subdenominations in the 4th schedule, under lease of 29th Jan. 1825, from the representatives of C. O'Callaghan (now represented by A. Lysaght and W. H. McGrath), whose interest was

derived from the owners of the entire estate, but who had served notice of surrender, by which the interest of Shannon would be determined pending the present suit. Long previous to such determination Mr. Shannon had built a house and made other substantial improvements. The commission of partition issued 20th December, 1859. On the 3rd July, 1860, and before the determination of his lease, Mr. Shannon bought up the interest of Ash and Mulcahy; but only acquired the full legal title on May 8th, 1861. By order of the Master of July 4th, 1862, Mr. Shannon was made a party defendant to the suit. In July, 1861, Mr. Shannon made application, first to two, and then to one, of the three Commissioners to be allowed to prove his claim to have the lot he occupied assigned as his share of the lands in schedule 4; but this application was coupled with certain statements respecting the fitness of the third Commissioner (who was the land-agent of McGrath) for his office; and the Commissioners made their arrangements without having any interview with Mr. Shannon, or anyone on his behalf; and by their return, none of the lands Mr. Shannon held were allotted to him; nor were the lands allotted Mr. Shannon adjacent to those allotted to Mrs. Goldwin, the other representative of Margaret Hickman.

Brewster, Q.C. (with him *Sherlock, Q.C.*, and *Mark O'Shaughnessy*), for Shannon, moved to set aside the return. The return violated the Master's directions by not allotting adjacent shares. The general principle long established is that, where practicable, the occupying owners shall be entitled to have their own holdings allotted to them—*Story v. Johnston* (1 Y & C. 538, Excheq.) The case of *Delmege v. Barrington* (not reported) was also cited. There it had been specially directed in the Master's Report that a castle and demesne a long time in the occupation of one of the parties, should be allotted to that party.

Sullivan, Serjeant (with him *Warren, Q.C.*, and *G. Cathrew*) in support of the return.—Compliance with the Master's Report was impossible, from the number of subdivisions. No plan was suggested by Mr. Shannon for carrying out his object. Mr. Shannon's holding was more than he was entitled to. The commissioners must act on their own judgment.—*Pews v. Nickham* (19 Beav., 316). No regular application was made by respondent to commissioners. The Courts will refuse to set aside partitions made *bona fide*, even though there be errors of judgment, whether of law or of fact.—*Jones v. Tutty* (1 Sim., 136); *Manners v. Charlesworth* (1 Mil. & K., 330). The respondent applied to the commissioners for preference as representing the eldest daughter, but no such right exists.—*Canning v. Canning* (2 Dr., 434). At the time of the commission issuing, there was only a species of right in the respondent not worth any thing in substance. Could he afterwards, by buying up the reversioner's interest, combine the two rights *pendente lite*, and upset the arrangements already made?

Brereton, Q.C., and *Jellat*, for respondent, McGrath.—No undue influence had been used with the commissioners, whose conduct had been impeached. *Sherlock*, in reply, cited Dan. Ch. Pr., p. 869, as

to duty of commissioners to consult the owners. In *Canning v. Canning* it is laid down that the commissioners may take the circumstance of one of the parties being the eldest daughter into account in coming to a decision, even though the eldest daughter has no priority of choice.

THE MASTER OF THE ROLLS said that the case was greatly embarrassed by the unusual directions contained in the Master's report by which the Master was made to assume the functions of a Commissioner of Perambulation. According to that report, the respondent could not get his farm, but the report was now confirmed by lapse of time. The suit ought to have been instituted in the Landed Estates Court, where matters could have been set right at any stage, without the difficulty of a confirmed report. No right vested in Mr. Shannon as tenant, but the landlord's and tenant's combined formed a reasonable claim if it had been put forward by a regular notice to the commissioners; but considering Mr. Shannon's irregularity, that there was nothing wrong in the conduct of the commissioners, that all the other parties were satisfied, his Honor refused the motion with costs.

Exchequer Chamber.

Reported by J. Field Johnston, Esq., Barrister-at-Law.]

[CORAM LEFROY, C.J., O'BRIEN, HAYES, FITZGERALD, JJ., FITZGERALD, HUGHES, DEASY, BB.]

MONTGOMERY v. MIDDLETON AND POLLEKFEN.

A contract for the sale of a cargo of mixed maize, then on its way from New York to Sligo, contained a condition that, should the vessel which carried it not arrive at Sligo on or before the 20th of June, 1861, the contract should be void. Held (affirming the judgment of two of the judges of the Court of Common Pleas), that in trying an action brought by the plaintiff for non-acceptance, to which the defendants pleaded that the condition was not performed, the judge should have left to the jury the question whether on or before the 20th June, 1861, the vessel had arrived at Sligo within the intent and meaning of the contract (Hayes, J., dissentiente).

THIS was an appeal by the defendants from the judgment of the Court of Common Pleas, making absolute a conditional order for a new trial, which will be found reported, with the pleadings and particulars of the case, in 7 Ir. Jur. N.S. 370, and 13 L. C. L. Rep. 173.

F. M'Donough, Q.C., for the appellants.

D. Heron, Q.C., for the respondent.

Cur. adv. vult.

April 28.—DEASY, B., having stated the contract and the facts, added—I think that the decision of the Court of Common Pleas was right. Unless there be a distinction between "arrival" and "departure," "arrival," in the present case, must *prima facie* mean arrival at the port of Sligo.—*Moir v. Royal Exchange Assurance Company* (4 Campbell, 84, and 3 Maule & Selwyn, 461). In *Lindsay v. Janson* (4 H. & N., 699), and *Jarman v. Cope* (13 East., 391), the

question was left to the jury. I am unable to see any distinction between the stipulation to depart and to arrive, such as that one is to be construed by the Court, and the other by the jury. *Brown v. Johnson* (10 M. & W., 331), and *Kell v. Anderson* (10 M. & W., 498), are distinguishable from the present case. There an arrival where the discharge should take place was contemplated. Where a word in a contract admits of more meanings than one, its meaning is a question for the jury. The words "at Sligo" are undoubtedly susceptible of different meanings.

FITZGERALD, J.—We have the advantage of a very full report of this case in the Common Pleas, and especially of the judgments which were given. There is some embarrassment in the way the case comes before the Court. It is not a special case, nor a case reserving liberty to the Court to draw inferences, nor is it a bill of exceptions, but a combination of all three. There is very little controversy as to the general principles which ought to govern the decision, but there has been as to some of the authorities on the construction to be put upon them. Much of the argument addressed to us might have been very forcible if used to a jury. But there is no controversy as to the correctness of the rule laid down by Baron Parke in *Neilson v. Harford* (8 M. & W., 823). The rule to be deduced from that and other cases is, that except in the case of libel, the construction of a document is entirely for the Court, but where the instrument contains words of art, these are submitted to the jury, and when they have ascertained their meaning, the Court draws the inferences which ought to follow. The defendants allege that the condition means that the vessel should arrive at one of the quays. We have thus the parties at issue upon the meaning of the words "arrive at Sligo." By themselves, the words do mean the port or harbour of Sligo, as the plaintiff contends. If there were nothing to contravene this, the plaintiff would be entitled to a direction. The defendants say not only did the promiser mean, but the promisee understood him to mean the quay of Sligo. The defendants' contention being that place of arrival and place of discharge are the same thing, it is to be observed that this contract fixes no time either for the commencement or the completion of the discharging. It might have been any time after the 20th. Therefore, "arrival" and "discharge" do not here mean the same thing. Again, neither party was aware of the draught of this vessel. There was no statement of the tonnage, and if there had been, that would not tell what water she would draw. Again, there were no materials from which it could be told. Again, as to the documents in payment, a distinction is to be taken between the time of arrival and of discharge. Upon this contract, open to these observations, let us see what are the facts which the defendants contend exempt them from accepting this cargo. 1. The vessel's arrival was within the natural port and harbour of Sligo, and where a certain class of vessels discharge all their cargo, and where others discharge a part, and then go up to the quay to discharge the remainder. 2. She was bound to report herself when she arrived at Oyster Island. 3. By the contract, having regard to the usage of the port, she was bound to discharge at the quay,

and the defendants were not bound to accept elsewhere. The defendants relied very much on the correspondence preliminary to the contract, especially the letter of the 15th May, 1861. But the contract is to be found in the bought and sold notes alone, which were subsequent to the letters. If it be doubtful, these letters may be taken as extrinsic evidence by the jury, to explain its meaning, but the Court cannot look into this letter. The Chief Justice would not leave it to the jury to say if there had been an arrival within the meaning of the contract, but took it as a matter of construction, and his mode of putting the case to the jury amounted to this, that "arrival" and "discharge" meaning the same thing, and the vessel not having arrived at the quay, the defendants were entitled to a verdict. If the question had gone to the jury, in what sense did the plaintiff, when using the expression "arrive," understand it, and in what sense did the vendor understand the vendee to use it when entering into the contract, they might have found that "arrival" meant arrival within the port and harbour of Sligo, and in such a finding, if it had been given, there would have been nothing to correct. It would have been fair and sensible. The *Surf* was in safe anchorage; she was liable to port and anchor dues. The defendants could examine the cargo. If the jury had so found, I for one should say it would be very difficult to quarrel in fact with the decision. The question ought to have been sent as in the case in 2 *Man. & Granger*. There extrinsic evidence was given on both sides to enable the jury to understand the expression. There the jury were not directed to find the extrinsic facts, and then leave them to the Court, but they were directed to construe the words by the extrinsic evidence. What was the question sent? The sense in which the term was used. This was considered to be right. If the present question is to be determined by the contract itself, then the plaintiff has fulfilled his part of it by showing that the vessel had arrived within the port and harbour of Sligo; but if extrinsic evidence be necessary, then the question should have gone to the jury, and they might have given an answer of either description.

HUGHES, B.—I think that the Court of Common Pleas was right. The fourth paragraph omits the words "at Sligo." My opinion is, that it was within the province of the judge to tell the jury that the words "at Sligo" were to be inserted there. But having ascertained that the words were capable of different meanings, it was his duty to submit the question to the jury, and ask them which of the meanings of these words was in the fourth paragraph to be applied to them. I think there was an error in this respect, and that a new trial should be had.

FITZGERALD, B.—I have found considerable difficulty in this case. The agreement was not the charter-party of the vessel. We must assume there was evidence that the agreement was made with reference to the usage of the harbour of Sligo. There are several places for discharge, quays for vessels of a lighter draught, and Oyster Island for vessels of a heavier draught. We must take it as found that the vessel had not arrived at the quay before the 20th of June. Whether she had arrived at the port of Sligo within the meaning of the contract, ought to have been left

to the jury, and I think no authority is necessary to be cited for that. My difficulty is this, that the special case is partly a statement of law and partly a statement of facts. The Chief Justice directed the jury to find a verdict for the defendants, on the ground that the *Surf* was bound to deliver the cargo at the quay. He does not ascertain the meaning of the expression, but attempts to do so indirectly by another part of the contract. It was for the jury to ascertain what was the meaning of the part of the contract in controversy. It was for the defendants to make out by parol evidence that what occurred was not an arrival at the port of discharge. It was for the jury to say whether or not.

HAYES, J.—I differ from the other members of the Court, and think that the conditional order ought to have been discharged. It is said that the Chief Justice ought to have left it to the jury as a question of fact to say if this vessel had arrived before the 20th June within the true intent and meaning of the contract. The Chief Justice would not do this, and I think he was right. "Arrival" or "departure," generally speaking, is, I think, a pure question of fact, but when special words are used, then it becomes a question of mixed law and fact, and such questions are exclusively for the Court, for though it may call in the aid of a jury to explain certain words in the contract, yet that duty of the jury is merely ancillary to the determination of the Court. One of two modes may be adopted at the trial. The judge may determine the law upon certain points, and leave the rest to the jury, or the jury may present the facts, and leave it to the Court to apply the law to those facts. The latter was the course adopted here. Every material fact was given in evidence. What remained to be done? Two things. First, the judge, assuming the facts to be true, was to ascertain the meaning of the contract. Secondly, the jury were to say if the terms of the contract so interpreted had been complied with. But this, their remaining duty, was more ministerial than otherwise. It was simple. The case was one for a direction. Assuming the judge to have been right in the course he took, and the jury to have found otherwise than they have done, I think the Court above must have set aside their verdict. The Chief Justice said that as the *Surf* was obliged to deliver her cargo at the quay, she was obliged to be at the quay by the 20th. I have read the correspondence. The letter of the 23rd of May pointedly refers to the offer of the defendants as the one accepted by the plaintiff. I look at that letter as indicative of the intention of the parties, and as explicative of any doubt upon the contract. There are these words, "As the cargo of the *Surf* is not large, we are willing to give 31s. 6d. for it delivered here, so far as in good order," &c. Any place but that of discharge and delivery, seems to have been wholly out of the defendants' contemplation. The price was to be calculated, not on the quantity of grain brought to Sligo, but to the quay. It was not contemplated that the vessel should be where she might be detained days to the great injury of the defendants. I do not find anything in the bought and sold notes to contradict the terms of this letter, and what I have said of the letter applies to the bought and sold notes, though I have addressed it

to the letter as more fully expressing the intention of the parties. I think the Chief Justice was quite right, and that there was enough of evidence to rebut the *prima facie* presumption on the face of the contract. I do not think it necessary to cite the cases which are all well settled. The difficulty is in applying them. Upon my best consideration, I think that the verdict for the defendants ought not to be disturbed.

O'BRIEN, J.—I should be sorry to encroach upon the settled principle which leaves the construction of a document to the Court, and not to the jury; but that principle is subject to several exceptions. The rule laid down in *Neilson v. Harford* is this: that "the construction of all written instruments belongs to the Court alone, whose duty it is to construe all such instruments as soon as the true meaning of the words in which they are couched, and the surrounding circumstances, if any, have been ascertained as facts by the jury. And it is the duty of the jury to take the construction from the Court, either absolutely, if there be no words to be construed as words of art or phrases used in commerce, and no surrounding circumstances to be ascertained, or conditionally, when those words or circumstances are necessarily referred to them." In the present case the whole question is this,—was it for the Court or for the jury to determine what was the meaning of the words, "arrive at Sligo," for we all think the fourth paragraph is to be read as if the words "at Sligo" were in it. The defendants' argument is and must be, that the contract was so framed as to lead to the conclusion that whatever is the place of discharge, that is the place of arrival within the meaning of the contract. Looking at the contract, I cannot think that is the meaning of it. The place of arrival is not identical with the place of discharge. Payment is to be made either by cash or by bills; and a reduction is to be allowed, which can only be when the cargo is delivered. I think that the contract defines the place of arrival to be Sligo, whatever the place of discharge might be. If it appears that besides Sligo there are three landing-places, we are obliged, even upon the defendants' own showing, to call in this extrinsic evidence to construe the contract; and the instant we do this the question becomes one entirely for the jury. If there was any question on usage, that question was clearly to be left to the jury. There was a usage as to the place of discharge, therefore the question of that usage was for the jury. The *prima facie* meaning of "arrive at Sligo" being "arrive at the port of Sligo," the defendants contending that it meant something else; and there being evidence of usage, I think it should have been left to the jury to say with what meaning and intention the parties used the expression, "arrive at Sligo."

LEFROY, C.J.—There are two questions on the face of the record which we are called on to decide, 1. Whether the Chief Justice was right in giving a direction. 2. Whether his direction was right. The latter is waived, because the parties forego it; and the only question we have to decide, unless we choose to volunteer a decision not rendered necessary, is whether the Chief Justice was right in directing the jury as to the nature of the contract between the parties. If, adverting to topics given in evidence, he had said to the jury, "These are matters well deserving

of your consideration in determining the sense intended by the word 'arrive,'" I should see no objection to that. It would have been for them, taking their entire knowledge and their mercantile experience, to say what was the meaning of the contract. In stating the grounds on which I give my opinion against a direction, I shall confine myself to the one question, because it is enough for a judge to be exposed to the chance of being in error on that upon which he is called on to decide, without adding that upon which he is not called on to decide. With all respect to my brother Chief Justice, I entertain a strong opinion on this case. *Ad questionem facti respondent iuratores, ad questionem legis respondet iudex.* What does this contract import upon the face of it? What are the grounds in it for the construction put upon it, and on which the jury were told they should act? It is not enough to show that one party understood the sense of a particular term. A man cannot reserve to himself the right, according to circumstances, of saying "I will use that term in a sense which I did not tell to the other party." It might be very convenient to him to say, "I meant at the island," or "at the quay." What is there here to show in what sense the word was used? As to time there is not any ambiguity nor doubt—the day of the month is given. What are the terms of the bought and sold notes? There are two preliminary matters as to which the contract gives us the meaning of both parties; and then comes the passage of it in which the ambiguous term is to be found. All the incidents with reference to the performance of the contract are referable to "at Sligo;" and the condition is, "Should the vessel not arrive at Sligo aforesaid on or before the 20th June, 1861, the contract to be void." What in point of law is the meaning of the arrival of a ship if there be not something to alter that meaning? It means arrival at the natural port and harbour. The defendants tell us that the construction of arrival at Sligo is arrival at the quay of Sligo. That is a sense different from its enlarged, its legal meaning. Why, then, when they made the contract did they not say so? I take it that when a man uses a term he must be held to use it in its legal meaning, unless there be something in the contract to show that he did not use it with that meaning. The defendants say that the other incidents show that they meant the quay of Sligo. These incidents might attach to the arrival at the quay, but there could not have been a performance of the contract if arrival was not arrival at the harbour of Sligo. Upon the authority of that well-established decision quoted before, the arrival being the *factum* on which the only ambiguity arises, the party cannot be allowed to interpose a different construction from that usually imported. It is for the jury, as men conversant with the habits of their trade, to say whether it is for the defendants to deal thus with their brother merchant—to reserve to themselves a different meaning of the word "arrive;" to say "you shall be bound by our secret understanding of the term." There are many cases in which a construction does belong to the Court; but the import of an expression in a contract which has an apparent meaning, which bears several senses, is for the jury; and I am glad to find by the cases which occupy half a

page of the report, that we have come back to the proper understanding of the *dictum* which I have quoted, and which was departed from in that case before Byles, J. The judgment of the Court of Common Pleas is affirmed. Let there be a new trial, in which, I am sure, the question, with all proper directions, will be left to the jury.

Judgment affirmed.

Court of Queen's Bench.

[Reported by William Woodlock, Esq., Barrister-at-law.]

M'KENNA v. MOUTRAY.—May 23, June 1.

Pleading—Departure—Construction of lease.

A departure in pleading is still, even since the passing of the Common Law Procedure Act, 1853, ground of general demurrer.

Devise of a farm of land in the townland of C., "together with half an acre of bog, during the continuance of the demise," with a covenant by the lessor for quiet enjoyment of the demised premises with the appurtenances. The lessee having been disturbed in the enjoyment of the bog allotted to him brought an action on the covenant. Held per O'Brien, J., and Fitzgerald, J., that whether the clause in the lease relating to the half acre of bog amounted to an actual demise of the soil or to a grant of turbary, it was in either case too vague and uncertain to sustain an action.

Per Hayes, J., that the covenant for quiet enjoyment extended to the farm only, and therefore that no action on that covenant could be brought for a disturbance of the enjoyment of the half acre of bog.

DEMURRER.—The summons and plaint complained that William Anketell, of Mount Anketell, in the county of Monaghan, by deed, bearing date the 17th February, 1843, demised, set, and to farm let to the plaintiff all that and those that farm of land in the townland of Corry, containing 12a. 3r. 11p., Irish plantation measure, be the same more or less, situate in the barony of Trough and county of Monaghan aforesaid, together with half an acre of bog, during the continuance of said demise, to hold the said premises, with the rights, members, and appurtenances thereunto belonging or in anywise appertaining unto the plaintiff, from the 1st day of November, 1842, for and during the term of 99 years from thenceforth, fully to be completed and ended, subject to the yearly rent of £16 sterling; and by the said deed the said William Anketell did thereby for himself, his heirs, executors, administrators, and assigns, covenant, promise, and agree to and with the said plaintiff that he, the said plaintiff, paying the said reserved yearly rent, and performing the covenants in the said deed contained, should and might peaceably and quietly have, hold, and enjoy the said demised premises, with the appurtenances, during the term thereby granted, without any let hindrance, interruption, or disturbance of the said William Anketell or his assigns, or any other

person or persons claiming or deriving from or under him, them, or any of them, and afterwards during the said term all the reversion of the said William Anketell in the said farm of land, with the appurtenances, vested in the defendant by divers conveyances and assignments; and afterwards, during the said term, the said plaintiff paid to the said defendant the said reserved yearly rent, and performed all the covenants in the said deed contained on his part to be performed, yet the said plaintiff could not peaceably and quietly have, hold, or enjoy half an acre of bog (being a portion of the said demised premises); and the said defendant refused and declined to allow the said plaintiff to have and enjoy half an acre of bog, or any portion of bog whatsoever; but hindered him from having same, contrary to the said covenant in that behalf made as aforesaid, to the damage of the plaintiff of £150. To this the defendant pleaded, thirdly, that at the time of the making of said demise in said writ mentioned the said William Anketell was seised in his demesne as of fee of and in certain lands and bogs called the lands and bogs of Cullamore, adjoining the said lands of Corry; and after the making of the said demise, and in pursuance of the provisions in said indenture contained, the said William Anketell allotted to the plaintiff half an acre of bog, part of the said lands and bog of Cullamore; and the plaintiff entered upon the said half acre of bog, and enjoyed same by cutting turf thereon; and afterwards, and while so in possession and enjoyment of the said bog, the plaintiff surrendered and gave up possession of the same to the said William Anketell; and the said William Anketell afterwards allotted to the plaintiff one other half acre of bog, part of the said lands and bogs of Cullamore; and the plaintiff entered upon the said last-mentioned half acre of bog, and enjoyed the same by cutting turf thereon; and the defendant said that he did refuse and declined to allow the plaintiff to have or enjoy any portion of bog of or belonging to the defendant, for he said that the plaintiff had neglected and refused, and still neglected and refused, to give up to the defendant the possession of said last mentioned half acre of bog or of the soil thereof, contrary to the condition in said indenture of demise contained. To this defence the plaintiff replied that he did not surrender or give up the possession of the half acre of bog, part of the lands of Cullamore, as firstly in the said third defence alleged; and he said that the premises demised to him, as in the summons and plaint alleged, consisted of a dwelling house and land situate in the townland of Corry and not elsewhere; and that after the allotment to him of the said half acre of bog firstly in the said third defence mentioned, and before the said defendant became entitled to the rent and reversion of and in the said demised premises, the said William Anketell, being also seised of the said lands and bogs of Cullamore, as in the said defence stated, conveyed the same for valuable consideration to one John G. Richardson, without any exception of the bogs therein or of any part thereof; and the said John G. Richardson thereupon entered into the possession of the said lands of Cullamore and evicted, expelled, and removed the said plaintiff from the possession and enjoyment of the said half acre of bog; and the plaintiff further said that, save as aforesaid, no bog what-

soever was ever allotted or appointed to him, or possessed or enjoyed by him pursuant to the provisions of the deed of demise in the said summons and plaint mentioned. To this replication the defendant demurred, alleging, as grounds of demurrer, that the said replication was a departure from the cause of action in the summons and plaint stated; and that the same did not contain any sufficient ground of reply to the matter of defence in the third defence pleaded; and that the said replication, by the facts therein stated, displaced the liability of the defendant in the summons and plaint stated as alleged.

Jackson (with him *Harrison, Q.C.*), for the defendant to support the demurrer.—Two constructions may be put on the words “together with half an acre of bog,” in the lease. Either they are a demise of half an acre of bog, or they are a grant of turbary restricted in its use to half an acre. In either case the demise on the one hand, or the grant of turbary on the other, is void for uncertainty. It is not stated where the bog is—*O'Hare v. Fahy* (10 Ir. O. L. Rep. 318). If it is a demise, no liability can attach on the defendant in respect of a demise of land which he never possessed—1st Furl. L. & Ten. 312. The plea is in substance good, and the replication is no answer to it. Then the replication is a departure. It states facts inconsistent with the facts stated in the summons and plaint—*Bartlett v. Wells* (31 L. J., Q. B., N. S., 57); *Brine v. The Great Western Railway Company* (31 L. J., Q. B., N. S., 101). We must take all the pleadings together; and if, on the record as it stands, it appears that the plaintiff has not a good cause of action he must be put out of Court. The reversion, which in the pleadings is alleged to have passed here, was the reversion in the farm and not the reversion in the half acre of bog. The word “bog” signifies a particular description of land, and a grant of it will pass the soil and freehold—*Boyle v. Olpherts* (4 Ir. Eq. Rep. 241).

Shegog and Law, Q.C., for the plaintiff.—The summons and plaint is good, and discloses a sufficient cause of action—Common Law Procedure Act, 1853, s. 81. The meaning of the words “together with half an acre of bog,” &c., is that the landlord was to supply the tenant with as much turf as half an acre would rear as long as the lease lasted. A covenant to supply premises with water is one that will run with the reversion—*Jourdain v. Wilson* (4 B. & Ald. 266); st. 23 & 24 Vic. c. 154, s. 13. The word “farm,” which occurs in the lease necessarily, implies a capital messuage and dwelling-house, for the use of which the supply of turf was necessary—*Sheppard, Touch.* p. 93. “Half an acre of bog during the continuance of this demise,” conferred on the tenant the privilege of cutting turf on such part of the lessor's bogs as the lessor might from time to time appoint, not being less than half an acre. *O'Hare v. Fahy* cannot rule this case, because there was nothing there to limit the right at all; the words there were merely “a right of common”—*Metcalf v. Rorke* (8 Ir. L. Rep. 137). The privilege becomes immediately appurtenant to the house when once it is granted. The word “bog” is not a technical word with a certain ascertained signification. The question is, what signification will the Court put on the word here. *Boyle*

v. Olpherts does not apply here. There all bogs had been excepted, and the action was to recover the soil under them when they had been cut out—*Sammers v. Dixon* (7 East. 200); *Tomlinson v. Day* (2 Br. & Bingh. 680).

Harrison, Q.C., in reply, referred to *Boyle v. Olpherts* (*ub. sup.*), and *Platt on Covenants*, p. 706.

Cur. adv. vult.

June 1.—*O'BRIEN, J.* having stated the pleadings proceeded to say: One of the grounds of objection to the replication is that it is a departure. It will be observed that by the replication the plaintiff admits that Anketell was at the time of the lease seized of the lands and bogs of Cullamore, and that under the provisions of the lease he allotted to the plaintiff half an acre of bog, part of said lands and bogs of Cullamore. The replication also states that Anketell conveyed the lands and bogs of Cullamore for valuable consideration to Richardson before the defendant became entitled to the rent and reversion of and in the demised premises. This replication I think is clearly bad on the ground of its being a departure from the summons and plaint: the plaint stating that it was the defendant who hindered the plaintiff from having the bog; while the replication states that it was Richardson who did so, and the cases which were cited in the course of the argument shew that a departure is, even since the passing of the Common Law Procedure Act, a ground of demurrer. The replication then being bad, the plaintiff contended that the defence was bad also, and pointed out various defects in it. The defence appears to be a very singular one, but it is unnecessary to consider how far it can be supported, as I am clearly of opinion that the summons and plaint is also bad, and that it does not disclose any cause of action. The summons and plaint states the demise to have been of “all that and those that farm of land in the townland of Corry, containing 12a. 3r. 11p. Irish plantation measure, be the same more or less, situate in the barony of Trough, and county of Monaghan, together with half an acre of bog, during the continuance of the demise,” and the way the plaintiff sustains his case is this: he contends that this is not a demise of half an acre of bog-land in addition to the farm, but is a grant of turbary, which right was to continue during the demise for the benefit of the occupier of the farm, and that if the first half acre was cut away or exhausted, he had a right to get another half acre and so on; and he then says that, this being the nature of the contract, he relies upon *Jourdain v. Wilson* (4 B. & Add. 266) as shewing that he might maintain an action of covenant against the assignee of the reversion. It appears to me that that case would not assist him, and I have no doubt that this lease is to be considered as a demise of the soil of the bog. We cannot speculate on what may have been the intention of the parties except as it appears on the lease itself, and there is nothing to authorize us to put on these words “half an acre of bog” any other than the plain ordinary construction. We were referred to *Boyle v. Olpherts* (4 Ir. Eq. Rep. 241) shewing that a grant of bog would be a grant, not merely of a right of turbary, but would be a grant of the soil. In the present case I am at a loss to find anything to control

the ordinary meaning; the words "during the continuance of said demise," are not sufficient to do so. They may have been introduced for the purpose of shewing that the demise of the bog was to be as extensive as that of the farm. Then the objection comes that the demise is void for uncertainty as not shewing where the bog lies. It cannot be said that the uncertainty is of that character which may be made good by the election of the lessee: that may be where there is a demise referring to various lands, and then a demise of one of them without saying which. There a subject matter is denoted, and the grant can be made good at any time, but there is no case in which a grant in such vague terms as the present can be made good by election. It is said it may be construed this way, that the lessor intended to give half an acre of bog somewhere, and that it could be got from his lands wherever they were, but such a construction is impossible.—Shepp. Touchst. 250, 251; Bac. Ab. Grant, H. There is this further in the case that the summons and plaint does not shew the defendant to be the assignee of the reversion of that portion of the premises in respect of which the action for the breach of the covenant for quiet enjoyment is brought. It is plain that the bog is distinct from the farm, and the summons and plaint states only that Anketell's reversion in the farm vested in the defendant, without shewing that the reversion in the bog did so likewise. By referring to the subsequent pleading it appears that Richardson was the person against whom, as assignee of that part of the lands the action should have been brought. *Twining v. Pickford* (2 B. & Add.) lays down the law on that subject. On these grounds I have no hesitation in saying that the summons and plaint is bad in the view that these words operated as a demise. Suppose now that the words amount not to a demise but to a grant of turbary, the objection for uncertainty would equally apply in that view of the matter, and the case of *O'Hare v. Fahy* (10 Ir. C. L. Rep. 318) would apply. It was proved or assumed there that the pleading amounted to a statement that the party was in possession of a right of turbary from particular lands, and that this was to be referred to what he then had in his possession, and that, but for that reference, the grant of turbary would have been void. Thus, I think on any construction the summons and plaint is bad, and the demurrer must be allowed.

HAYES, J.—I concur in the judgment pronounced by my brother O'Brien that the demurrer must be allowed, but I differ from him as to the grounds on which I have arrived at that conclusion, and I confess that inasmuch as my views are not shared by the other members of the Court, I entertain them with great diffidence. Questions have arisen both upon the construction of the lease, and on the pleadings. With respect to the lease, this lease first demises a farm of land containing 12a. 3r. 11p. Irish plantation measure, be the same more or less, so that so far as the farm of land is concerned, no question arises. Then comes the clause "together with half an acre of bog during the continuance of this demise." Now the first demise is of a farm. If we adopt the explanation of the word "farm" given in Shepperd's Touchstone, it hardly lies in the mouth of the defendant to say that

the plaintiff did not demise a house to which common of turbary might attach. I think it may be presumed that at the time of the demise there was a house on the land, and that with that half an acre of bog might be granted, and I also think it is plain that what the parties were arranging for was a supply of turf for that house. If the words were "a sufficient quantity of bog for the use of the said farm," there would be little difficulty in understanding what was meant, because though the word "bog" in Ireland means land, as was held in *Boyle v. Olpherts*, in the case which I have put the meaning would manifestly be to give a grant of turbary. As I have said the parties were arranging for a supply of turf. Is it reasonable to suppose that that would be done by granting the soil of half an acre, and is it not more reasonable that the tenant should have contracted that he might always have the use of a piece of bog-land, and that when the piece should be cut out, he might call on the landlord to assign him some other piece of bog-land for domestic purposes, that very thing being part of the consideration for the rent? On the other hand it has been insisted that the construction ought to be that the parties intended to convey the soil, and freehold, and that as they have left it uncertain where it is to be the whole thing is void for uncertainty, and *O'Hare v. Fahy* is cited. I am not prepared to say but that that case may apply where the Court is so embarrassed, that the only resource it has is to hold a particular clause in a deed void; but that ought to be only done in the last resort, and where the language of the grant leaves the matter wholly vague and uncertain. In all other cases the rule applies, which is laid down in Broom's Legal Maxims, p. 545, "Although a patent ambiguity cannot be explained by extrinsic evidence, it may, in some cases, be helped by construction, or a careful comparison of other portions of the instrument, with that particular part in which the ambiguity arises; and in others it may be helped by a right of election vested in the grantee or devisee, the power being given to him of rendering certain that which was before altogether uncertain and undetermined. For instance, where a general grant is made of ten acres of ground adjoining or surrounding a particular house, part of a larger quantity of ground, the choice of such ten acres is in the grantee, and a devise to the like effect is to be considered as a grant, and if I grant ten acres of wood where I have one hundred, the grantee may elect which ten he will take, for in such a case the law presumes the grantor to have been indifferent on the subject." This passage, I may observe, is cited in *Hargrove v. Lord Congleton* (12 Ir. C.L.R., 362). I am of opinion, then, that we ought not to treat the words in question as void for uncertainty, but as the grant of the privilege of cutting turf on land other than the land demised, and that the place was designedly omitted. I come now to consider the question of the pleadings. The plaint sets out the material part of the lease, and then states the breach of covenant. (His Lordship read the defence). This plea shows no matter of defence, but the plaintiff treating it as a defence files a replication. (His Lordship read the replication.) This replication has been demurred to as being a departure, and so it is.

The plaint was grounded on the disturbance by the defendant as assignee of Anketell, while in the replication he enters on a matter with which the defendant had little to do. The replication being bad, and the defence also bad, the question is, can the plaintiff stand. Mr. Law insists that the half acre was within the covenant for quiet enjoyment, and that the object of the covenant was to secure the quiet enjoyment of everything in the lease. I think that is not so, and if authority is wanting it will be found in the case of *Warn and Wife v. Beckford* (9 Price, 43). My judgment, therefore is, that the summons and plaint discloses no cause of action, and therefore that there must be judgment for the defendant.

FITZGERALD, J.—I also concur to this extent that the summons and plaint is bad, and that the defendant is entitled to judgment on that ground. I am of opinion with my brother O'Brien that the demise of bog is void for uncertainty as a demise of land; also that it is equally void for uncertainty if it is to be treated as a grant of turbary; also, that taking it either way on the pleadings, whether the plaintiff has or has not a remedy against Anketell, his lessor, he has none against the defendant.

Court of Common Pleas.

[Reported by J. Field Johnston, Esq., Barrister-at-Law.]

DELMOR v. M'CABE.—Jan. 27.

Covenant—Demurrer—Estoppel.

Indenture of 1st March, 1862, reciting that under indenture of conveyance of 17th July, 1841, between the defendant and C.D. the defendant was seised and possessed of the premises thereafter mentioned; and reciting that the defendant had agreed with the plaintiff for the sale of all the defendant's estate and interest under the conveyance of the 17th July, 1841, to the plaintiff, witnessed that the defendant did grant, bargain, sell, and assign unto the plaintiff, his heirs, executors, administrators, and assigns, a certain dwelling-house and premises, to hold the same unto the plaintiff, his heirs, executors, administrators, and assigns for ever. Covenant—That the defendant then had in himself good right, full power, and lawful authority to make that conveyance of his estate and interest under the conveyance of the 17th July, 1841, to the plaintiff, his heirs executors, administrators, and assigns. Held—That this was not a covenant that the party had power to convey a freehold estate, but a covenant that he had power to convey such estate, as he took under the indenture of the 17th July, 1841.

COVENANT.—The first paragraph of the summons and plaint complained "that the defendant, by deed made the 1st of March, 1862, between the defendant and plaintiff, reciting that the defendant was seised of a tenement with the appurtenances in Liffey-street, in the city of Dublin, under a certain indenture of conveyance of the 17th July, 1841, for the considerations therein mentioned, granted to the plaintiff, his heirs, and assigns the said tenement with the appurtenances,

together with all the estate and inheritance of the defendant therein, to hold to the plaintiff, his heirs, and assigns for ever. And the said defendant did by said deed covenant with the plaintiff that he, defendant, then had good right, full power, and lawful authority to make that conveyance of his, the defendant's estate and interest, under the said conveyance of the 17th July, 1841, to the plaintiff, his heirs, and assigns. And the plaintiff, in fact, says that the defendant had not then any right, power, or authority to make any conveyance to the plaintiff and his heirs of any estate or interest in the said premises. And for a further breach the plaintiff says that the defendant had not then any right, power, or authority to make any conveyance for ever of any estate or interest in the said premises. And for a further breach the plaintiff says that the defendant had not then any right, power, or authority to make any conveyance of any estate of inheritance in the said premises." The defendant pleaded, "that by indenture, dated the 17th day of July, 1841, and made and executed between and by one Catherine Darcy of the one part, and the defendant of the other part, after reciting that the said Catherine Darcy was then *seised and in possession* of a small dwelling-house and premises in Lower Liffey-street, in the city of Dublin (being the house and premises in the said first paragraph mentioned), for the period of 17 years from the date thereof then last past; and that the said Catherine Darcy had agreed to sell and assign all her right, title, and interest in the said dwelling-house and premises for the sum of £3 10s. unto the defendant, his heirs, executors, administrators, and assigns, the said Catherine Darcy did in consideration of the said sum of £3 10s. then paid to her by the said defendant, grant, bargain, sell, and assign to the defendant, his heirs, executors, administrators, and assigns the said dwelling-house and premises, to have and to hold the same unto the defendant, his heirs, executors, administrators, and assigns, together with all and singular the rights, members, and appurtenances thereunto belonging, or in anywise appertaining, for ever. And the said Catherine Darcy did, by the same deed, covenant with the defendant that he, the said defendant, his heirs, executors, administrators, and assigns should and would, from time to time, and at all times for ever thereafter, peaceably and quietly have, hold occupy, possess, and enjoy the said dwelling-house and premises, and have, receive, and take the rents, issues, and profits thereof without the let, suit, hindrance, or denial of her, the said Catherine Darcy, her heirs, executors, administrators or assigns, or of any other person or persons claiming or deriving by, from, or under them, or any of them. And the defendant avers that he became entitled to and entered into possession of said house and premises under the said last-mentioned indenture and not otherwise, and continued in such possession until the execution of the indenture next hereinafter mentioned; and that by deed, dated the 1st of March, 1862, made between the defendant and the plaintiff, being the deed in the said first paragraph mentioned after reciting that by indenture of conveyance dated the 17th of July, 1841, being the indenture hereinbefore stated, the defendant was *seised and possessed* of the premises thereafter mentioned being the pre-

mises in the said first paragraph mentioned, and that the defendant had contracted and agreed with the plaintiff for the sale of all his, the said defendant's estate and interest under the said conveyance of the 17th July, 1841, to the plaintiff, the said defendant did grant, bargain, sell, and assign unto the plaintiff, his heirs, executors, administrators, and assigns the said dwelling-house and premises, to hold the same unto the plaintiff, his heirs, executors, administrators, and assigns for ever. And the defendant did by the said indenture covenant with the plaintiff that he, the defendant, then had in himself good right, full power, and lawful authority to make that conveyance of his estate and interest under the said conveyance of the 17th July, 1841, to the said plaintiff, his heirs, executors, administrators, and assigns. And the defendant avers that the plaintiff immediately upon the execution of the said last-mentioned indenture of the 1st day of March, 1862, entered into possession of and became and was entitled to the possession of the said house and premises under and by virtue of the said last mentioned indenture. And the defendant avers that he had, at the time of the entering into by him of the said covenant in the said last-mentioned indenture contained, good right, full power, and lawful authority to make the said conveyance of his estate and interest under the said conveyance of the 17th of July, 1841, to the plaintiff, his heirs, executors, administrators, and assigns as in the said covenant contained." The plaintiff demurred to this plea, because it did not thereby appear that the defendant, at the time of the execution of the conveyance of the 1st of March, 1862, had any estate of freehold, or any estate whatever in the premises; and because the averments contained in it, if true, afforded no answer to the cause of action.

W. Sidney (with him *Samuel Ferguson, Q.C.*), in support of the demurrer.—The question is, if the defendant professed to pass the fee-simple in this property, or only such estate as he had under the deed of 1841; and if only the latter, whether he is not estopped from denying that he was seised of an estate in fee-simple. If there be an estoppel there is a breach of covenant. This defence was probably framed under the authority of *Cooke v. Founds* (1 Levinz, 40.) The recital will not help the defendant if it professes to show he had an estate in fee-simple. The defendant is estopped—*Lainson v. Treniere* (1 A. & E. 792); *Bowman v. Taylor* (2 A. & E. 278); "and possessed" will not make equivocal the meaning of "seised," because a term of years and a freehold may subsist in the same person without merger if held in different rights—*Jones v. Davies* (5 H. & N. 766). "Seised and possessed" may mean that the defendant was seised and was also in possession—*Stott v. Stott* (16 East. 343). The recital that Catherine Darcy was seised and in possession for the period of 17 years, means that she had been in possession for 17 years previously. [*Monahan, C.J.*—Can the words in the conveyance of 1841 be taken into consideration in construing this one?] I think not. The Court will take into consideration the whole instrument. The words "seised and possessed" are not ambiguous; but if they are, then they are to be taken most strongly against the covenantor. [*Christian, J.*

—Is there any authority for this,—that the allegation of being seised is an estoppel from showing a less estate, such as a life estate?] I have not found any.—*Bradshaw's case* (5 Coke, pt. 9, 60 b.)

J. E. Walsh, Q.C., and *C. H. Tandy, contra.*—*Browning v. Wright* (2 B. & Pull., 13,) is a modification of the doctrine that covenants shall be construed against the grantor. *Howell v. Richards* (11 East., 633,) takes a distinction between covenants for title and covenants for quiet enjoyment.—*Foord v. Wilson* (8 Taunton, 543). These cases are all collected in the last edition of Sugden on Vendors and Purchasers, pp. 605, 606. [*Christian, J.*—If a grantor covenants generally, there is no presumption of law which cuts down the intention, but if he means to covenant only to a certain extent, he must say so. *Ball, J.*—Must not "seised" import an estate of freehold of some sort?] It does not. The words show that the defendant did not know what estate he had, and what follows shows that what he intended was to convey whatever estate was acquired under the deed of 1841. The conveyance is to the plaintiff, his heirs, executors, administrators, and assigns. In *Cooke v. Founds*, there was an express covenant that the defendant had seisin. We gave nothing but what we had, and we covenant we have done nothing to lessen that. We might have a tortious seisin. [*Monahan, C.J.*—Then you might plead that you were seised in fee.] No; because it would be only a tortious fee. A man could not be both seised and possessed. [*Christian, J.*—If the word "possessed" were out of it, would you admit that there must be an estate of freehold imported?] No; because the seisin might be tortious. The recital that the defendant was seised and possessed, does not create an estoppel. There is no rule that a recital is to be construed strictly to create an estoppel, but the contrary. The cases cited were cases of particular recitals. *Lainson v. Treniere* and *Bowman v. Taylor* only go to show that a recital may be an estoppel. These cases are both treated of in the notes to the *Duchess of Kingston's case* (2 Smith's L. C., 705); *Viner's Abridgement Estoppel*, P. 5, 9, 15, and 16; *Estoppel*, M. 7; *Dyer's Reports*, 196, note. It is a rule that an estoppel should be certain to every intent.—*Right dem. Jefferys v. Bucknell* (2 B. & Ad., 281); *Kepp v. Wiggett* (10 C. B., 53). This recital is deficient in the first element, that of certainty. The recital of the contract for sale runs thus, that the defendant had contracted and agreed with the plaintiff for the sale of all the defendant's estate and interest under the conveyance of the 17th of July, 1841, which shows the intention of the conveyance. The covenant which follows is a guarded one; that the defendant had in himself good right, full power, and lawful authority, to make that conveyance of his estate and interest under the said conveyance of the 17th July, 1841. *Jones v. Davies* only shows that a man might, under certain circumstances, have both a freehold and a term of years in him.

S. Ferguson, Q.C., in reply.—The recital is an estoppel; it is sufficiently particular, and the covenant that the defendant had good right to convey removes any difficulty. The cases cited were on the old rule of law, which does not now apply.—*Doughty v. Neale*

(1 Saunder's Rep., 214); *Karne v. Pryther* (Croke James, 375). The nature of the possession is shown by the statement of occupation. The statement is that of a person seised that he is in occupation. "Seisin" cannot be applied to a smaller estate than one of freehold. It is a word of art, and has a specific meaning.—Coke Littleton, 200, b; Burton on Real Property (60). The word "seised" has been the key to the construction of the Statute of Uses for three hundred years. [*Christian, J.*—What do you say to a tortious seisin, and to this that the whole may mean, I am in rightly or wrongly, and whatever it be, I will convey that?] An intention of this kind must be clear on the face of the instrument. A vendor is not to be taken as holding himself out to the man who gets his money as a disseisor or a trespasser. The covenant is a covenant that the defendant has good right to convey to the plaintiff and his heirs that estate of freehold of which he has already recited himself to have the seisin. The conveyance from Catherine D'Arcy is a conveyance to hold to M'Cabe, his heirs and assigns, for ever. [*Christian, J.*—To look at that deed is inconsistent with the former branch of your argument. Estoppel means to exclude the truth, but to look at that conveyance would show that Catherine D'Arcy had no estate.] The Court is asked to turn the word "and" into "or;" but there are intelligible words sufficient to give the meaning of the parties.—Platt on Covenants, 142; *Doe dem Spencer v. Godwin* (4 Man. & Selw., 265). The onus of showing the intention contended for lies on the defendant. His covenant would then amount to this—I covenant to do what I covenant to do. It would be an illusion. [*Christian, J.*—It would be a breach of that covenant if he had conveyed to another.] It would be negatory. [*Christian, J.*—It would mean, I had something or nothing, and that something or nothing which I had, I still have.]

Cur. adv. vult.

May 1.—MONAHAN, C. J.—The summons and plaint is very short. It complains that the defendant "did by said deed covenant with the plaintiff that he, defendant, then had good right, full power, and lawful authority, to make that conveyance of his, the defendant's estate and interest under the said conveyance of the 17th of July, 1841, to the plaintiff, his heirs and assigns, and the plaintiff in fact says that the defendant had not then any right, power, or authority, to make any conveyance to the plaintiff, and his heirs, of any estate or interest in the said premises, or any conveyance for ever of any estate or interest, or any conveyance of any estate of inheritance." The breaches assigned are substantially, that the defendant had no power to convey an estate of inheritance, or any freehold estate of any kind, in the premises. The defence, in other words, says that the defendant did not covenant to give a freehold, but only such estate as he had the power to grant, and did grant. According to the practice, though it is set out in the defence, we have thought it right to refer to the deed itself, a copy of which I have before me. What is the covenant? Is it, I have good right, full power, and lawful authority, to convey the estate I got under the deed of the 17th of July, 1841, or is it,

I have power to convey an estate for ever, or at all events, a freehold estate. The deed is very short. The plaintiff says that it is recited here that the defendant is seised and possessed of certain premises under a certain indenture, and that the legal meaning of being seised is, that he had at all events a freehold estate. No doubt that is the legal meaning. What is the meaning of adding "possessed?" There is a possibility of a man having a freehold and a chattel which would not merge, and it was argued that this was the meaning here. It was also argued that the meaning might be that the defendant was seised and was in possession. But the word "possessed" would then be unnecessary, because "seisin" implies possession. The plaintiff insists that the defendant's reciting he is seised, is equivalent to saying he conveys a freehold estate, and that the meaning of the instrument is, I covenant that I have the power to convey what I represent in the deed, I have, to wit, a freehold estate. Though the rule is not so general as formerly, yet the Court is at liberty, in construing a deed, to substitute the copulative for the disjunctive conjunction, and *vice versa*. The title here is alleged to have been gotten under a single instrument. There is no rule of law which, under such a single instrument, would allow an estate to exist over and above the one which is given to a man, his heirs and assigns. Therefore, from the recitals, I hold the word "and" to be "or," and that the meaning is—whereas I am either seised or possessed, &c. There is nothing in this to show the certainty of the estate, whether freehold or chattel. What estate will pass to a man's heirs, executors, and administrators, for ever? I think the defendant meant by this instrument, "I will sell whatever I have." If the previous recitals mean, "I have either a freehold or chattel estate," the subsequent words would mean, "I will give that such as I have." There was formerly, and still is, a rule that under the word *demise* a covenant is implied. But it is a very restricted rule. But it is very doubtful if, in a grant of fee simple state, the word "grant" implied a covenant. Whatever doubt might have existed, is set at rest by the 8 & 9 Vict., c. 106, s. 4, which enacts "that the word 'give' or the word 'grant' in a deed shall not imply any covenant in law in respect of any tenements or hereditaments, except so far as the word 'give' or the word 'grant' may by force of any Act of Parliament imply a covenant." Yet if a man is guilty of fraud, and falsely recites that he is seised in fee-simple, and it turns out that he knew he was not, is he to keep the purchase-money? No; but the remedy for that is an action for deceit, not an action of covenant. This doctrine is much canvassed in the recent case of *Moneyppenny v. Moneyppenny*, where the House of Lords held that everything depends upon the true construction of the express covenant. What, then, is the express covenant here? Is it a covenant that the party has power to convey a freehold estate? It occurs to us that it is no such thing but a covenant that he has power to convey such estate as he got under the deed of 1841. The next covenant in the deed is the ordinary one against incumbrances, and it is confined to incumbrances created by the party himself, and those claiming under him. An incumbrance by a former

owner would not be a breach of this covenant. It must be one created by himself. If he had conveyed the estate he got, there would be a breach of the former covenant, in the same way if he had incumbered it there would be a breach of the latter covenant. *Cooke v. Founds* (1 Lev. 40.) was referred to by the plaintiff's counsel. The plaintiff in that case alleged that the defendant covenanted he was seised of a good estate in fee-simple. There was a plea like the plea in the present case, that the true meaning of the covenant was, that the defendant had a power to grant whatever he got. The plaintiff had judgment (referred to by Lord St. Leonards in his work on Vendors and Purchasers), "for the covenant is absolute that he is seised of a good estate in fee." So there there was an absolute covenant that the party was seised in fee. Here there is not, and we give judgment for the defendant.

Demurrer overruled.

WALKINGTON v. GREER—April 20.

Setting aside summons and plaint as embarrassing.

A summons and plaint contained two counts, one upon a bill of exchange, and another for goods sold and delivered, making together, £96 10s. 7d. The prayer of the plaint prayed judgment for £106 10s. 7d., and interest. The bill of particulars included a sum for interest upon the bill of exchange, which, when added to the two sums claimed in the two counts, amounted to £106 10s. 7d. The Court refused to set aside the summons and plaint as embarrassing.

A. M. Porter moved that the summons and plaint in this case might be set aside as embarrassing, inasmuch as the amount claimed in it did not correspond with the amount for which judgment was prayed in the prayer. There were two counts in it, one upon a bill of exchange accepted by the defendant, and the other for goods sold and delivered, and the sums claimed in these counts, when added together, amounted to £96 10s. 7d. The prayer of the plaint prayed judgment for £106 10s. 7d., and interest. The bill of particulars contained a sum for interest on the bill of exchange, and this, when added to the sums set out in the body of the summons and plaint amounted to £106 10s. 7d. This summons and plaint violates the 10th section of the Common Law Procedure Act, 1853. It may be said that the bill of particulars cures this to a certain extent, but the Legislature never intended that it should be in this way. [Ball, J.—If the plaintiff marked judgment, it would be in fact for compound interest?] Yes. [Monahan, C.J.—It would not. The plaintiff would have to make an affidavit of what was due. Ball, J.—If he swore to compound interest being due, he might mark judgment for it?] Yes. [Christian, J.—He would have to give particulars, and if it appeared that compound interest was claimed, he could not mark judgment for it.] The plaint cannot be pleaded to. [Christian, J.—The body of the plaint is set right by the bill of particulars. No summons and plaint is to be set aside for that which formerly was the subject-matter only of special demurrer. Monahan, C.J.—

Plead any pleas to the two counts, and there is an end of the case.] The defence would be bad if it did not plead to what is virtually a third count. [Christian, J.—Has it not been held that you may plead to the endorsement of particulars as part of the plaint?] It never was intended that the defendant should have a count against him unpleaded to, or else have judgment marked against him for a larger sum than was really due. This form never has been used before; it embarrasses the defendant now, and will embarrass the trial.

M. Harrison, Q.C., contra.—Though this summons and plaint is not signed by counsel, not a word is put in or left out of it that ought not. Interest, by the custom of merchants, goes without mentioning it. The claim could not amount to a claim for compound interest; there is nothing to prevent interest from running on the goods sold and delivered. [Christian, J.—Is there a custom that interest be upon interest?] In the margin of the printed form which is used, there is an asterisk with the words, "if interest be claimed," &c. It was in that way that this occurred. The defendant's counsel does not say that he does not understand the plaint. If he destroys the two claims in the two counts of the plaint, he destroys the whole plaint. If this motion be granted, the Court ought to make an order that every plaint in future be signed by counsel.

MONAHAN, C.J.—We think that this is special demurrer sought to be revived. If we yielded to the present motion, we should do the same with every similar motion.

Motion refused.

BATES v. MCCORMICK AND ANOTHER.—May 6.

Cruelty to animals—Construction of 12 & 13 Vic. c. 92, s. 2.

To cause one cock to fight another is an offence punishable under the 2nd sect. of the 12 & 13 Vic., c. 92. A cock is an "animal" within the meaning of the 2nd section.

Coyne v. Brady (7 Ir. Jur. N. S. 66) distinguished. *The 2nd section of 12 & 13 Vic. c. 92, deals with offenders, who, if the offence were a felony, would be principals in the first degree; the 3rd with those who would be accessories before the fact or principals in the second degree* (per Christian, J.)

THIS was a case stated by the justices of the peace for the county of Longford, assembled at Longford, for the opinion of the Court of Common Pleas, pursuant to 20 & 21 Vic. c. 43, s. 2. The case stated that at a petty sessions holden on the 13th April, 1863, the defendants were charged by a certain summons for that they on the 17th of March last, at Longford, were guilty of cruelty to animals in having encouraged, aided, or assisted in fighting cocks contrary to the 2nd section of the 12 & 13 Vic. c. 92; that at the hearing of the said complaint it was proved, on the part of the complainant, Constable Henry Bates, of Longford, that the defendants cruelly treated, abused, and tortured certain cocks by fighting same on the 17th of March last; that it was contended on the part of the defendants that cock-fighting did not come within the meaning of the second sec-

tion of the Act; that the justices being of opinion that the offence so committed rendered the defendants legally liable under the statute, gave judgment against them, and adjudged that each of the said defendants should pay respectively the sum of £1 ls. as a fine, and one shilling costs.

Waters (with him *Serjeant Sullivan*) claimed to be heard first in support of the conviction, and cited *Bridge v. Parsons* (32 L. J., N. S., Mag. Cas. 95).

J. A. Curran, jun. (with him *W. Irvine*) contended that the appellants' counsel had a right to be heard first, and cited *W. & L. Railway v. Kearney* (12 Ir. C. L. Rep. 224); *Fosberry v. W. & L. Railway Co.* (8 Ir. Jur., N. S., 64); and *Coyne v. Brady* (7 Ir. Jur., N. S., 66). [*Christian, J.*—It is a mistake to call the parties appellants and respondents at all; it is a matter between the justices and the Court.] It was suggested by the Court that the counsel in support of the conviction should not press the point until the members of the Court had communicated with the other judges.

J. A. Curran, jun. cited *Clarke v. Hague* (8 Cox's Crim. Cases, 324); *Coyne v. Brady* (7 Ir. Jur. N. S. 66); and *Morley v. Greenhalgh* (32 L. J., N. S., Mag. Cas. 93). These were all decided on the 3rd section,* the concluding part of which would be perfectly useless if under the more general words of the second section cock-fighting could be put down in any place. [*Monahan, C. J.*—The third section applies to anyone who aids, encourages, or assists; but the charge against your clients is that they fought the cocks themselves.] In *Bridge v. Parsons* (32 L. J., N. S., Mag. Cas. 95), which will be relied on on the other side, one cock had its leg broken, and therefore was tortured; but though two cocks were fought they were not both tortured. [*Monahan, C. J.*—Was it put upon the defenceless condition of the cock?] Yes.

Serjt. Sullivan and Watters contra.—As a matter of fact it is found in this case that the defendants tortured the cocks by fighting) and the quantum of torture has nothing to do with the question. There are two points of law to be considered: whether fighting is torturing within the second section, and whether a cock is an animal within the second section. *Bridge v. Parsons* is conclusive. The point of that decision did not lie in the fact that one cock was disabled as has been stated. Upon the argument that there had been cruelty, *Wightman, J.*, says, "You may assume

that that was so; but the more difficult question is, whether the cock is an animal within the meaning of the statute." It was held that he was; and *Wightman, J.*, in giving judgment says, "The Legislature, therefore, may have intended to exclude from section 2 animals of a wild nature, such as foxes, for instance, so that no one should be liable for practising the ordinary sports of the field; and therefore they have limited the operation of section 2 to animals of a domestic nature. I think, therefore, that this case falls within the 2nd and 29th sections; and I am well disposed to put such a construction upon the words of the Act if that construction may have the effect of preventing such cruelty as we find described in this case." Fighting is torturing; and the cock is an animal. As to *Coyne v. Brady*, this Court decided that case upon the 3rd section; but it never expressed, and never meant to express, any opinion on the second. It is as great cruelty to set cocks fighting in a private yard as in a place kept for the purpose.

W. Irvine in reply.—If the argument on the other side were to hold good, there would be no use in the third section being added to the second. It is assumed that fighting cocks and torturing them are the same thing, but the true assumption is the reverse. The justices have stated in the case that the defendants have tortured the cocks by fighting; but the English courts have decided that that can only take place in a place kept for the purpose. The justices do not aid themselves by jumbling together the second and third sections. Unless *Coyne v. Brady* is overruled this conviction must be quashed. *Bridge v. Parsons* was decided on its own merits. A great deal of weight was attached to the fact that the cock was maimed and disabled. *Ipsa facto* that cock was tortured. In the present case there is not even mention made of spurs being used. To allow the cock to follow its own wicked nature is not torturing it.

MONAHAN, C. J.—We do not entertain any doubt but that this case comes within the second section of the 12 & 13 Vic. c. 92. *Coyne v. Brady* was decided in reluctant obedience to a case in England, in which it was held that the latter part of the third section referred to publicly fighting cocks in a place kept for the purpose. It is not necessary to consider that now, for the present case is stated under the second section (his Lordship read the section). In *Bridge v. Parsons* it was decided that a cock is an animal within this section, and we think that was rightly decided. The next question is, whether the causing one cock to fight another is causing or procuring the animal to be tortured. We do not doubt but that doing so in the manner described in this case is an offence within the second section.

CHRISTIAN, J.—The second and third sections deal with distinct classes of offenders. The second deals with those who, if the offence were a felony, would be principals in the first degree. The third deals with those who would be accessories before the fact or principals in the second degree. I fasten on the words "cruelly abuse." Unless fighting cocks be not cruelly abusing them this conviction must be affirmed.

Conviction affirmed.

This being the first case, and the Crown being the prosecutor, no costs were given.

* 12 & 13 Vic. c. 92, sec. 2. And be it enacted that if any person shall, from and after the passing of this Act, cruelly beat, ill-treat, overdrive, abuse, or torture, or cause or procure to be cruelly beaten, ill-treated, over-driven, abused, or tortured, any animal, every such offender shall for every such offence forfeit and pay a penalty not exceeding £5.

Sec. 8. And be it enacted that every person who shall keep, or use, or act in the management of any place for the purpose of fighting or baiting any bull, bear, badger, dog, cock, or other kind of animal, whether of domestic or wild nature; or shall permit or suffer any place to be so used, shall be liable to a penalty not exceeding £5 for every day he shall so keep, or use, or act in the management of any such place, or permit or suffer any place to be used as aforesaid. Provided always that every person who shall receive money for the admission of any other person to any place kept or used for any of the purposes aforesaid, shall be deemed to be the keeper thereof. And every person who shall in any manner encourage, aid, or assist at the fighting or baiting of any bull, bear, badger, dog, cock, or other animal as aforesaid, shall forfeit and pay a penalty not exceeding £5 for every such offence.

Court of Appeal in Chancery.

[Reported by Edmund T. Bewley, Esq., Barrister-at-Law.]

[BEFORE THE LORD CHANCELLOR AND THE LORD JUSTICE OF APPEAL]

SWEENEY v. FLEMING.—Nov. 17, 1862, Jan. 26, 1863.

Ecclesiastical benefice—Judgment—Receiver—Construction of 3 & 4 Vic., cap. 105, sec. 19, 21, 22.

A judgment does not operate as a charge upon an ecclesiastical benefice, under the 3 & 4 Vic. cap. 105, sec. 22, and the judgment creditor is not entitled to have a receiver appointed over the profits of the benefice.

Winter v. Homan (6 Ir. Ch. 479) overruled; Hawkins v. Gathercole (6 De G. M'N & G. 1) considered and acted upon.

THE petitioner being possessed of a judgment against the respondent, who was rector of the parish of Kilfine, presented a petition under the 15th section of the Chancery Regulation Act, for the purpose of raising the amount of the judgment by the appointment of a receiver over the tithe rent-charge and other ecclesiastical dues of the parish. The matter of the cause petition having been referred by the Lord Chancellor to Master FitzGibbon, the question was raised as to whether the court had power to appoint a receiver under the 22nd sec. of the 3 & 4 Vic. cap. 105 (Figgot's Act), over the rents and profits of an ecclesiastical benefice, and Master FitzGibbon on the authority of *Hawkins v. Gathercole* (6 De G. M'N & G. 1) (his attention not having been called to the recent decisions of the Irish Court of Chancery on this point) held that under this Act a receiver could not be appointed. Master FitzGibbon having subsequently discovered that the contrary had been decided by the Lord Chancellor in the case of *Winter v. Homan* (6 Ir. Ch. 479), applied to the parties to have the matter re-argued before him, and, on their refusing to consent to this, extended the time for appealing to the Master of the Rolls. The Master of the Rolls affirmed the order of the Master *pro forma*, and from his Honor's decision an appeal was now brought.

J. Greene for the appellant.—The language of the Act of Parliament is sufficiently clear.* By the 22nd

* 3 & 4 Vic. cap. 105.

Sec. 19.—“And whereas the existing law is defective in not providing adequate means for enabling judgment creditors to obtain satisfaction from the property of their debtors, and it is expedient to give judgment creditors more effectual remedies against the real and personal estate of their debtors than they possess under the existing law; be it therefore enacted, that it shall be lawful for the sheriff or other officer to whom any writ of *elegit*, or any precept in pursuance thereof, shall be directed at the suit of any person upon any judgment which, at the time appointed for the commencement of this Act, shall have been recovered, or shall be thereafter recovered, in any action in any of her Majesty's Superior Courts at Dublin, to make and deliver execution unto the party in that behalf suing, of all such lands, tenements, rectories, tithes, rents, and hereditaments, including lands and hereditaments which may be of copyhold tenure, as the person against whom execution is so sued, or any person in trust for him, shall have been seized or possessed at the time of enter-

section it is enacted that judgments shall operate as a charge upon all lands, tenements, rectories, advowsons, tithes, rents, and hereditaments, and further that every judgment creditor shall have the same remedies against the hereditaments charged by virtue of the Act as he would be entitled to in case the person

ing up the said judgment, or at any time afterwards, or over which such person shall at the time of entering up such judgment, or at any time afterwards, have any disposing power which he might, without the assent of any other person, exercise for his own benefit, in like manner as the sheriff or other officer may now make and deliver execution of one moiety of the lands and tenements of any person against whom a writ of *elegit* is sued out; which lands, tenements, rectories, tithes, rents, and hereditaments, by force and virtue of such execution shall accordingly be held and enjoyed by the party to whom such execution shall be so made and delivered, subject to such account in the Court out of which such execution shall have been sued as a tenant by *elegit*, is now subject to in a Court of Equity: Provided always, that such party suing out execution, and to whom any copyhold lands may be so delivered in execution, shall be liable and is hereby required to make, perform, and render to the lord of the manor or other person entitled all such and the like payments and services as the person, against whom such execution shall be issued, would have been bound to make, perform, and render in case such execution had not issued; and that the party so suing out such execution, and to whom any such copyhold lands shall have been so delivered in execution, shall be entitled to hold the same until the amount of such payment and the value of such services, as well as the amount of the judgment, shall have been levied: Provided also, that as against purchasers, mortgagees, or creditors, who shall have become such before the time appointed for the commencement of this Act, such writ of *elegit* shall have no greater or other effect than a writ of *elegit* would have had in case this Act had not passed.”

Sec. 21.—“And be it enacted, that it shall be lawful for any person entitled to sue out, or who has already sued out, a writ of *elegit* upon any judgment recovered in any of her Majesty's Courts at Dublin, or to issue, or who has issued, execution in any suit or proceeding on any recognizance there to apply by petition to the Court of Chancery or to the Court of Exchequer as the equity side for an order that a receiver may be appointed over any lands, tenements, rectories, tithes, annuities, rents, or hereditaments by this Act made liable to be seized, extended, appraised or taken in execution on any such judgment; and also (after such order shall have been obtained as hereinafter mentioned) all Government stock, funds, or annuities, or stock or shares of or in any public company, or the dividends or proceeds thereof to which any person or persons against whom such judgment may have been obtained, or who may be liable to pay the same, or any person or persons in trust for him or them, or any of them, may be entitled, or to order that any receiver appointed, before the passing of this Act, over the property of any judgment debtor may be extended to the matter of the new petition; and that in proceeding under the Act passed in the session of Parliament held in the fifth and sixth years of his late Majesty King William the Fourth, entitled *An Act for facilitating the appointment of sheriffs in Ireland, and the more effectual audit and passing their accounts; and for the more speedy return and recovery of fines, fees, forfeitures, recognizances, penalties, and demands; and to abolish certain offices in the Court of Exchequer in Ireland; and to amend the laws relating to grants in custodiam and recovery of debts in Ireland; and to amend an Act of the second and third years of his present Majesty for transferring the powers and duties of the Commissioners of Public Accounts in Ireland to the Commissioners for auditing the Public Accounts of Great Britain*: and this Act, the said Court of Chancery and Court of Exchequer, at the equity side thereof, shall have power to appoint or extend a receiver in a summary way on a petition, at the instance of such person over any property of such judgment debtor which such creditor would or could make available for the payment of his judgment debt, by filing (after a writ of execution had been issued and returned at law upon such judgment) a bill in a Court of Equity or by any writ of execution at law or (sub-

against whom such judgment shall have been entered up had power to charge the same hereditaments, and had by writing under his hand agreed to charge the same with the amount of the judgment debt and interest thereon. Now, in Ireland a clergyman had power before the passing of this Act to charge his be-

nefice: the operation of a judgment by this Act is intended to be co-extensive with the power to charge, and, therefore, as before the Act a clergyman could charge directly by deed, so now he could charge indirectly by judgment. The English cases on the corresponding statute, 1 & 2 Vic. cap. 110, cannot then be taken as authorities on the Irish law, for by the 13 Eliz. cap. 20, the English clergy were prohibited from charging their benefices by deed. On the other hand, the 10 & 11 Chas. I. cap. 3, which is the Irish Act analogous to the statute of Elizabeth, has been repealed. In *Digby v. Irvine* (6 Ir. Eq. 149); and *Lymberry v. Helsham* (1 Ir. Ch. 623), the only questions involved were questions of remedy and not of right, and it was decided that the estates in those cases respectively did not come within the scope of the 5 & 6 Will. IV. cap. 55 (the Receivers Act). In *Lymberry v. Helsham*, the Master of the Rolls, remarks, "It is right to observe that if a bill or cause petition was filed under circumstances similar to those in *Hawkins v. Gathercole*, the question would be different, as Sir E. Sugden decided in *Wise v. Beresford* that a charge upon a benefice for the life of an incumbent was not prohibited by the statute law of Ireland." In *Hawkins v. Gathercole* (1 Sim. N. S. 63) it was decided by Lord Cranworth that, notwithstanding the 13 Eliz. cap. 20, a judgment entered up against a beneficed clergyman was a charge upon his benefice under the 1 & 2 Vic. cap. 110, and that the creditor was entitled to have a receiver appointed over the rents and profits. In *Hale v. Carpendale* (5 Ir. Jur. 121), it was also held by the Lord Chancellor that a judgment was a valid charge upon an ecclesiastical benefice under the 3 & 4 Vict. cap. 105, secs. 19, 21, 22, and that the Court in a plenary suit will grant a receiver over the benefice. *Hawkins v. Gathercole* (6 De G. M. & G. 1), having come before the Court on appeal, the decision of the Court below was reversed, but it will be seen that the *ratio decidendi* was the previous state of the law in England. In the judgment of Knight Bruce, L.J., the major premise of his syllogism is, that before the Act a benefice could not be charged directly by deed, and hence he very fairly draws the conclusion that after the Act it could not be charged by judgment. *Winter v. Homan* (6 Ir. Ch. 479) was decided after all these cases, and the Lord Chancellor in referring to *Hawkins v. Gathercole*, observes: "It is true that that case has since been overruled, but the reasons for so doing are so entirely based on the English statute of Elizabeth, that I cannot help feeling that save for that statute the opinion of the Court would have been

ject to the proviso hereinafter contained) by petition under the provisions of this Act. And it shall be lawful for the said Courts respectively to appoint or extend a receiver accordingly over the whole thereof, or over so much thereof as shall appear to be sufficient for the purpose of paying the sum due on such judgment or recognizance; and every such petition shall state the judgment or recognizance, and the sum due thereon, and shall be verified by the affidavit of the person interested, or by such other affidavit as the Court shall direct, stating the sum due for principal, interest, and costs over and above all just and fair allowances; and it shall be lawful for the said Court to require proof by the affidavit of the party applying for such order, or by such other affidavit or affidavits, or evidence as it shall require, of the particulars of such property over which such receiver shall be sought, and the nature and amount in value thereof, and where situate, as to such Court shall appear just and reasonable; and the proceedings on any such petition may from time to time be continued by or against the representatives of the original parties or other persons interested or liable respectively in respect of such judgment in the same manner as proceedings under the said recited Act, may now be continued; and that it shall not be necessary in proceeding under the last-mentioned Act of the fifth and sixth years of his late Majesty King William the Fourth, or this Act, at any time during the sittings of either of the said Courts of Chancery or Exchequer, to present a petition in order to obtain an order of the Court in such matter after an order shall have been made by such Courts respectively on the first petition presented in any such matter; and no costs of any such petition so presented after an order on such first petition shall be allowed."

Sec. 22.—"And be it enacted, that a judgment already entered up or to be hereafter entered up against any person in any of her Majesty's Superior Courts of law at Dublin, shall operate as a charge upon all lands, tenements, rectories, advowsons, tithes, rents, and hereditaments, including lands and hereditaments of copyhold tenure of or to which such person shall at the time of entering up such judgment, or at any time afterwards, be seized, possessed, or entitled for any estate or interest whatever at law or equity, whether in possession, reversion, remainder, or expectancy, or over which such person shall at the time of entering up such judgment, or at any time afterwards, have any disposing power which he might, without the assent of any other person, exercise for his own benefit, and shall be binding as against the person against whom judgment shall be so entered up and against all claiming under him after such judgment; and shall also be binding as against the issue of his body and all other persons whom he might, without the assent of any other person, cut off and debar from any remainder, reversion, or other interest in or out of any of the said lands, tenements, rectories, advowsons, tithes, rents, and hereditaments; and that every judgment creditor shall have such and the same remedies in a Court of Equity against the hereditaments so charged by virtue of this Act or any part thereof as he would be entitled to in case the person against whom such judgment shall have been so entered up, had power to charge the same hereditaments, and had, by writing under his hand, agreed to charge the same with the amount of such judgment debt and interest thereon: Provided that no judgment creditor shall be entitled to proceed in equity or to obtain the benefit of such charge under this Act until after the expiration of one year from the time of entering up such judgment, or in cases of judgment already entered up or to be entered up before the time appointed for the commencement of this Act until after the expiration of one year from the time appointed for the commencement of this Act; nor shall such charge operate to give the judgment creditor any preference in case of the bankruptcy of the person against whom judgment shall have been entered up, unless such judgment shall have been entered up one year at least before the bankruptcy; provided also, that as regards purchasers, mortgagees, or creditors who

shall have become such before the time appointed for the commencement of this Act such judgment shall not affect lands, tenements, or hereditaments otherwise than as the same would have been affected by such judgment if this Act had not passed; provided also, that nothing herein contained shall be deemed or taken to alter or affect any doctrine of Courts of Equity whereby protection is given to purchasers for valuable consideration without notice: provided also that nothing in this Act contained shall take away or prejudice any remedy, or proceeding which any judgment creditor may, or if this Act were not passed, might have or take in relation to his judgment; but such creditor shall be at liberty to proceed at law or equity for recovery of any sum secured by or due upon any such judgment, whether before or after such period as aforesaid, as if this Act had not been passed."

changed, and the decision of the Court below would not have been disturbed. As I consider that case, it can hardly be deemed a decision upon this statute; it was decided purely upon the English statute of Elizabeth, and I do not think that the difference between the statute law of England and Ireland was then mentioned as bearing on the case at all. My idea is that I cannot assert that *Hawkins v. Gathercole* (1 Jur. N. S. 481), as it now stands, rests on grounds which are applicable here, or that there is anything to show that the former decision would have been disturbed if the statute law of England had been the same as the law of this country; and his Lordship then proceeds to hold under circumstances similar to those in the present case, that the judgment was a charge on the benefice.—*Long v. Storis* (3 De G & Sm. 308); *Wise v. Beresford* (3 Dr. & War. 276: 5 Ir. Eq. 407); *Wynne v. Robinson* (4 Bligh. N. S. 27); *Vincent v. Helsham* (4 Ir. Jur. 213).

Serjeant Sullivan and *W. R. Smith* in support of the ruling of Master Fitzgibbon.—The 1 & 3 Vict., cap. 110, England, and the 3 & 4 Vict. cap. 105, Ireland, are analogous statutes; the 11th and 13th sections of the English Act corresponding respectively with the 19th and 22nd sections of the Irish. The sections are indeed identical, with the exception of one or two verbal differences not worth mentioning. We find also that the words "lands, tenements, rectories, tithes, rents, and hereditaments," mentioned in the 19th section are repeated in the 22nd. A question then arises as to what is the meaning of "rectory" in the 19th section, and if we establish that it is there used in a restricted sense, it must follow that it bears the same meaning in the 22nd section. Such is the principle laid down in *Ridgeway v. Munkittrick* (1 Dr. & Warr. 93) where Sir Edward Sugden states: "It is a well settled rule of construction, and one to which, from its soundness, I shall always strictly adhere, never to put a different construction on the same word when it occurs twice or oftener in the same instrument, unless there appear a clear intention to the contrary." According to the 19th section, the sheriff is to deliver to the judgment creditor execution of the rectories, tithes, &c., of the judgment debtor. By the second clause of the 22nd section it is enacted, that the judgment creditor "shall have such and the same remedies in a court of equity against the hereditaments so charged by virtue of this Act, or any part thereof, as he would be entitled to in case the person against whom such judgment shall have been so entered up had power to charge the same hereditaments, and had, by writing under his hand, agreed to charge the same." Looking back to the first clause of this section, we see that the lands, tenements, rectories, tithes, rents, &c., of the judgment debtor form the subject matter which is charged by virtue of this Act. It is evident, therefore, that if the prior portion of this section has not charged a rectory, the subsequent portion is inapplicable. In other words, the charging power in the first clause is coextensive with the remedy in the second. With regard, then, to the meaning of "rectories," in the 19th section it is plain that mu & mean "lay rectories," for admittedly ecclesiastically rectories were not extendible under an *elegt*. Such is the decision virtually of

the Lord Justice of Appeal in *Digby v. Irvine* (6 Ir. Eq. 149), where he expresses himself thus: "There is not a single intimation of an intention of the Legislature to enlarge the description or change the character of the estates which might be extended upon an *elegt* under the statute of Westminster or the statute of Frauds." This decision is approved of, and the point in question expressly decided in *Hawkins v. Gathercole* (6 De G. M'N. & G. 25). If then, "rectories" means "lay rectories" in the 19th section, it must bear the same meaning in the 22nd section. When the language of one statute is embodied in another, in the latter it must be construed as it was in the former. *Eyre v. M'Dowell* (7 Ir. Jur. N. S. 45). At the time of the decision in *Hale v. Carpenter* the Lord Chancellor had doubts as to the validity of the decision in *Hawkins v. Gathercole* as it then stood, and his lordship thus prefaces his judgment: "I would have great difficulty in coming to the conclusion that the case of *Hawkins v. Gathercole*, decided by Lord Cranworth, was wrong; that case was a more difficult one than the present, as in this country it had been established prior to the passing of the 3 & 4 Vict. c. 105, that a clergyman could charge his benefice, the Act of 10 & 11 Chas. I., analogous to the 13 Eliz. c. 20, having been repealed, while the English Act remains." Lord St. Leonards, in the last edition of his *Vendors and Purchasers*, p. 523, *in notis*, expresses it as his opinion that the law of England and Ireland on this point is now the same, and that the final decision in *Hawkins v. Gathercole* is equally applicable to both countries. *J. Greene* in reply.

Cur. adv. vult.

Jan. 26, 1863.—THE LORD CHANCELLOR.—This case, which has been very ably and fully discussed, involves a question as to the construction of a certain section of an Act of Parliament which relates to the operation of judgments on ecclesiastical benefices. It turns upon the construction of the 3 & 4 Vict. c. 105, which came before the Rolls in *Lymberry v. Helsham* and *Digby v. Irvine*, and was also discussed in a case heard before myself that apparently involved a contradiction to the other decisions. The sections of the Act are the same as those which were in question in the earlier causes, namely, the 19th, 21st, and 22nd. The 19th section of the 3 & 4 Vict. c. 105., after reciting that the existing law was defective in not providing adequate means for enabling judgment creditors to obtain satisfaction from the property of their debtors, and that it was expedient to give judgment creditors more effectual remedies against the real and personal estate of their debtors, proceeded to enact that the sheriff might deliver execution to the party suing, of all such lands, tenements, rectories, tithes, rents, and hereditaments, as the person against whom execution is so sued, or any person in trust for him shall have been seised or possessed at the time of entering up the judgment, or at any time afterwards, "in like manner as the sheriff or other officer may now make, and declare execution of one moiety of the lands and tenements of any person against whom a writ of *elegt* is sued out." The effect of this section was obviously to enable the sheriff to give execution

of all the lands, tenements, &c., of a judgment debtor, where previously he could only deliver execution of a moiety. In the Rolls the right construction was put upon it both by the Lord Justice of Appeal and the present Master of the Rolls, and it was decided that the operation of it was not such as to extend to ecclesiastical property rights which did not exist before. For the soundest reasons fully given in *Lymberry v. Helsham* (1 Ir. Ch. 633), it was there held that this section did not affect ecclesiastical rectories, which had never been extendible under an *elegit*. There is a subsequent section, however, which differs in its aspect from the 19th, and gives remedies of a different character from those which existed at Common Law. I refer to the 22nd section, which has nothing to do with executions, but is an enactment that a judgment shall operate as a charge on property. Its language is as follows: "that a judgment already entered up, or to be hereafter entered up, against any person in any of her Majesty's Courts of Law in Dublin, shall operate as a charge upon all lands, tenements, rectories, advowsons, tithes, rents, and hereditaments, including lands and hereditaments of copyhold tenure, of or to which such person shall at the time of entering up such judgment, or at any time afterwards, be seised, possessed, or entitled, for any estate or interest whatever at law or in equity, whether in possession, reversion, remainder, or expectancy, or over which such person shall, at the time of entering up such judgment, or at any time afterwards, have any disposing power which he might, without the assent of any other person, exercise for his own benefit, and shall be binding as against the person against whom such judgment shall be so entered up, and against all claiming under him after such judgment," &c. Now, if that section stood alone, it would be difficult to exclude from its operation the property in question. This difficulty was, so to speak, the basis of the opinion of Lord Cranworth in *Hawkins v. Gathercole* (1 Sim., N. S., 63), where, notwithstanding the fact that, by the settled law of England, a clergyman could not incur his benefice, it was held that this section of the Act overrides the existing law. When the point, then, came before me in the case of *Hale v. Carpendale* (ubi supra), I had before me the Irish law, the Irish Act, and Lord Cranworth's decision on the construction of the English Act, which, if right, was a *fortiori* an authority as to the interpretation of the Irish statute. Accordingly, I then decided that a judgment was a charge on an ecclesiastical benefice, and in doing so I followed the decision of the Lord Chancellor of England in a case so much stronger. The judges in England having felt embarrassed by this decision in *Hawkins v. Gathercole*, Stuart, V.C., in the case of *Baker v. Brothers* (2 Sm. & Giff., 509), expressed his dissent from the opinion of Lord Cranworth, and as his Lordship's judgment was under review, dismissed a motion for a receiver, holding that the statute of Elizabeth prevented a clergyman from incumbering his benefice. The only difficulty experienced in England seemed to be the existing state of the law as to incumbrances on ecclesiastical property, and as that did not apply to Ireland, the decision here in *Hale v. Carpendale* was acted on for many years, and so matters remained un-

til *Hawkins v. Gathercole* (6 De G. M'N & G.; 24 L. J. Ch., N. S., 332) came before the Lords Justices on appeal. The decision of Lord Cranworth was then reversed, and the Court held that "rectories," in the 13th section of the 1 & 2 Vict., c. 110, was equivalent to "lay rectories," from comparison with the 11th section, and from the principle of construction that when a word occurred in the early part of a statute, unless there was a manifest repugnancy, it should be taken as having the same meaning in any subsequent section. The case again came before me in *Winter v. Homan* (ubi supra); perhaps my attention was not sufficiently directed to *Hawkins v. Gathercole* as then finally decided, and certainly this case had not then made its appearance in the regular reports. As the decision turned on the Irish law, I thought I was acting right in following the authorities which had been so long acted on, unless they should be shown to be distinctly erroneous. The case, however, has now been brought before us again, and we must examine into the principle of the decision in *Hawkins v. Gathercole*, and ascertain whether there is in reality any difference between the law of Ireland and England on this question. The way in which this came before us by appeal from Master FitzGibbon appeared at first sight strange. However, it seems that *Winter v. Homan* was not mentioned to the Master at the hearing, but that having found it afterwards himself in the course of his private reading, he applied to both parties to have the case re-heard before him, in order that he might follow the existing decision of this Court. The parties, however, refused to have it re-heard, and hence the whole matter is very satisfactorily explained. On looking into *Hawkins v. Gathercole*, we find that the distinction between the English law and the Irish, although an argument for the construction of the words, was not the basis of the decision. Where "rectories" occurred in one section, and had a received and definite meaning, it was very properly held that the same interpretation should be put on it in another part of the same Act. Now there is nothing on the face of the sections different in the Irish Act; but in Ireland then the law allowed clergymen to incur their benefices. However, it is our duty to reconcile the different clauses of the Act of Parliament; where we find the word "rectories" used in one section in a limited sense, we should put the same meaning on it in another section, whose language is almost identical, unless we are constrained to act otherwise. I think these words "rectories," "tithes," can be so construed in the 22nd section, and by giving to them the meaning of "lay-rectories" and "lay-tithes," we shall reconcile this section with the interpretation already put on the 19th. I am satisfied now that the judgment of the Court on this question originally was wrong, and, looking at the reasons that have been adduced, I cannot see any sound or satisfactory distinction between the law in the two countries. The judgment of Master FitzGibbon must, therefore, be affirmed; but no costs ought to be given, as the appellant came here relying upon the decisions of this Court.

THE LORD JUSTICE OF APPEAL.—I concur in the judgment of the Lord Chancellor for the reasons so fully stated by him. This appeal was absolutely se-

cesary for the purpose of settling the law on this subject, and, therefore, each party must bear his own costs in the Court below.

[BEFORE THE LORD CHANCELLOR AND THE LORD JUSTICE OF APPEAL.]

IN THE MATTER OF THE ESTATE OF JOHN RORKE, OWNER; EX PARTE, MARIA ISABELLA LLOYD, PETITIONER. May 7, 8.

Notice—Constructive or Imputed—Priority—Registration.

A, the owner of an estate, and also a solicitor, executed a mortgage to B, dated the 29th of March, 1856, and registered the 3rd of April, 1859. On the 1st of March, 1859, a lease, on fine, of the same lands was executed by A to C, and this was registered on the 16th of March, 1859. This lease was drawn and registered by A, for which he was paid by C the costs out of pocket. Held that A having drawn and registered the lease, was the solicitor of C in the transaction, and that C, therefore, had notice through A of the prior unregistered mortgage to B.

This was an appeal from an order of Judge Longfield, made under the following circumstances. The case came before the Court below on the motion of Mary Stein, Margaret Reid, Teresa Ennis, and Anthony Browne, mortgagees, who sought that the lands of Tyrellstown, being a part of the lands ordered to be sold in this matter, should be sold discharged from a certain lease bearing date the 7th of March, 1859. This motion was opposed by Patrick Maher, the lessee in the said lease and the appellant in the present appeal. By a deed of mortgage, dated the 29th of March, 1856, John Rorke, the owner in this matter, conveyed the lands of Tyrellstown amongst others to Mary Stein, Margaret Reid, and Teresa Ennis, to secure the repayment of a sum of £4,000, with interest thereon at the rate £5 per cent. per annum, and this mortgage was registered on the 3rd of April, 1859. By an other indenture of mortgage dated the 1st of February, 1859, John Rorke granted the lands of Tyrellstown, with others, to Anthony Browne, to secure the repayment of a sum of £3,000 with interest at the rate of £5 per cent. per annum. This mortgage was registered on the 23rd of March, 1859. By an indenture of lease, bearing date the 7th of March, 1859, John Rorke demised the said lands of Tyrellstown to Patrick Maher, the appellant, for a term of thirty years, at a yearly rent of £845, the lessee at the same time paying one year's rent in advance and a fine of £1,500. This lease was registered on the 16th of March, 1859. The owner, John Rorke, was a solicitor, and it was alleged in support of this motion, that on the occasion of granting this lease of the 7th of March, 1859, he had acted as solicitor for the lessee Patrick Maher. On the other hand an affidavit was filed by Patrick Maher, in which he stated he had never employed John Rorke as his solicitor on this or any other occasion; but that, on the supposition that such was the custom of

the country, he had allowed his landlord to prepare the lease, and had merely paid him the expenses out of pocket incurred in the preparation of the lease. Such being the facts of the case, the mortgagees maintained that their mortgages were entitled to priority over the lease to Maher, notwithstanding the prior registry of the lease, on the grounds that the mortgagor had notice of the mortgages executed prior to the lease; and that the lessee was constructively affected by this notice, inasmuch as he had employed the mortgagor as his solicitor in the preparation of the lease. The matter having been fully argued, Judge Longfield ruled that the lands in question should be sold discharged of the lease to Patrick Maher, with liberty for him to apply for compensation at the settling of the schedule, if there should be any funds remaining after payment of prior incumbrances.* From this ruling of Judge Longfield Patrick Maher now appealed.

Serjeant Sullivan (with him *Sir Colman O'Loughlen, Q.C.*, and *Palles*), for the appellant.—The authorities as to constructive notice have changed of late years—*Lord St. Leonards' Vendors and Purchasers*, 14th ed. 768; *Perry v. Holl* (2 De G., F. & J. 38); *Espin v. Pemberton* (3 De G., and J., 547; 4 Drewry, 333); *Perry—Herrick v. Atwood* (2 De G. & J. 21); *In re Burmester* (9 Ir. Ch. 41); *Tucker v. Henzill* (4 Ir. Ch. 513) following *Majoribanks v. Hovenden* (6 Ir. Eq. 238).

May 8.—Flanagan, Q.C. (with him *M. O'Loughlen*), in support of the ruling of Judge Longfield.

Rorke acted as solicitor for Maher in this transaction, and therefore in accordance with the authorities on this point Maher must be held to be affected with notice of the prior mortgages—*Atkins v. Delmege* (12 Ir. Eq. 1); *Twycross v. Moore* (13 Ir. Eq. 250); *Tucker v. Henzill* (ubi supra); *Kennedy v. Greene* (3 Myl. & K. 699); *Atterbury v. Wallis* (8 De G. M.N. & G. 454); *Dryden v. Frost* (3 Myl. & Cr. 670); *Eyre v. Burmester*, (8 Jur. N.S. 1019).

Sir Colman O'Loughlen, Q.C., in reply.—The principal question in the case is, whether Rorke is to be considered the attorney of the appellant. That he was not the actual attorney is manifest; if anything, he can only be regarded as the constructive attorney. The earliest case on this subject is *Sheldon v. Cox* (Amb. 624), where notice to an agent was held to be notice to the principal; but there it was admitted that Cox had acted as attorney to Drummond and Markham. Although the older cases may appear to be strict on this point, they are virtually overruled by later decisions. In fact it may now be laid down that a party taking under a subsequent conveyance will only be affected with notice of prior incumbrances, so far as a knowledge of their existence could have been acquired, if he had employed an independent solicitor—*Espin v. Pemberton* (ubi supra); *Burke v. Smith* (9 Ir. Eq. 137); *1 Furlong's Landl. & Ten.* 379; *Baker v. Meryweather* (2 Carr. & Kir. 737); *Chandos v. Brownlow* (2 Ridg. P. C., 945); *Frail v. Ellis* (16 Beav. 350); *Ware v. Egmont* (4 De G. M.N. & G. 473); *Grissell v. Robinson* (3 Bing. N.C. 10).

* *In re John Rorke's Estate* (8 Ir. Jur. N.S. 53; 13 Ir. Ch. 273.)

THE LORD CHANCELLOR.—This is an important case. It involves two questions, both of great importance. And in the first place, as to whether Mr. Rorke was the agent or solicitor of Maher in this matter, I consider it unquestionable that in form he was. He engaged the lease by Maher's direction; no draft of it was submitted to any other solicitor; and in every way he acted entirely as if solicitor for the tenant. A great deal has been said as to the custom of the landlord's solicitor preparing the tenant's lease; but this case goes farther; this is a purchase more than a lease. However, this lease after delivery was registered by Rorke; and even though it may be customary for the landlord's solicitor to prepare the lease, without doubt it is the part of the tenant's solicitor to register it. This transaction is all done by Mr. Rorke; is all for the benefit of the tenant, and is all done as solicitor. This is not the ordinary case of notice. In the case in *Ridgeway, Chandos v. Brownlow* (ubi supra), Pescod was not the person who conveyed the estate to the tenant. The lease too was submitted by the tenant to his co-lessees in Ireland, and a new draft, as approved of by counsel in Ireland, was subsequently sent back to England, and executed by the lessors. This case then, does not go to establish the position contended for by the appellant. In the present case Mr. Rorke was substantially the tenant's solicitor in the registration, and the registration is the very act complained of. In *Majoribanks v. Hovenden* (ubi supra) notice to the attorney is held to be sufficient notice to the client; and as such is sufficient to displace a deed on the registry. Here Rorke had undoubtedly that notice. A question then arises as to how far this general principle is modified by the fact that the lease would not have been executed if the tenant had actual notice of the prior incumbrances. A distinction is sought to be made between the present case and those cited; and Sir Colman O'Loughlin has endeavoured to establish the principle that when the fact is one which might have been discovered by ordinary diligence, if an independent solicitor had been employed—and in such a case only—the tenant will be affected by notice. It does not strike me that any such distinction exists. In *Espin v. Pemberton* (3 De G. & J., 554), Lord Chelmsford observes, "The notice which affects the principal through a solicitor, does not depend upon whether it is communicated or not. If a person employs a solicitor who either knows or has imparted to him in the course of his employment, some fact which affects the transaction, the principal is bound by the fact, whether it is communicated or concealed from him.....If the mortgagee is imprudent enough to entrust his interests to the mortgagor, being a solicitor, he may do so and take all the consequences." Thus, the principal is affected by notice of a fact which is either known or imputed to be known, and this, too, in a case of actual fraud, as in *Kennedy v. Greene*. *Espin v. Pemberton* was a somewhat similar case, but there were facts which displaced the position that Pemberton acted as solicitor for Browne. In the present case plainly knowledge existed on the part of Mr. Rorke, and from the circumstances, it also appears that he acted as solicitor for Maher. Therefore, however one may regret the doctrine of notice, this appears to me to

come within the recognised authorities. The decision of the Court below must be affirmed, but without costs.

THE LORD JUSTICE OF APPEAL.—I am entirely of the same opinion. The case is perfectly close to the authorities on this point. Without going into it in detail, it is enough to say that the appellant paid Mr. Rorke the charges for registering his lease. The act of registration was done as agent for Maher, and this is the act wherein consists the ground of the fraud. If there had been no registration, this question would not have arisen. The very act which constitutes the claims of Maher, is that which subverts the natural priority of the deeds. *Order below affirmed.*

NOTE.—As to the doctrine of constructive notice through a solicitor, vide *Wyllie v. Pollen* (3 N. R. 500; 9 L. T., N.S. 71; 11 W. R. 1081).—*REP.*

Court of Queen's Bench.

[Reported by William Woodcock, Esq., Barrister-at-law.]

CROWN SIDE.

[Coram O'BRIEN, HAYES, and FITZGERALD, JJ.*]

THE QUEEN AT THE PROSECUTION OF JOSEPH CREA V. THE MIDLAND COUNTIES AND SHANNON JUNCTION RAILWAY COMPANY.—Nov. 12, Dec. 13, 1862.

Mandamus—Transfer of Shares to Pauper for purpose of getting rid of liability.—Consideration.

A conditional order for a mandamus to register a transfer of shares in a railway company made absolute, although it appeared that the transfer which, however, was a transfer out and out, not subject to any secret trust for the transferor, was made to a pauper, in order to enable the transferor to get rid of liability, and that the consideration money stated in the deed was a mere fiction (Dubitante FITZGERALD, J.)

THIS was a motion on behalf of the Midland Counties and Shannon Junction Railway Company to shew cause against a conditional order for a mandamus, bearing date the 17th January, 1862, whereby it was ordered that a writ of mandamus should issue directed to the Midland Counties and Shannon Junction Railway Company, directing them by their secretary to enter in the register of transfers of said company, a memorial of the transfer to the said Joseph Crea by one George Barton as a shareholder in the said company, of the shares of him, the said George Barton, in the said company, by deed duly executed in that behalf by the said George Barton, bearing date the 30th October, 1861, and to endorse such entry on the deed of transfer aforesaid, pursuant to the requisition of the said Joseph Crea, and the requirement of the statutory enactments in that behalf unless cause shown. The affidavit of Joseph Crea, the prosecutor, stated that he had been informed by George Barton, and believed that some time at the end of the year 1860 or early in the year 1861, he, said George Barton, at the earnest solicitation of certain gentlemen then interested in an undertaking for constructing a railway for communication between

* The Lord Chief Justice was present during the arguments in this and the following case, but took no part in the judgments.

Banagher and Meelick in the King's County and the Great Southern and Western Railway at the town of Clara in the said county, was induced to subscribe for ten shares in the said undertaking, the capital of which was to consist of 12,000 shares of £10 each, the company to be called "the Midland Counties and Shannon Junction Railway Company;" that deponent had also been informed, and believed, that the provisional directors of the said undertaking procured an Act of Parliament to be obtained and passed on the 6th August, 1861, being cap. 246 of the 24 and 25 Vict., and shortly described as "The Midland Counties and Shannon Junction Railway Act, 1861," whereby the subscribers therein named were united into a company for the purpose of said undertaking under the name and title aforesaid, and were by that name constituted a body corporate, with perpetual succession and a common seal; and the Companies Clauses Consolidation Act, 1845, the Lands Clauses Consolidation Act, 1845, and other statutes, were incorporated with the said Act; that after the incorporation of the company the directors made the first call of £2 per share, payable on or before the 1st of November, 1861, and no further call had since been made; that Mr. Barton, on the requirement of certain of the said directors, on the 22nd October, 1861, paid into the Bank of Ireland, to the credit of the said company the sum of £20, being the amount of the said call of £2 per share on his said shares, and thereupon received a written receipt therefor, signed by Christopher Dolier, on behalf of the Governor and Company of the Bank of Ireland; that the said Barton having afterwards agreed with the prosecutor for a transfer to him of the said ten shares of him the said Barton; he, the said Barton, did execute under his hand and seal, pursuant to the provisions of the Companies Clauses Consolidation Act, 1845, a deed of transfer of the said ten shares to deponent, and that deponent who, thereupon, under his hand and seal, subscribed and affixed to the said deed of transfer: accepted the said transfer, and the said deed was executed and bore date the 30th October, 1861; that on the 4th November, 1861, the first half-yearly meeting of the shareholders of the said company was held at the office of their solicitor, at Upper Ormond-quay, in the city of Dublin, and pursuant to a resolution passed at the said meeting, the common seal of the company was affixed to the register of shareholders; that on the 1st of November, 1861, a gentleman named Joseph Kent, on behalf of deponent and others, wrote a letter to Mr. Robert Hacket, of Fribane, in the King's County, secretary of the company, and therewith enclosed to him, amongst others, the said deed of transfer, for the purpose of the same being registered, and required him, as such secretary, to let him, the said Kent, have the certificate of the registry of such transfer at his earliest convenience; that in reply to this, Mr. Hacket, on the 2nd, November, 1861, wrote to Mr. Kent a letter merely returning the transfers; that Mr. Kent then wrote to Mr. Hacket asking for his reasons for not registering the transfers, to which Mr. Hacket replied on the 8th of November, 1861, referring Mr. Kent to Mr. Meldon the solicitor for the company, and adding: "I may, however, tell you that we look upon the matter as

a fraudulent transaction towards the above company, and I have in my possession, a letter from one of your acceptors of the transfers declining to have anything further to do with it, and requesting his signature to the so-called transfer cancelled: I suppose he does not fancy a term of imprisonment;" that after deponent had accepted the transfer from George Barton, and after same had been sent to be registered, a person called on deponent at his place of business in Clara, and told him that Mr. Hacket had sent for him, and that he was waiting for him at the Clara Railway Station, and that deponent forthwith went to the said railway station and there saw Mr. Greer, with whom deponent was acquainted, who then introduced him to the said Hacket, saying to the said Hacket: "this is one of the young men who has accepted the transfers," or words to that effect; whereupon the said Hacket addressed deponent, asking him did he know the danger he incurred by accepting said transfers, and the said Hacket, after holding out various threats to him, finally stated that he would be imprisoned for life if he had anything to do with the said transfers, and he, the said Hacket, strongly recommended and urged him, in order (as he stated) that deponent should save himself from such imprisonment, that he should withdraw from the matter, and that the only way he could do so would be by writing a letter to the solicitor of the company, that he would have nothing to do with the transfer, and also requesting him not to register same; and that deponent being greatly frightened and alarmed, wrote such letter to the solicitor. The affidavit also referred to language used at the half-yearly meeting, which was, deponent believed, calculated and designed to intimidate unduly and unreasonably any parties who should contemplate to accept, or might have accepted transfers of any shares in the company; and, finally, stated that deponent was now ready and willing to abide by the shares transferred to the deponent, and that the application for a mandamus was made with the knowledge and full concurrence of George Barton. The deed of transfer of the shares, which bore date the 30th October, 1861, purported to be made in consideration of the sum of £15 sterling paid to Barton by Joseph Crea. There was an affidavit by Mr. Hacket, in which that gentleman stated it to be positively untrue that he, after holding out various threats to the prosecutor, finally stated that the said prosecutor would be imprisoned for life if he had anything to do with the transfers. The account which Mr. Hacket gave of the transaction was as follows: that it was perfectly true that he did send for said Joseph Crea as stated, and asked him if he were really going to buy Mr. Barton's shares; that Crea replied that he was; that deponent then asked him if he were really going to take them and to pay up the calls on them; and Joseph Crea then said he knew nothing about them, that Mr. Barton asked him to sign the paper, meaning the transfers, and that he did so, but that he had no money or intention to pay anything on them; that deponent then told him that by signing that paper he placed himself in Barton's shoes, and that deponent knew very well the railway company would look to him for the payment of the shares and press the matter by law, and that he

should either pay the amount or go to gaol, and that from what deponent learned of the law of such a case that he would not come out under the Insolvent Act, and most likely would have to be in gaol for life, as it was evidently a fraudulent transaction; that said Joseph Crea then expressed a wish to have nothing more to do with it, on which deponent advised him not to be guided by anything deponent had said, that he should consult with a lawyer on the subject and take the best advice as to how he should act; that deponent also gave him Mr. Meldon's address, and deponent positively said that to the best of his recollection the foregoing was all the conversation that passed between him and the said Joseph Crea, and that it was not his intention to use any intimidation whatever, his object being merely to explain to Crea the liability he incurred by accepting a transfer of the shares, that he was acting entirely on his own responsibility in sending for and speaking to said Crea, and that he had received no instructions to do so, either from any of the directors or from the solicitor for the company. The affidavit further stated that Joseph Crea was a shopman or apprentice to said George Barton, and was entirely dependent on him, and was a person without any means of paying up the calls on the said shares; it also stated the belief of deponent that the sum of £15 mentioned in the deed of transfer as the consideration money for said transfer never was paid or intended to be paid by the said Joseph Crea to said George Barton, but that the sole object of said transfer was to rid said George Barton, who was a solvent and respectable man, from his liability on foot of said shares by transferring them to a pauper. The affidavit of Mr. Meldon, after shortly referring to the formation of the company, went on to state that the fifth paragraph of the subscription contract provided that a deposit of £1 per share should be paid by each subscriber at the time of, or previous to, signing the deed; that said deed was duly executed by George Barton; that on the 25th of January, 1861, the provisional directors made a call of 10s. per share, being a portion of £1 per share provided by said contract to be raised, and that deponent immediately after, and before the Act was passed, applied to said Barton for payment of the amount; that the provisional directors met on the 28th July, 1861, and previous to the Act obtaining the royal assent, a resolution was passed calling for payment of 10s. per share, being the balance of the deposit of £1 per share; that the Act of incorporation received the royal assent on the 6th August, 1861, and a call of £2 per share was soon after made; that the said George Barton referred to in prosecutor's affidavit had duly executed the subscription contract, but had never paid up any portion of the £1 per share provided to be paid by it; that about the 4th November, 1861, deponent received from the prosecutor a letter of which the following was a copy: "Clara, November 3rd, 1861.—J. D. Meldon, Esq.; Sir, I have signed my hand to a form accepting of ten shares in the Shannon Junction Railway, transferred to me by George Barton of Clara, not then knowing the liabilities under which I was bringing myself, and since that I have ascertained information letting me know dangers to which I exposed myself, and as I am to pay any sum of money which may be called

for, I will decline it, if it may please you to do so. Hoping that you will proceed no further, and that you will have my name crossed off, I am, Sir, your most obedient humble servant; Joseph Crea." Deponent then, on behalf of the company, submitted that the conditional order should be discharged for, amongst others, the following reasons: 1st, that the deposit of £1 per share required by the subscription contract was never paid by Barton; 2nd, that the transfer was colourable only and fraudulent for the purpose of evading liability, and that the consideration of £15 stated in the deed to have been paid never was, in fact, paid by the prosecutor out of his own money if paid at all.

Heron, Q.C. (with him *Barry, Q.C.* and *Finch White*) for the company.—We resist the application for a mandamus on the ground that the £1 per share was not paid, and also on the ground that the transfer is colourable, and that neither transferor nor transferee has complied with the express provisions of the Act of Parliament, by which it is required that in transfers the consideration for the transfer shall be truly stated in the deed. The statement in the deed is that the consideration was £15; we say that nothing was paid, and that is not denied. This is not the case of a *bona fide* transfer. *Costello's Case* (2 De G. F. and J. 302). [*O'Brien, J.*—What do you look upon as the test of *bona fides* in an assignment?] A *bona fide* intention on the one part to take, and on the other to part with the shares. That does not exist here, because Crea himself, after taking time to consider, deliberately calls the transaction a form. Then the consideration is untruly stated; st. 8 and 9, Vict. c. 16, s. 14. [*O'Brien, J.*—The consideration it is true, is directed by the Act to be truly stated, but is that so mandatory that a deed of assignment which states the consideration untruly, is not to be registered? As a matter of fact there is scarcely a deed of transfer which states the consideration truly as between the transferor and transferee. There are generally several assignments, and the last is the one for which the consideration is stated.] The words in reference to that are as mandatory as any in any of the sections relating to the transfer of shares. [*O'Brien, J.*—The consideration might be required to be stated for the purpose of the Stamp Laws]. A shareholder has not an absolute right to transfer his shares, his right to do so is, by the 14th section of the act, 8 and 9, Vict. c. 16, subject to the regulations of the company." [*Hayes, J.*—Does your case go to this, that even if there was a registry of the transfer the transfer would be bad, because the consideration was not truly stated?] No, because the company would have accepted the shareholder, and would have waived its right to insist upon the want of consideration. *Ex parte Budd*, (10 W. R. 51, s. c. 31 L. J. N.S. Ch. 4), is an important case upon the statement of consideration. The question in this case is not so much as to Barton's liability as whether this is a case where the Court, having a discretion, ought to exercise that discretion by granting a mandamus. The party has power, under the Common Law Procedure Act of 1856, to issue a summons and plaint claiming a mandamus, and he ought to be left to that remedy.

Sullivan, Serjt. and *Phillips* for the prosecutor.—

The only meaning of the section as to stating the consideration is, that a less sum shall not be stated to have been paid than has actually been paid, and that is for the purposes of the Stamp Laws. *Cheale v. Kenward* (3 De G. & J. 27), shows that the fact of nothing having been paid on the shares will not invalidate an arrangement to accept a transfer of them. *Ex parte Budd*, and the other cases cited on the other side, were all cases under the Winding-up Acts, and the question in them was, whether there was not some secret trust in existence. There is no case of the kind made here. The transfer here was intended to be a transfer out and out. The payment of the deposit is not a condition precedent to the party being entitled to be looked upon as a shareholder. The only condition precedent to a transfer imposed by the 16th section of the Act of Parliament is, that all calls shall have been paid; a deposit is a different thing from a call. Mr. Barton never was asked to pay anything but the ten shillings. If the transfer was made for the *bond fide* purpose of passing an interest, we are entitled to be put on the register of shareholders, no matter whether the intention was to get rid of a liability or not—*De Pass's Case* (4 De G. & J. 514). The test is, does the assignor retain any interest, or is it intended that he should part entirely with the shares? If the company have a claim under the subscribers' contract, let them sue on it, but the transfer should not be vitiated.

Barry, Q.C., replied.—There is no answer to our charge of the transaction being colourable only. The prerogative writ of mandamus should not be granted to give effect to such a transaction. The case has been argued on the other side as if it was the case of a defence to an action for calls and not of an application for a prerogative writ. Suppose a bill had been filed in Equity by a pauper transferee to compel specific performance of an agreement to transfer under the circumstances of the present case, and the company was made a party, can any case be produced to show that the Court would decree specific performance? The argument that it is only for fiscal purposes that the consideration for a transfer must be truly stated, is fatal, for then we have a deed here which is admittedly insufficiently stamped. The stamp upon a deed of gift would be £1 15s., on a deed for a consideration of £15 only two shillings and sixpence (st. 13 and 14 Vict. c. 97). He referred to the *Esgair Mwyn Mining Company* (9 W. R. 410, S. C. 3 L. T. N. S. 883).

Dec. 13.—O'BRIEN, J.—With respect to this case we are of opinion that the conditional order should be made absolute. The application here is made by Mr. Crea the transferee of the shares. There is no principle better settled than this, that the fact of an assignment of this sort being executed for the purpose of getting rid of a liability to calls, even if executed to a perfect pauper, is a valid transaction provided there be not any secret trust, arrangement, or understanding, whereby an interest in the shares would be preserved and retained by the alleged transferor. Now I believe that principle is well settled, and with respect to a transaction of the kind being an unfair dealing towards the rest of the shareholders, I can only say that the Act of Parliament gives the right of

transfer, and every one who enters into these companies must know that he puts himself into the position, though he started with solvent fellow-shareholders, of being left with insolvent fellow shareholders. Well, it was then suggested during the argument, that there was something in the circumstances under which this company was created that rendered it a breach of faith on the part of Mr. Barton to assign his shares. I was at a loss to come to that conclusion; besides, another argument against it is that the application is made on behalf of the transferee Crea. Besides, I see no ground for supposing that there was in the original contract here, any understanding or agreement between Mr. Barton and his co-partners that would render it a breach of faith on his part to abandon the concern when he found that it was likely to be a prosperous one. It is then said that the non payment of the deposit of £1 per share by Mr. Barton is a ground against granting the mandamus. I can only say as to that, that it is now too late to raise that objection. The company have registered Mr. Barton, and required him to pay two calls subsequently. If they are right they should not have put him on the list of shareholders. It was open to them, under the subscription deed to have insisted on the payment of the £1 deposit before he signed the deed. They have not done so; and it is, therefore, now too late for them to raise the point. But the real question is, is this a transfer for the purpose of getting rid of a liability? Is it one that we can enforce upon that ground? It is suggested that we are to assume that there is an understanding whereby the transfer is not really an absolute one. I cannot find any sufficient ground for coming to that conclusion. I have read the affidavits, and though they use the words "fraudulent" and "colourable," they do so in connection with the words that it was executed to a pauper, and executed for the purpose of getting rid of liability to payment. I do not think either of these circumstances would be sufficient to render the transaction colourable or fraudulent if the transfer was executed *bond fide*, and the shares were absolutely parted with. The party making the suggestion has not made it in terms which render it necessary for the other party to come here with an affidavit stating matters shewing positively that the transfer was an absolute one. Then it is said that the writ of mandamus is discretionary. It is certainly so to a certain extent. I take it that where there is a discretion vested in the Court, that discretion must be guided and regulated according to established rules, and if there is no other ground for not exercising it than that it enables a party to get rid of future calls, I do not think that a sufficient reason for refusing to do so; if we do not come to the conclusion that the transaction is saddled with any secret trust or arrangement, then it is urged that the party has another remedy, namely, by action. I do not think that that either is a sufficient reason for our refusing the mandamus. Mr. Crea, the applicant, would, by the transfer being registered, be put in a condition of assigning over the shares for value, if they are of any value, or of getting rid of his liability by assigning them to some other party if he thought it right to do so. I do not see why, if we are of opinion

that otherwise there is no sufficient cause for refusing the application, the fact of there being a right of action is such a sufficient ground. We have been referred to several cases. It is not my intention to go through them all. Suffice it to say that in all of them I find circumstances which do not exist in the present case. I find instances where the transferor after the transfer exercised acts of ownership in respect to the shares. In one case, *Budd's Case*, upon looking through the report in the *Law Journal*, it will be found that the transferee stated he could do nothing without consulting the transferor. In the mining case, the *Esgair Mwyn Case*, Wood, V. C., in his judgment refers to the fact that the certificates of transfer were there retained by the transferee, who remained the owner of the shares, and to the fact that both the transferor and transferee refused to be examined as to the nature of the transaction. It was there alleged that the transfer was not an actual one, but that the arrangement was that the transferor had retained an interest in the shares so as to be able to avail himself of them in the event of the company turning out prosperous. With respect to the point relating to the stamp, I do not think that it is so clear that the provisions of the Stamp Act as to the £1 15s. stamp would apply here. It may be that that provision was intended to meet a variety of cases where shares were assigned in trust. The point was made at the close of the case. It was open to the parties, but I am not so clear that in this case, there being a sale, the deed is to be considered as one of gift; and I do not find that the point is at all noticed in the case of the *Esgair Mwyn Mining Company*, though it was said that the consideration of £97 10s. there was a fiction. It may be that the parties were of opinion that some consideration should be stated. They may be wrong, but I do not think that a ground on which we should refuse the motion.

HAYES, J.—I agree that the mandamus ought to issue. If on its issuing the party thinks he has good grounds for meeting it, he can do so on its return, but as the case now stands I think the order ought to be made absolute. The party seeking for the mandamus relies on the deed of assignment to him. In opposition to that it is alleged that the deed is colourable, and made for the purpose of avoiding liability, and that that is sufficient to put the other party to state all the facts. I do not follow that argument. All it could do was to make the party say that it was not colourable. However, in the course of this case, it was relied on by Mr. Heron that the consideration money was not paid. That is a circumstance deserving of consideration, but it is explicable in several ways, and we ought not to presume that there was a fraud to such an extent as that the parties did not intend to pass the property in the shares by the deed. But there was a point suggested by Mr. Barry, to which I listened with great attention, as I thought it was of great importance as regulating our proceedings as to this prerogative writ, and that was, that by granting the writ we would be lending ourselves to a fraud; and the statement was that the company was got up by gentlemen of the country, not for the purpose of dealing with the shares, but that a few gentlemen got up the company for the purpose of

benefitting their territorial interests, if I may call them so; that Mr. Barton was one of those gentlemen, but that after he got his partners well shipped in this transaction, he abandoned them, and let them put to sea without him; that that was a gross fraud on his part, and that this being a prerogative writ for the purpose of preventing defects of justice, we would be forgetting the great purpose for which the prerogative was intrusted to us, if we allowed it to be used for the purpose of protecting frauds, and, therefore, I was anxious to find out the facts by which he made out the frauds which he said we should be protecting, and how he brought them home to Mr. Crea. But I do not think either that a case of fraud was made out, or that it was brought home either to Mr. Barton or to Mr. Crea; and, therefore, I think the case stood as before, a simple case of a person to whom shares were transferred, being an avowed pauper, seeking to have the shares transferred, and having given nothing for them, and being done to avoid liability. I think there is nothing to lead me to believe there is any fraudulent arrangement by which this transfer is only colourable, or that Mr. Barton is still to be deemed the owner of the shares. I see nothing of that, and as I think the whole property in the shares is intended to be passed by the deed, I am of opinion that the mandamus ought to issue.

FITZGERALD, J.—I should prefer leaving the party to any remedy he may have. He may have a remedy under the act of 1856; because I entertain grave doubt whether we exercise a wise discretion in making absolute the conditional order for a mandamus to compel the railway company to act on a deed false on the face of it in a material particular, namely, the consideration and the receipt for it; and it cannot be considered otherwise than as a false statement. I say further, that where we are asked to enforce a transaction of this kind, a suspicious one, one between a principal and his clerk, when the principal passes property of this kind, we ought to look with considerable strictness on it, and have it explained; and I would wish some further explanation describing what the transaction was. Upon that ground, I admit, I entertain grave doubt as to the propriety of the rule we are making. As to the letter of November 3, I would not bind Crea by a letter which was not properly obtained. The secretary of the company had no right to go about threatening this man, but we cannot shut our eyes to his statement, "I have signed my hand to a form;" that shews that he looked on the transaction as a mere form. It is upon these grounds that I entertain the doubt which I have mentioned.

Order made absolute, without costs.

THE QUEEN AT THE PROSECUTION OF JOHN BLACKBORN v. THE MIDLAND COUNTIES AND SHANNON JUNCTION RAILWAY COMPANY.—November 11, December 13, 1862.

Mandamus—Transfer of Shares—Infancy.

A mandamus to compel the registry of a transfer of shares in a railway company to an infant, refused.

This was an application on behalf of the Midland Counties and Shannon Junction Railway Company to

show cause against a conditional order, bearing date the 17th January 1862, whereby, on motion on behalf of John Blackburn, it was ordered that a writ of mandamus should issue directed to the said company commanding them, by their secretary, to enter in the register of transfers of the said company a memorial of the transfer to one Leonard Fuller by the said John Blackburn, as a shareholder in the said company, of the shares of him, the said John Blackburn, in the said company, by deed duly executed in that behalf by the said John Blackburn, bearing date the 30th of October, 1861, and to endorse such entry on the deed of transfer aforesaid, pursuant to the requisition of the said John Blackburn and the requirements of the statutory enactments in that behalf, unless cause shewn. The affidavit of the prosecutor, who was the holder of ten shares, stated the facts relative to the constitution of the company and to the call of £2 per share, payable on or before the 1st November, 1861, which have been already given in the last case, and stated further, that he had paid the said call of £2 on the 24th October, 1861; that deponent afterwards having agreed with one Leonard Fuller, of Kilcoursey, Glara, in the King's County, land-steward, for a transfer to him of the said ten shares of deponent, did execute under his hand and seal, pursuant to the provisions of "The Companies Clauses Consolidation Act, 1845," a deed of transfer of the said ten shares to the said Leonard Fuller, who thereupon, under his hand and seal, subscribed and affixed to the said deed of transfer, accepted the said transfer, and the said deed was executed, and bore date the 30th October, 1861. On the 1st November, 1861, the said deed of transfer was forwarded to the secretary of the company for the purpose of being registered and of having a certificate of the registry. The secretary declined to register the transfer and returned the deed. After stating certain other matters to which it is unnecessary, for the purpose of this report, to refer, the affidavit stated that the said Leonard Fuller was ready and willing to take the shares of deponent so transferred, and that the application for a mandamus was made with the knowledge, and had the full concurrence of the said Leonard Fuller. The consideration stated in the deed of transfer was the sum of £15. The case made by the affidavits on behalf of the company was, shortly, that the sum of £15 stated as the consideration for the transfer was entirely fictitious and had never been paid; that Leonard Fuller, the transferee, was a labouring boy in the employment of, and living with, the prosecutor at trifling wages, if any; that he was the nephew of the prosecutor and under the age of twenty-one years, having been born in the month of July, 1843; that the transfer was colourable only, and fraudulent for the purpose of evading prosecutor's liability to the company; that the fifth paragraph of the subscription contract which had been signed by the prosecutor, provided that a deposit of £1 per share should be paid by each subscriber at the time of, or previous to the signing of the deed, and that although the resolutions had been passed by the provisional directors in January and July, 1851, previous to the Act incorporating the company receiving the royal assent, calling for pay-

ment of this £1 per share, the prosecutor had never paid the amount. The case turned, however, almost entirely upon the point of the minority of Leonard Fuller the transferee.

Heron, Q.C., (with him *Barry, Q.C.* and *Finch White*), for the Railway Company.—The Court will not compel the company to register a transfer to an infant who may repudiate the transfer and get rid of his liability to future calls. *Newry and Enniskillen Railway v. Coombe* (3 Exch. 565). *The Birkenhead etc. Railway Company v. Pilcher* (5 Exch. 24); *Reid's Case* (24 Beav. 318); *Stikeman v. Dawson* (4 Railw. Cas. 585). The Court will not give effect to a transaction which on the face of it is merely colourable. The party having broken his contract, the writ ought not to be granted to him for the purpose of assisting him further in committing a fraud.

Sullivan, Serjt., and *Phillips*, for Mr. Blackburn. It is the right of every shareholder to transfer his shares, even to a pauper, for the purpose of getting rid of his liability. The only limit is that the transfer must not be merely colourable, and that the shareholder must not retain an interest in the shares. *The Huddersfield Canal Company v. Buckley* (7 T. K. 36). The fact of a person being an infant at the date of the transfer to him does not destroy his liability to calls. *Cork and Bandon Railway Company v. Cazenove* (10 Q. B. 935); *The Midland Great Western Railway Company v. Quinn* (1 Ir. C. L. Rep. 383). There is nothing to shew that this transfer is merely colourable, or that Mr. Blackburn retains any interest in the shares, or that there is any secret trust for his benefit. *Hyam's Case* (1st De G. F. and J. 75). S. 14 of the Companies Clauses Act, st. 8 and 9 Vict. c. 16, is express that every shareholder may sell and transfer his shares.

Barry, Q.C., in reply.—If it was necessary we might argue that the applicant has no right to appear here at all as he is not the transferee. There is a consideration mentioned in the transfer deed, which we say has never been paid, and that is not denied on the other side (*The Queen v. Newcastle &c. Railway Company* (21 L. J. Q. B. 234); *Ex parte Budd* (10 W. R. 51). He referred on the question of infancy to *The Dublin and Wicklow Railway Company v. Black* (8 Exch. 181), and Addison on Contracts, last edition, 941.

Dec. 13.—O'BRIEN J.—In this case we have all come to the conclusion that the conditional order should be discharged. I shall state the reasons, perhaps not adopted by all the members of the Court, on which I, at least, have come to that conclusion. The circumstances of this case are materially different from the other in this respect, that the transferee here was, at the date of the transfer, an infant, and still continues so, and also in this, that the application to compel the registry of the assignment was made, not on his behalf, but on behalf of the transferor. The application was resisted on the ground which was strongly relied upon, that no assignment to an infant was one that the company could be called on to register at all, no matter how *bonâ fide* it was. The other objection was that it was not a *bonâ fide* transfer for the purpose of getting rid of a liability and parting with all the interest in the shares, but

that this infant being a nephew of Mr. Blackburn, the assignment was executed to him for the purpose of Mr. Blackburn's getting rid of his liability if he could, whereas it would be in his power afterwards to get back the shares. Now the fact of infancy is relied on in two ways: first, as being a positive ground for not compelling the company to register the transfer at all, and also as a ground for presuming that the assignment was only colourable in the sense I have stated. With regard to the former ground, I am inclined to think that the fact of the assignment being made to an infant, is a circumstance that should prevent us from interfering to compel the company to register the transfer. It was contended that infants may be shareholders: so they may in a certain sense. But in what position would our granting the order place the company? We would relieve the original shareholder from all liability, and would not give the company a shareholder whom they could hold. If they brought an action against the infant for future calls, it would be open to him during his infancy to plead his infancy; if the action was brought against him after he had attained his full age, it would be open to him to plead, if the facts were so, that he had repudiated this transfer after coming of age. It is impossible to hold that we, consistently with the laws which govern the Courts as to contracts by infants, should hold the infant conclusively bound by such a transaction as this. The cases which have been cited do not appear to me to bear out the proposition for which the prosecutor contends. One of them is the case of the *Birkenhead &c. Railway Company v. Pilcher* (5 Exch. 114). That was an action for calls, and the defendant pleaded that at the time the shares were allotted to him, and at the time the calls were made, he was an infant. It was held that the plea was bad for want of an averment that the defendant had repudiated the contract, or continued a minor; but it is well settled that in a contract of this sort, it is perfectly open to an infant after he has come of age to say: "the transfer was executed to me when I was a minor; I never accepted it since I came of age, and I now repudiate it." If he did that in a reasonable time, the decisions establish that that would be a good defence. In those cases the defendant continued to be a shareholder after he came of age, and did no act to repudiate. It was held that the plea was bad for want of an averment of repudiation. The law is laid down by Parke, B., in his judgment, who says, that when "there is nothing but the simple fact of infancy pleaded to an action for calls against a purchaser who has been registered, and thereby become a shareholder in a subject of a permanent character, the interest continuing to be vested in the infant, and the consequent obligation to pay, the simple plea of infancy is, according to the above authorities, insufficient;" and he goes, afterwards, on to state that, to make the plea good, it ought to appear that the party had disclaimed the transaction after he had reached his full age, or that he still continued an infant. Another case is that of the *Newry and Enniskillen Railway Company v. Coombe* (3 Exch. 565). The plea there was, that the defendant became the holder of the shares by reason of his having contracted and subscribed for them, and not other-

wise; and that at the time of his so contracting and subscribing, and also at the time of making the calls, he was an infant; that while he was an infant he repudiated the contract and subscription, and gave notice to the plaintiffs that he held the shares at their disposal. That plea was held good. So, here the Court held that a repudiation by the holder of shares, even during minority, was a full answer to an action of the company, and that if the company relied on a subsequent abandonment of the repudiation they should have stated it—in other words, that it would be open to the party, in this case, if an action was brought against him, to repudiate the contract on his coming of age, and to plead that repudiation as a bar to the action. We do not think that an assignment which may be attended with such consequences is one that we should compel the company to register; nor do we think it one that the Act of Parliament ever contemplated that the company should be compelled to register. That is my opinion, and I have the authority of the Lord Chief Justice to say, that without stating any opinion as to the liability of an infant, or the effect of a transfer to an infant, it is a most material element to test the *bona fides* of the transfer, if an infant was selected on whom to cast the liability for the purpose of enabling the transferor, if he thought fit, at a future time to assert his title to the shares.

HAYES, J.—I agree that the mandamus ought to be refused; and I think that to grant it would be an indiscreet and unjust exercise of the prerogative. I say an indiscreet exercise of it, because I think there is, on the face of this transaction, which Mr. Blackburn calls on us to confirm, a number of facts leading me to the conclusion that it never was the intention of Mr. Blackburn absolutely to get rid of the property in the shares; and, I think, that he thought that by transferring his shares to this infant he was, as it were, putting them in a safe place where he could easily get them again if times improved. That is not such a transaction as we ought to assist, and I say, therefore, that it would be an indiscreet exercise of our power to grant the writ. I say, also, that it would be an unjust exercise of our power, for in all these cases of registry of transfers, we must not forget that while the parties have rights, there are also certain rights secured to the company. The rights of the company are these: they have a right to compel the shareholders to pay all calls. They have a right, if the shares are not paid, to get rid of the party's ownership by declaring the shares forfeited. In this case there are difficulties as to both points. We have heard the difficulty which exists in enforcing the calls against infants; but there is, besides, an unexplored region of doubt and difficulty about the forfeiting of the shares of infants if the calls are not paid; and, therefore, I think it would be unjust for us to take the shares out of the hands of a man, and, at his call, to put them into the hands of a person who is not *sui juris*.

FITZGERALD J.—I concur, only desiring to observe that this is an application on the part of Mr. Blackburn, and that the infant transferee does not intervene.

Cause shown allowed, with costs.

Court of Common Pleas.

[Reported by J. Field Johnston, Esq., Barrister-at-Law.]

NOLAN v. GUMLEY.—Jan. 16.

Construction of the rule requiring a warrant of attorney given by a person in custody to be attested by an attorney attending at his request.

The defendant applied that a judgment obtained upon a warrant of attorney signed by him seven years previously while in the custody of the Sheriff might be set aside upon the ground that same had been fraudulently obtained by a person who falsely represented himself as the assignee of the judgment on foot of which he had been arrested, and for which there had been comparatively no consideration, admitting that he had no personal interest in the application. The Court upon the grounds that there had been some consideration for the judgment, that a long period of time had elapsed; that the original judgment creditor and the party who obtained the judgment in question were both out of the country, and that the applicant had no personal interest, refused to set it aside.

The defendant applied that the above judgment might be set aside upon the ground that there was not an attorney present on his behalf when he signed the warrant of attorney conformably with the requirements of the 93rd General Order, 1854: alleging that the party who obtained the warrant from him on the day previously, dictated to him a letter to an attorney named by him, and whom he, the defendant, had never seen, requiring him to attend the next day which he did, and witnessed the defendant's signature without explaining to him the nature of the consent. It was sworn upon the other side that at the time he said he knew the contents of it.

Held—That the 93rd General Order had been complied with, and that the judgment could not be set aside upon this ground.

The defendant applied that the above judgment might be set aside upon the further ground that the warrant was not attested conformably with the latter portion of the 93rd General Order, 1854. The attestation was as follows: "Signed, sealed, and delivered, &c.—his attorney."

Held—that the attestation was sufficient, and that the judgment could not be set aside upon this ground.

Semble—That a statutable mortgagee is a purchaser for value.

St. John Armstrong applied to the Court that a judgment obtained upon a warrant of attorney signed by the defendant might be set aside, and the warrant declared to be of no force on the ground that same was obtained by fraud while the defendant was in the custody of the Sheriff of the county of Dublin, and also on the ground that the 93rd of the General Orders, 1854, had been disregarded. The

motion became necessary by reason of the assignee of the judgment which had been registered as a mortgage against defendant's lands filing a claim in the Landed Estates Court, in which proceedings had been had to sell defendant's property. Having stated the affidavits on which the motion was grounded the defendant's counsel intimated that there were affidavits intended to be used on the other side, which had not been filed in this Court, but had been filed in the Landed Estates Court, and that he did not object to copies of these affidavits being used. [*Monahan, C.J.*—There is a difficulty in the way of our making an order on affidavits which are not filed in this Court.] The motion was directed to stand over until affidavits should be filed in the Court of Common Pleas.

January 19.—St. John Armstrong renewed his application. The defendant's affidavit stated that one Parker Molloy obtained a judgment against him upon foot of a bill of exchange, which was a renewal of another bill of exchange, for which he never received more than £5, the residue having been paid to a person named Richardson; that on the 9th of March, 1854, deponent was arrested upon foot of said judgment, and that in September, 1855, while in Kilmainham, the present plaintiff Nolan came to him and told him the judgment had been assigned to him, and that deponent would be discharged from custody if he executed a bond and warrant of attorney for £43; that Nolan dictated to him a letter to an attorney, Carolan, requiring Carolan to attend the next day to witness the execution of the bond; that on the following day, Carolan and Nolan attended; that deponent had never seen Carolan before; that Carolan was nominated by Nolan; that Carolan did not explain to deponent the nature of the warrant; that upon the statement that said judgment had been assigned, and no part of it paid, deponent executed the bond; that judgment was marked thereon and registered as a mortgage against deponent's lands, which had been sold in the Landed Estates Court; that the assignee of this last judgment, Hunter, never required payment of it, but had filed a claim in the Landed Estates Court, which Judge Hargreave directed to stand over, pending the present application; that deponent was discharged from custody in August, 1856, and between the 6th and 16th of that month, was first made aware of the fraud practised upon him by meeting Hunter in the street and hearing from him that Parker Molloy's judgment had never been assigned to Nolan; that Parker Molloy had left this country before the judgment was obtained by Nolan, and that Nolan had left this country in 1858; that deponent did not believe that £15, the alleged consideration money, for assigning the judgment was ever paid by Hunter to Nolan, or that Nolan would have ever made over said judgment for such a sum, except with a private understanding; that deponent had no personal interest in the present application, but had a number of puisne creditors who were interested in setting aside said judgment. In *Hutson v. Hutson* (7 Term Reports 7), Lord Kenyon, says, "There is great weight in the observation that the defendant under the pressure of an arrest ought to be considered incapable of waiving

the benefit of this rule, and that at all events, and in all cases, he should be protected by the advice of an attorney, expressly attending for him." There was at that time in force a rule similar to the 93rd General Order,* Carolan was virtually an agent of Nolan. The defendant's attorney must be present when the warrant is signed; the plaintiff's attorney or plaintiff's attorney's agent will not do for the purpose, *Mason v. Sliddell* (8 Dowling's, P. C. 207); *Barnes v. Pendrey* (7 Dowling's, P. C. 747); *Cocks v. Edwards* (2 Dowling's, P. C. N. S. 55). The last-mentioned of these cases decides that lapse of time is no bar to the application. *Hornsey v. Wilson* (1 Ir. Jur. N. S. 204), was decided in this Court. The attestation to the execution of this warrant of attorney is deficient. *Hibbert v. Barton* (10 M. & W. 678); *Pocock v. Pickering* (16 Jur. 760). In this last case the attestation was "Signed, sealed, and delivered in the presence of me, H. C., who, at the request and in the presence of the said J. H. B., J. C., and J. H. P., have set and subscribed my name as the attorney on their behalf attesting the execution hereof, having first read over and explained to them, and each of them the nature and contents thereof." That was held insufficient, and Coleridge, J., says, "The same attorney is now to become the witness, and in discharging this distinct duty, he is to do three things:—First, he is to subscribe his name as witness; Secondly, he is, in the attestation, to declare himself to be the attorney for the person executing; and, thirdly, he is also, in the attestation, to state that he subscribes as such attorney." [*Monahan, C.J.*—What was decided there was that one of the requirements of the Act, that the attesting attorney should state he is the attorney for the party, was not complied with.] Upon the ground that the plaintiff was the defendant's attorney in the matter; upon the broad ground put by Lord Kenyon in *Hutson v. Hutson*, and because the 93rd General Rule was not complied with, this judgment ought to be set aside. The registering of it was an execution. [*Christian, J.*—No, it was not: an elegit would be.]

E. Litton, contra.—Eight years have elapsed. The persons who could have deposed to the facts have left the country. All that has been urged might have been discussed before, and was discussed with the exception of the narrow legal ground. We are assignees by deed. The defendant states that he has no interest in the application, and only seeks to have the funds in the Landed Estates Court distributed amongst his *bona fide* creditors. If the case made be true, the defendant could have been discharged from prison, but grounds of fraud affecting the judgment obtained by Parker Molloy cannot be relied on in this

* 93rd Rule, which for the purposes of this case is identical with 1 & 2 Vict., cap. 110, section 9, upon which the English cases turned, is as follows:—No such warrant given by any person in custody of a sheriff or other officer shall be of any force, unless there be present some attorney on behalf of such person in custody, expressly named by him, and attending at his request, to inform him of the nature and effect of such warrant, before the execution thereof, which attorney shall subscribe his name as a witness thereto, and declare himself to be attorney for the defendant, and that he subscribes as such attorney.

motion. Hunter has made an affidavit, stating that he had "no such conversation" with the defendant as is alleged. I admit the word "such" looks like special pleading. It is too late to inquire into the consideration for this judgment. *Bligh v. Brewer* (3 Dowling's, P. C. 266), is an authority on this as well as upon the subsequent point of the defendant having an attorney present at the execution of the warrant. [*Monahan, C.J.*—If it be true that Nolan untruly stated that he was the assignee of Molloy's judgment, how can you argue we are to assume there was a good consideration for the second judgment?] In the schedule in the Landed Estates Court, they put opposite to it, "Nothing due;" whereas it is now contended that it is a nullity. [*Christian, J.*—That is a very queer way of alluding to it, if it be contended that it is a nullity.] As to the second ground upon which the application is made, that the attorney be expressly named by the defendant does not mean that he be originally named by him. *Ferguson's Practice*, 1145. *Taylor v. Nicholls* (6 M. & W. 91). This case decides that the warrant is not vitiated by the fact that the name of the attorney who attests it on behalf of the defendant was first suggested by the plaintiff's attorney if he was expressly adopted by the defendant. Carolan, who is a disinterested party has made an affidavit stating that it is not true that the purport of the warrant was never explained to the defendant at the time, and stating also that the defendant "said he knew the contents of it." [*Christian, J.*—The 93rd Rule does not require the attorney to explain the warrant or to read it; but to attend to do so, if necessary; the party may dispense with that by telling him he already understands it.] So says, Parke, B., in *Taylor v. Nicholls*. [*Monahan, C.J.*—It is positively averred that Carolan did not explain the nature of the warrant. Can you make out that what he did was an explanation?] The best answer is that of Baron Parke, that the rule does not require this. [*Christian, J.*—The explanation must be given or dispensed with.] "Inform" would have no sense if that which was already known was to be the subject-matter of information. The defendant is prevented from making this case after putting the judgment on the records of a Court. *Dobson & Love v. M'Daid* (1 Ir. Law Rep. 236). Then, the attestation is sufficient: there are the three particulars, that Carolan is the attorney, that he has been requested to attend, and that he witnesses as an attorney.

St. John Armstrong, in reply.—[*Monahan, C.J.*—Show us that *Taylor v. Nicholls* was ever overruled or was ever questioned?] The requirements of the rule cannot be dispensed with. The Common Law Procedure Act, 1853, section 145, is a re-enactment of 9 Wil. III., c. 10, sect. 8; and in *Montgomery v. Byrne* (2 Ir. Com. Law Rep., 230) it was held that the requisites of that statute could not be dispensed with, because a public policy was to be supported. This case is analogous in that respect. It is the duty of the party obtaining the warrant to see that all the requisites of the statute are complied with. [*Christian, J.*—That meant that the parties could not dispense with the rules of pleading.] [*Ball, J.*—Is the principle that anyone may waive a

privilege introduced for his own convenience over-ruled by statute?] [*Monahan, C.J.*—The question is this, is it the true construction to hold that the Act is not complied with by the mere presence of the attorney?] [*Christian, J.*—Read any passage over-ruled *Taylor v. Nicholls.*] [*Monahan, C.J.*—Or show any case inconsistent.] *Barnes v. Pendrey.* [*Monahan, C.J.*—Your client wrote the day before, requiring Carolan to come to him, and so the case differs from *Barnes v. Pendrey.*] Will the interval of a day make any difference? [*Keogh, J.*—It seems to me the material thing is that seven years have elapsed.] We did not know till lately that the judgment was assigned to Hunter. We were never put in motion properly before. A statutable mortgagee is not a purchaser for value. [*Christian, J.*—I think it was decided by the Lord Chancellor that a statutable mortgagee is a purchaser for value.] *M'Auley v. Clarendon* (8 Ir. Chan. Rep. 568); *Eyre v. M'Dowell* (7 Ir. Jur. N. S., 41). [*Monahan, C.J.*—*Eyre v. M'Dowell* decided that the statutable mortgagee takes only what interest the mortgagor has at the time of the registration; but it is a different question if this man is not the *bona fide* assignee of this judgment.] The attestation is deficient according to *Pocock v. Pickering.*

Cur. adv. vult.

Jan. 22.—*MONAHAN, C.J.*—This application is made upon three distinct grounds. The defendant's affidavit states that he was indebted to Parker Molloy and was arrested by him; that the present plaintiff came to him in Kilmainham, and told him he would be discharged from custody on giving a bond for £43; that he represented to him that Molloy's judgment had been assigned to him, and dictated to him a letter requiring Carolan to attend the next day to witness the execution of the bond; that Nolan and Carolan attended the next day; that he signed the bond and warrant; that he had never seen Carolan before, and that Carolan was nominated by Nolan, and that Carolan did not inform him of the nature of the warrant; that judgment was marked thereon and registered against his (defendant's) property which has been sold in the Landed Estates Court; that the defendant met Hunter after his discharge and learned from him the true facts regarding the judgment; that on the original bill of exchange he got no more value than £5, the residue, £22, having been paid to one Richardson; but Richardson is not to be found, and this affidavit is the only evidence of that. But it appears that upon the renewed bill the defendant did not avail himself of the defence of want of consideration. He never took proceedings to set aside Molloy's judgment until Nolan had left the country. The first ground made is that the judgment was fraudulently obtained, inasmuch as the other judgment had never been assigned. This would only be ground for allowing the party to plead. But it appears that he is a mere amateur; that his property will not bring him any benefit, and that he makes this application out of a love of abstract justice in favor of his *puisse* creditors. We do not think we should set aside this judgment, when there was some consideration for it at this distance of time, and when

Nolan and Molloy are both out of the country, in favor of an amateur. The second ground made is that there has been a non-compliance with the 93rd General Rule; if so, the length of time is no bar to the application, because the proceedings are a nullity. [His Lordship read the rule.] This rule requires two things, totally distinct in their nature, to be done, as is remarked by Mr. Justice Coleridge, in a very learned judgment in *Pocock v. Pickering* (18 Q. B. 789); first, an attorney must be present on behalf of the person about to execute. This has nothing to do with the manner of the attestation; secondly, the manner of the attestation is pointed out. It is argued that as to the first of these, though there was an attorney present, he was not present on behalf of Gumley nor named by him. Several cases were referred to upon this, and particularly *Cocks v. Edwards* (2 Dowl. P. C., N. S., 55); *Mason v. Sliddell* (8 Dowl. P. C., 207); and *Barnes v. Pendrey* (7 Dowl. P. C., 747); which require particular scrutiny to distinguish from this case. *Cocks v. Edwards* shows that the rule must be construed strictly. In *Mason v. Sliddell* the agent of the plaintiff's attorney was applied to for time by the defendant, and the matter was free from fraud. It was arranged that the defendant should execute a *cognovit*. The agent explained to the defendant the necessity of his having an attorney to attest the execution, and the defendant named the agent, and the *cognovit* was executed by the defendant and witnessed by the agent. The man knew perfectly well what he was doing, and yet it was held that there had not been a substantial compliance with the rule. *Barnes v. Pendrey* is the nearest to the present case. The reason given in that case why it was held that there had not been a compliance with the rule was because the name of the attorney was not known or mentioned, and the defendant could not have understood anything about him. The attorney could not have been considered an attorney named by the defendant; but it was expressly held that the employment of the attorney by the plaintiff's attorney, provided the latter were named by the defendant would not vitiate the instrument. We were referred by Mr. Litton to *Bligh v. Brewer*, which is also reported in 1 Crompton, Meeson and Roscoe, 651. In that case the defendant agreed to give a *cognovit*, and the clerk of the plaintiff's attorney informed him it would be necessary to have an attorney, and named one who would attend if the defendant had no objection. The defendant afterwards went to the office of the attorney so named, and prevented him from reading over the *cognovit*, stating that, he already knew its contents. It was held that the rule had been complied with, and Baron Parke, says, "In this case everything which the rule demands has been complied with. The rule requires three distinct things: first, that there shall be an attorney attending on the behalf of the person in custody; secondly, that it shall be a different person from the plaintiff's attorney; and thirdly, that he shall be expressly named by the defendant, and shall attend at his request." In *Taylor v. Nicholls* (6 M. & W. 91) the plaintiffs were the trustees of the defendant's marriage settlement, and the defendant agreed with the plaintiff's attorney to execute a warrant of attorney for a portion of the

trust-fund, which he had been allowed to take into his hands. The warrant was prepared and read to the defendant, and the plaintiff's attorney told him it was necessary some attorney should be present on his behalf. The defendant replied that he had no wish to have any particular attorney. The plaintiff's attorney mentioned the name of an attorney. The defendant assented and went to the attorney's office. The attorney asked the defendant if the warrant had been read over to him and if he understood it. He replied that it had been read, and that he fully understood it. The rule was discharged, and Baron Parke, says, "The attesting attorney must be 'expressly named' by the defendant. But we cannot therefore suppose that it was intended that the defendant must expressly pronounce at length the Christian and surname of the attorney; but he must be *expressly* named by him, in contradistinction to his being *impliedly* named or adopted. There is not a word to lead to the conclusion that he must be *originally* or *spontaneously* named by the party, or to exclude the suggestion of a name by a third person. What then is there to exclude the suggestion of a name by the plaintiff's attorney? I cannot import such words into the Act, when no such prohibition is expressed in it." How does this apply to the present case? No doubt Nolan suggested the name of Carolan, but it was adopted by the defendant. He was free to do so or not, and he adopted in the best possible mode of adopting, viz., by writing to Carolan to come. The defendant does not swear that he did not know what was the meaning of the warrant, and it is sworn that he said he knew the contents of it. There is no allegation that Carolan was a stalking horse of Nolan. This case comes, therefore, within the *authority* of the two last cases, so far as the attestation is to be proved *aliunde*, i. e. by affidavit. The third ground made is that the warrant is not attested. Unless the attestation be duly done there is no doubt but that the judgment must be set aside. [His Lordship read the attestation.] This is an allegation. "I am the attorney for the defendant, and I subscribe my name, &c." What is the objection? The execution is subscribed by Carolan as a witness. He does declare that he subscribes as attorney; and under that is "Frederick Carolan." Mr. Armstrong cited *Hibbert v. Barton* (10 M. & W., 678). The words were, "Witnessed by me, William Pemberton, as the attorney of the said William Barton, attending at the execution hereof at his request, and expressly named by him." That was held insufficient because the words were, "Witnessed by me as the attorney." The Court thought that was not a statement in fact that he was the attorney because he said, "as." The word "as" spoiled it. It would not be decorous in this Court to overrule that case, especially as it has been followed in the well-considered case of *Pocock v. Pickering* (18 Q. B., 789). Lord Campbell and Mr. Justice Coleridge were upon one side, and Mr. Justice Erle on the other. That would not justify us in going against that case if the present were similar. The attestation there was "signed, sealed, and delivered, being first duly stamped, in the presence of me, H. C., who at the request and in the presence of the said J. H. B., J. C., and J. H. P.,

have set and subscribed my name as the attorney on their behalf, attesting the execution hereof, having first read over and explained to them and each of them the nature and contents hereof." The two judges held that this did not amount to a statement; that this man was the defendant's attorney. But here it is in terms, "signed, sealed, and delivered, &c., his attorney." If one went about to prepare an attestation in the form required by the Act of Parliament, it would be in this form. In *Gay v. Hall* (5 Dow. & Lowndes, 422) the attestation was as follows: "Signed, sealed, and delivered by the said H. H., in my presence, and I declare myself to be the attorney for the said H. H., and that I subscribe as such attorney, G. O., solicitor." Patteson, J., says, "The attestation is confined to the words of the statute; it does not say anything about his being expressly named by the defendant, or attending at his request. I am of opinion that the attestation in this case is sufficient." So we are of opinion that in all common reason this attestation does contain a statement that this man is an attorney and attending on the defendant's behalf. There is no foundation for the application, and it must be refused with costs.

Application refused.

WILSON AND ANOTHER v. BRAGG.—June 10.

Changing the venue.

A motion by the defendant to change the venue before defence filed, is irregular, and will be refused with costs.

Whittle, for the defendant in this case, applied that the venue might be changed from Dublin to Belfast. The defendant had made an affidavit showing that the balance of convenience was in favor of the application. Defence had not been filed, but the defendant was desirous of having the venue ascertained.

Walter Boyd contra.

Motion refused with costs.

Court of Bankruptcy & Insolvency.

[Reported by John Levy, Esq., Barrister-at-law.]

[BEFORE LYNCH, J.]

RE ALEXANDER HALL.

Order and disposition—Bill given to trader to replace a bill supposed to have been lost—Bill given as a guarantee for the solvency of a customer, or for safe custody—Bills passed to replace another bill—Additional advances made on the new bills.

B., a customer of the bankrupt, gave him a bill for two hundred pounds in the ordinary course of bu-

business, which bill was sent into the bank where the bankrupt did business, but, by mistake, it was not entered on the docket with other bills sent in at the same time, and was supposed to be lost, and B. gave another bill in lieu of it, which was also sent to the bank, and put to the bankrupt's credit. B. was compelled to pay both bills. B. gave another bill to the bankrupt, the acceptance of a third party, which was lodged as a guarantee for his solvency and for safe custody. B. also gave the bankrupt two bills as renewals for a previous bill partly accepted for the bankrupt's accommodation, but upon which some advances had been made. The proceeds of all the bills became part of the bankrupt's estate. Held, that the proceeds of the two first bills did not pass to the assignees, and that B. was entitled to be repaid the amount out of the bankrupt's estate of the two first bills, but that the same rule did not apply to the claim on foot of the third bills.

THE bankrupt was an extensive wholesale woollen draper in this city, and had various transactions with Mr. Browne, a merchant tailor, who gave him in the course of their dealings three bills of exchange under the following circumstances. The first was a bill for two hundred pounds, which Browne passed to Hall, to be put to the credit of his account, this bill was supposed to be lost, and Hall applied for a fresh bill for the same amount which Browne gave him, and which Hall had discounted in the Bank of Ireland—the first bill was also by mistake sent into the bank, and put to the credit of the bankrupt, and Browne had in point of fact to pay both bills. The second was a bill accepted by Sir Compton Domville for Browne, and by him lodged with the bankrupt, not for the purpose of discount, but as a guarantee for Browne's solvency and for safe custody; this bill was also lodged by Hall in the Bank of Ireland, and put to the credit of his account. The third was a claim of £316 on foot of two bills for £383, which were given by Browne to the bankrupt, upon foot of which some advances were made to Browne, the proceeds of the whole of those bills got amongst the assets of Hall.

Kernan, Q.C., and Martin contended that this money being in the order and disposition of the bankrupt passed to the assignees.

Dowse, Q.C., and Foley, contended that it did not pass to the assignees, and that Browne had a right to be refunded the amount out of the general estate.

They cited *ex parte Bond in re Foster* (2 Mon. D. and D. Gex. 10); *ex parte Armstead in re Dilworth* (2 Glynn and Jameson, 371).

His Lordship, in giving judgment, said:—This case is before me on a motion made by Mr. James Browne, claiming to be paid three sums of money. The cases as to these sums are quite distinct from each other, and I shall separately dispose of them. The first claim is for £200, the produce of a bill now standing in the Bank of Ireland. The bill was given to replace another bill supposed to have been lost; and by pure mistake this bill and the other bill passed into the Bank, and £200 thus got into the assets, and Mr. James Browne has been thus compelled to pay £200 twice over. Now, there may undoubtedly

be some legal difficulty in the way; but there is so much of injustice in allowing this loss to fall on Mr. Browne—so much of hardship in allowing a mere mistake and oversight to work so far to his prejudice—that I think I can, without overstraining the law, declare him entitled to be paid this sum in full out of the money lodged in court. This is altogether an exceptional case. There is very little danger of its establishing any dangerous precedent; and I feel, therefore, that I can safely do individual justice without disturbing the general rules of equality established in bankruptcy, which must sometimes necessarily work individual hardship. I regard it as a mere mistake and accident, which I now set right by ordering this payment to Mr. Browne. The next claim is for £428 16s. 9d., the amount of the acceptance of Sir C. Domville. This bill of Sir C. Domville was placed by Mr. Browne in the hands of Mr. Hall; first, an offer to let it remain as a guarantee for his solvency. However, it was not received as such, but was held on express trust not to be discounted, but received merely for custody. No property in this bill ever passed. It is stronger than the cases of short bills, in which, necessarily, a dominion passes over bills to have them turned into cash; here no such dominion was intended—to receive payment was the most ever intended, even if so much. This bill, in violation of this agreement, was discounted, and its proceeds directly went, in my opinion, to make up the sum which Mr. Hall was enabled to draw for, when he sought to have all his available cash assets sent to him, and which he lodged in this court. *Ex parte Bond, in re Foster*, (2 Mont. De G. & D. 10), seems to me quite as strong as this case; and the principle of *ex parte Armstead, in re Dilworth*, (2 Gl. and J., 371), seems directly applicable. This was no trade transaction—it was a custody given merely for custody; and the general creditors have, in my judgment, no right to hold as part of the assets the portion which represents this sum. I, therefore, declare Mr. Browne also entitled to this sum of £428 16s. 9d. The third claim is for the sum of £316 7s. 5d. out of the amount of two bills for £383 12s. 5d.; and this claim is founded on the circumstance that these two bills were given as renewals for a former bill of £316 7s. 5d. But it is material to remark that these bills also cover further advances made by Mr. Hall to Mr. Browne. By the course of trade between Mr. Hall and Mr. Browne, bills of shorter date than the period of trade credit were passed, and the period of trade credit was covered by renewals; and, of course, the renewal bill was always intended as a means of enabling Mr. Hall to take up the former bill, but necessarily all the property and title to the renewal bill passed to Mr. Hall, and its proceeds were intended to increase his account so as to enable him to take up the former bill. Therefore it was rather a trade duty to take up the former bill than any direct trust out of any particular funds to do so. No case at all comes up to the proposition here contended for. An accommodation bill, in sundry other instances, might be put in the same class as this case. And with every wish—nay, with anxiety—to aid Mr. Browne if I could, I feel it impossible to make this transaction exceptional, and

to place him as to this in a position of favour beyond all the other creditors. I therefore must say no rule as to this claim.

House of Lords.*

Reported by James Paterson, Esq., of the Middle Temple,
Barrister-at-Law.

MALCOLMSON v. O'DEA.—July 28.

Fishery — Evidence — Ancient possession — Several fishery in navigable river — Evidence of title — Admissibility of old bill and answer in Chancery — Admissibility of ancient lease — Proof of title to ancient fishery.

M. brought an action against O. for breaking his several fishery in a public navigable river. At the trial, M., who was tenant of the corporation of L., gave in evidence a reconveyance by P. to the corporation of the fishery in question, dated 1684, and, in order to show there had been previously a pending suit between P. and the corporation, each claiming under conflicting grants from the Crown, M. gave in evidence a bill, filed by P. in the Court of Chancery, against the corporation, with their answer, dated 1674. On exception to this evidence, Held (reversing the judgment of the Irish Exchequer Chamber), that such evidence was admissible as part of the history of the adverse claim of P., which ended in P.'s reconveyance to the corporation.

At the trial, in order to prove the ancient possession of the fishery, M. gave in evidence an assembly book of the corporation, containing entries showing that the fishery was then let for certain rents to a tenant. On exception to this evidence,

Held (reversing the judgment of the Irish Exchequer Chamber), that such book was admissible in evidence, for the rule is, that ancient documents, coming out of the proper custody, and purporting, upon the face of them, to exercise ownership, such as a lease or a licence, may be given in evidence without proof of possession or payment of rent under them, as being in themselves acts of ownership and proof of possession.

Though Magna Charta made illegal all grants by the Crown, of a several fishery in a navigable river, which had not been in existence in the reign of Henry II., yet if evidence now be given of long enjoyment of a fishery there, to the exclusion of others, of such a character as to establish that it has been

dealt with as of right as a distinct and separate property, and there is nothing to show that its origin was modern, the reasonable presumption is that it became such in due course of law, and therefore must have been created before legal memory.

THIS was a proceeding in error from the judgment of the Court of Exchequer Chamber, in Ireland, sitting in error from the Court of Queen's Bench, in Ireland, overruling the judgment given in that court in favour of the plaintiff on a bill of exceptions of the defendants, by which they objected to the admissibility of certain documents given in evidence by the plaintiff, and that there was no evidence to go to the jury in support of the plaintiff's claim to a several fishery in the Shannon, except in the Lax Weir, the plaintiff's right to which is not in dispute.

This action was brought by the plaintiff in error, against the defendants in error, to recover damages for the defendants having fished in and carried away fish from the close, and several fisheries of the plaintiff in the river Shannon.

The plaintiff, in the material paragraph of the plaint, charged the defendants "with having fished in a several fishery of the plaintiff in the River Shannon, called the "Fisher's Stent," extending from the weir called the Lax Weir in the east, to the River Meelick, on the west."

The Lax Weir is situated in the Shannon, and is about one mile and a half to the east of and above Thomond-bridge, in the county of the city of Limerick. The Island Point lies about half-way between the Lax Weir and Thomond-bridge. The river Meelick falls into the Shannon, near to Castle Donnell, and is within a circle of three miles round the old walls of the old city of Limerick. Castle Donnell is outside such circle, and is situate half-a-mile from the river Meelick, and is styled in the ordnance map Castle Donnell. The whole of the Shannon between the Lax Weir and river Meelick is within the county of the city of Limerick, and within the flux and reflux of the tide.

To the above plaint the defendants pleaded fourteen defences, the substance of which was, that the defendants denied the plaintiff's property in the several fisheries and any trespass by fishing in any several fishery of the plaintiff: and they also alleged that the *locus in quo* was a common public fishery, and that it was an arm of the sea, or common public navigable river.

The plaintiff, in answer to the 10th and 11th defences setting up a prescriptive right in the public to fish in the *locus in quo*, as part of an arm of the sea or public navigable river, replied in substance, that each of the several places and fisheries, and the part of the Shannon, and the part of the arm of the sea in which it is situated, was and is a several fishery and ancient possession of the Crown of England and Ireland, which subsequently became vested in the corporation of the City of Limerick in fee simple; and that, on the 31st January, 1834, the corporation demised such several fishery to Poole Gabbott, for ninety-nine years; and that on his death, Thomas Gabbett, his administrator, demised the same to the plaintiff for seventy-five years, whereby the plaintiff at the said

* From the *Law Times*, by permission.

several times when, &c., was possessed of, and entitled to, the said several fishery.

The issues came on to be tried on the 23rd February, 1858, before Lord Chief Justice Levey and a special jury, when the jury found for the plaintiff on the issues joined as to a several fishery of the extent above described in the said third paragraph, and that the defendants had fished within the boundaries or extent of the said several fishery claimed by the plaintiff in the said third paragraph.

A bill of exceptions was tendered at the trial by the learned counsel on behalf of the defendants to the ruling of the Lord Chief Justice.

The bill contained eighteen exceptions, the first fifteen of which were taken to the admissibility of certain documents offered in evidence on the part of the plaintiff at the trial, which documents were admitted by the Lord Chief Justice; out of these fifteen, it was material to refer to the 9th and 10th exceptions, which were allowed by the Court of Exchequer Chamber. The remaining three exceptions, viz., the 16th, 17th, and 18th, which were also allowed by the Court of Exchequer Chamber, in substance raised the question whether any evidence was given at the trial on the part of the plaintiff, which warranted the Lord Chief Justice in leaving as a question to the jury the plaintiff's right to a several fishery in the Shannon at the *locus in quo*.

The plaintiff deduced his title from the corporation of Limerick, and in support thereof produced in evidence, amongst others, a lease, for ninety-nine years, bearing date the 31st January, 1834, by the corporation to Poole Gabbett of the fishery by the following description, viz.:

"All that and those the Great Weir, commonly called the Lax Weir, in the river Shannon, near Parteen, with the cribs, baskets, hurdles, and castle and the watch-house thereunto belonging, and adjoining and appurtenant, together with the fishings on the river Shannon, commonly called the Net Fishing, or Fisher's Stent, extending from the new Stent or new Extent, near the said Lax Weir, westward in the said river, according to the ancient custom, in as large and ample manner as the said Lax Weir and net fishing are now held and enjoyed by the corporation."

Also a certified copy of a bill in the Court of Chancery in Ireland, filed 16th of November, 1674, by Sir George Preston, complaining of the interruption in the enjoyment by him of the fisheries granted to him by Charles II., and a certified copy of the answer of the mayor, sheriffs, and citizens, and others.

The defendants objected to the admissibility of the bill in Chancery, on the ground that the bill and answer were not legal evidence, and that in the absence of proof of any decree determining the matters put in issue by the said bill and answer, the said bill and answer were immaterial and inadmissible in evidence. This formed the subject of the 9th exception.

The plaintiff also put in evidence a book, purporting to be the assembly book of the corporation of the city of Limerick, containing entries as to rent in arrear from tenants of the fishery. The defendants objected to it as not legal evidence, for that they appeared to have been made as private entries or memoranda of matters relating to the private business and affairs of the cor-

poration of Limerick to which the public had no access. This formed the subject of the 10th exception.

16th exception.—And the counsel for the defendants at the close of the plaintiff's case, called upon the learned Chief Justice, upon the evidence of the plaintiff to direct the jury on said evidence so read and given for the plaintiff, that plaintiff was not entitled to a several fishery in the tidal part of said river Shannon, being a navigable river; and that there was not any evidence to take away or rebut the public right of fishing in said tidal and navigable part of the said river; but his Lordship refused so to direct the jury; and therefore the defendants except and pray that their exception may be placed on the record for the examination of the court above.

And the defendants produced and examined one Patrick Farrell, who deposed that he is a fisherman on the river Shannon; that he has fished in the river for the last fifty-one years, above Thomond-bridge and below Thomond-bridge; that above Thomond-bridge he has fished with a draft-net as far as the Island Point; that it is upwards of thirty yards above the Metal-bridge now built by the Limerick and Ennis Railway; that he fished above the Island Point, between the Metal-bridge and the Lax-Weir, for the last twenty-six years; that at the highest part of the river where he fished he could not see the Lax-weir; below Thomond-bridge that he fished in the pool at both sides of the river; that he was convicted for fishing in the pool by Mr. Andrew James Watson, and fined £5 and a month's imprisonment; that he never paid the fine or suffered a day's imprisonment; that he was also sentenced to a like penalty in the time of Mr. Pool Gabbett; that he knows other fishermen to have fished as he did; that same are short-net men; that he belongs to the long-net fishermen; he describes the mode of fishing, and says he knows a great number of fishings. And the said witness, being cross-examined, deposed that he could not say when he was convicted at the suit of Mr. Andrew James Watson; that it was upwards of thirty years ago; that he does not know whether the police hunted for him or not; that he does not recollect the exact year Mr. Gabbett prosecuted; that it was about seventeen years ago; he went to the court and heard himself convicted; that he has fished with long nets above Thomond-bridge for the last twenty-six years; that he was never convicted for fishing above Thomond-bridge; that it was for fishing at the pool, or about Barrington's-quay, he was convicted. And the said witness, on being re-examined, deposed that he did not wait for the police, nor did he avoid them, and that he continued to fish as usual.

And the said defendants also produced and examined John O'Dea, one of the said defendants, who deposed that he is a fisherman living at Limerick, and in the place there called the Strand; that he has fished for salmon in the river Shannon with a draft net, or long net, every season for the last thirty or forty years, and in all the places proper for net-fishing, from about a quarter of a mile below the salmon weir, down to and in the pool; that from his boyhood he has seen other men fishing in the same parts of the river, and with nets; that he never was summoned or convicted for so fishing; and that no action was brought

against him for such fishing; that he has often fished eleven or twelve times a week, and in the daytime when the tide answered; that he used to fish from the salmon weir down the river as far as he pleased; and that the nearest point to the weir, whence he fished, was from below the castle; that he has often fished by day, and often took a good many salmon; that he knows the Island Point, and fished there, and about it, and above the place where the Metal Railway-bridge is built; that he has fished below Thomond-bridge, and has known of others to fish there; that he never heard of Castle Donnell until the law proceedings were commenced by plaintiff. And the said witness being cross-examined, deposed that he never was prosecuted for fishing; that he knew people to have been prosecuted by Mr. Gabbett; that it was for fishing as far as Barrington's-quay, but never below it; that he never heard of the castle called Castle Donnell by that name, until the law was commenced; that the name the fishermen called it was Cromwell's Fort; that he never was prevented by Mr. Watson from fishing.

And the said defendants also produced and examined one James Tobin, who deposed that he is a fisherman, and lives near the Treaty Stone, Limerick; that he has been in the habit of fishing with a long net above and below Thomond-bridge, and up to within about 100 yards of the weir; that he knows the river or stream called Captain Keane's Creek on the north side; that he did not fish so far as that point on the south side; that he has been engaged fishing for the last thirty-eight years; that his father was a fisherman; that he was never stopped fishing except on one occasion; that Mr. Gabbett attempted to prevent him, and that he went on fishing notwithstanding; that he was prosecuted by Mr. Gabbett, and convicted; that he was fined 5*l.* and a month's imprisonment; but that he never paid the fine, nor was he imprisoned; that he caught salmon, and fished openly; that he was summoned three times, and sentenced three times by the mayor, Mr. Franklin (since dead), Alderman Watson, Mr. Cripps, and Mr. Gibson; that he never was brought before any other court; that he never paid any fine, nor was he imprisoned; that the place he generally fished was below Thomond-bridge. And the said witness, on being cross-examined, deposed that the boats and nets used by him in fishing were never taken from him; that he remembered Constable Joynt; that he that he never attacked Mr. Gabbett's men, nor was he one of the party that attacked them.

And the defendants also produced and examined one Michael Cahill, who deposed that he is a fisherman at Limerick for the last forty-six years; that he was in the habit of fishing from the Island Point down to and below Thomond-bridge; that he often caught fish; that he was summoned about sixteen years since (after the trial, as he thinks) by Mr. Gabbett, for fishing; that the magistrates attending were Mr. Francis Spaight, Alderman Watson, Mr. Cripps, and Mr. Vokes, of the police; that he was fined 5*l.*, but never paid it; that he fished on the next day in the daytime and by night; that he was never stopped by them (Gabbetts); that he fished in their sight openly. And the said witness, on being cross-examined, de-

posed that he never saw the police looking after him; that he heard of the bonfire made by Cripps; that he never was examined before this.

And the defendants also produced and examined one James Shanny, who deposed that he is a fisherman on the Shannon, with a snap-net, and that it is about eighteen feet in length, and that it is used between two boats; that he was in the habit of fishing; that the night is the proper time for snap-net fishing; that he would not catch any through the day; that he fished at Barrington's-quay, and all the way from that down; that he never was prevented there; that he never was prosecuted but once, in 1834, by Mr. Gabbett; that he was sentenced to two months' imprisonment, or a fine of 5*l.*; that he never was imprisoned or paid the fine; that he believed he had a right to fish, and told the magistrate so; that he knows a place below the weir called the Fisher's Stent; that it is a little below the Lax Weir; that this place was also called Poolbeg; that there was a stream running through it; that he remembers John Keane; could not fish there without three men. And the said witness, on being cross examined, deposed that he never saw the Meelick river.

And the said defendants also produced and examined one James Hynes, who deposed that he is a snap-net fisherman; that he fished and was in the habit of fishing from Parteen Creek down the river; that he could be seen from the Weir, and caught salmon there, and many of them; that he has fished for the last sixty years: that he did so since he was fifteen years of age; that he is now seventy-five years of age; that he never was stopped fishing, although attempts were made to do so; that when the party who wanted to prevent him fishing were stronger, he yielded, and when they were not he did not yield; that his boat or net was never seized; nor was he ever summoned for fishing; that there was a stone at the Limerick side of the river, called Armagh Stone, about forty yards below the Weir, and that it was the limit of the fishery of the Weir by Mr. Gabbett; that Poolbeg-hole was stopped by reason of the river being reversed at the Limerick side of the river.

And the said defendants then closed their case.

17th exception.—And thereupon the Lord Chief Justice summed up and charged the jury, and told them that, in his opinion, there was evidence to go to them in support of the plaintiff's case; and at the conclusion of his Lordship's charge, and before the jury returned the verdict, counsel for the defendants called upon his Lordship to direct the jury, that upon the true and legal construction of the several grants of the Crown, and the other witnesses and documents given in evidence on the part of the plaintiff, the public right of fishing in the tidal parts of the river Shannon, or in the place where the defendants fished, as proved in evidence, was not and has not been destroyed, taken away, or in any manner restrained; and the plaintiff had not at the times when and so forth, or any of them, a several fishery therein, as in summons and plaint alleged; and that the jury should find a verdict for the defendants upon all the issues except the tenth issue; but his Lordship refused so to direct the jury, and on the contrary informed them that there was evidence to go to them in support of the

plaintiff's case, on which they might, if they so thought proper, find a verdict for the plaintiff, and therefore the defendants except.

18th exception.—And counsel for the defendants called upon the learned Chief Justice to inform and direct the jury that there is no evidence of the plaintiff's right to an exclusive or several fishery in the part of the river Shannon in which the fishing by the defendants took place, as proved in evidence, but his Lordship refused so to do; and on the contrary informed them, as aforesaid, that there was evidence to go to them in support of the plaintiff's case, on which they might, if they so thought proper, find a verdict for the plaintiff; and therefore the defendants except; which several exceptions, and also the exceptions taken to the admissibility of documents read in evidence on the part of the plaintiff, and on this dominical before stated, and also appearing on his Lordship's notes, the defendants pray may be placed on the record for the examination of the Court above.

The learned Lord Chief Justice therefore overruled and refused to allow such exceptions, and to direct the jury, as prayed by the learned counsel on behalf of the defendants; whereupon the jury found a verdict for the plaintiff, and they assessed his damages, besides his expenses and costs, to sixpence sterling, and for his expenses and costs to sixpence. The exceptions having been argued before the said Court of Queen's Bench, Lefroy, C.J., Perrin, O'Brien, Hayes, JJ., the Court (Perrin and O'Brien *dissentientibus*), on the 16th June, 1859, overruled the said several exceptions, and gave judgment for the plaintiff.

Such grounds of error were argued in the Court of Exchequer Chamber of Ireland, when the six judges before whom the same were argued, *videlicet* Monahan, C. J., Keogh, Christian, JJ., Pigot, C. B., Fitzgerald, Hughes, BB., were unanimous in their judgment that the 9th exception should be allowed; (Fitzgerald, B., *dissentiente*) that the 10th exception should be allowed; and as to the 16th, 17th, and 18th exceptions, the judges were divided in opinion, the majority, *videlicet*, Monahan, C. J., Christian, J., Pigot, C.B., and Hughes, B. (Fitzgerald, B., and Keogh, J., *dissentientibus*), being of opinion that those exceptions ought to have been allowed, and that there was no evidence to go to the jury in support of the right claimed by the plaintiff, and thereupon judgment was given in the said Court of Exchequer Chamber in favour of the defendants, and that the judgment of the Court of Queen's Bench should, for the errors aforesaid, be reversed, and that the said 9th, 10th, 16th, 17th, and 18th exceptions should be allowed, and that the verdict so found as aforesaid for the plaintiff should be quashed, and that the said Court of Queen's Bench should command the sheriff to cause a jury to come anew to try the issues and assess damages anew, and that each party should abide their own costs.

Error having been brought to the House of Lords,

Cairns, Q.C., Mellish, Q.C., and Baylis, for the plaintiff in error.

Maindy, Q.C., and Barry for the defendant in error.

At the conclusion of the arguments, the House put

the following questions to the learned judges who attended, viz., Pollock, C. B., Williams, and Willes, JJ.:—

1. Ought the 9th exception to have been allowed or disallowed?

2. Ought the 10th exception to have been allowed or disallowed?

3. Ought the 16th, 17th, and 18th exceptions to have been allowed or disallowed?

After time taken to consider, the following unanimous opinion was delivered by

WILLES, J.—My Lords, in answer to the first question, we are of opinion that the 9th exception ought not to have been allowed. That exception was to the admission of a certified copy of a bill in the Irish Chancery of the 16th Nov. 1674, and of an answer thereto. The bill was filed by Sir George Preston, against the corporation of Limerick and others, for the purpose of defending and quieting his alleged possession of a fishery substantially co-extensive with that in dispute, and which he claimed under two grants of King Charles II. against aggressions of the corporation. It alleged difficulties in the way of an action at law, and prayed a discovery, account, and injunction. The answer was filed on the 10th Feb. in the same year, 1674–5, and after insisting that the matter was of common law cognizance, it proceeded amongst other things to allege that the corporation had been entitled to the fishery before the wars, and had never forfeited their right thereto. Now this bill and answer were read as evidence of the facts stated therein. They were admitted, as appears by the record, for “the purpose of showing a pending suit.” Was it then legitimate evidence in the cause to show that in the year 1764–5 there was litigation between Sir George Preston and the corporation as to the right to the fishery under conflicting grants from the Crown? We are of opinion that it was, as part of the history of the adverse claim of Sir George Preston, which ended in the reconveyance of 1684. The weight which the existence of that litigation adds to the dealings between Sir George Preston and the corporation is not dependent upon the assertions made by either of the litigant parties in the bill and answer. If A. were to claim property of which B. was in possession as grantee of the Crown, under an adverse title, *e.g.*, a conveyance from the Crown as upon a forfeiture subsequent to B.'s grant, and were to take legal proceedings against B., and upon B.'s answering and setting up his own elder right, were then in order to quiet B.'s title to execute a deed purporting to convey or release to him the whole or part, that would surely be a piece of evidence to prove to posterity B.'s title, by way of showing an assertion of title on B.'s part, and submission upon that of his adversary having a *prima facie* interest, and a reasonable man might conclude that the force of the admission was greater, because it was accompanied by the abandonment of a litigation, by reason of which according to all probability the facts were more thoroughly ascertained and considered, and that under better advice than if the law had not been appealed to. We ought not to pass over a suggestion which has been made in the course of the case that Sir G. Preston's suit

was, or may have been, collusive. If we were to adopt that suggestion, we should be begging a question not touched by the exception which we see no sufficient evidence to raise, and which, if there were, was one for the jury, not the Court. We are of opinion, therefore, that the bill and answer were admissible for the purpose for which they were used at the trial, and that the 9th exception ought not to have been allowed. Your Lordship's next question to the judges is, whether the 10th exception ought to have been allowed? That exception was to the admission in evidence of "a certain book, purporting to be the assembly-book of the corporation of Limerick in the year of our Lord 1676," to wit, an entry of the 16th October, 1676, and also another entry of an account of rents in arrear. We cannot pass by this exception without noting that it treats the two entries as either both admissible or both inadmissible, and it might be a question whether it could be sustained, supposing either of the documents mentioned therein to be admissible. We need not, however, further criticise its language, because, construing it, not as one exception to the book, but as two distinct and separate exceptions, one to the entry of the 16th Oct. 1676, and another to the account of arrears, we are of opinion that each of such exceptions ought to have been overruled. As to the first entry, relating to the letting of the net fishing and Fisher's Stent to Carroll, we are dealing with something done nearly two centuries ago, and the great stress of the case bore upon the proof of the possession. The proof of ancient possession is always attended with difficulty. Time has removed the witnesses who could prove acts of ownership of their personal knowledge, and resort must necessarily be had to written evidence. In some cases, written statements of title are admitted, even when they amount to mere assertion, as in the case of a right affecting the public generally; but the entry now under consideration is admissible according to a rule equally applicable to a fishery in a private pond as to one in a public navigable river. That rule is, that ancient documents coming out of proper custody, and purporting, upon the face of them to exercise ownership, such as a lease or a licence may be given in evidence, without proof of possession or payment of rent under them, as being in themselves acts of ownership and proof of possession. This rule is sometimes stated with the qualification, provided that possession is proved to have followed similar documents, or that there is some proof of actual enjoyment in accordance with the title to which the documents relate. And certainly in the case of property allowing of continuous enjoyment, without proof of actual exercise of the right, any number of mere pieces of paper or parchment purporting to be leases or licences ought to be of no avail. It may be a question, whether the absence of proof of enjoyment consistent with such a document goes to the admissibility or only to the weight of the evidence, probably the latter. This, however, is not material in the present case, where repeated payment and receipt of rent under leases was proved. The only question is, whether the entry is a mere statement that Carroll had become tenant to the corporation or a mere direction to prepare a lease to him, or whether it purports to be his warrant and licence for fishing in the river. In

the former case it would be a mere written assertion by the corporation and its officers; in the latter it was an act of ownership, for it was a licence to another to use the fishery. Nor was it less a licence because for want of a seal it was revocable on the ground that a grant of an incorporeal hereditament for a time certain must be under seal, and that a corporation is incapable of passing an interest or giving an irrevocable licence without seal. Whether strong or weak, it was an act of ownership as much as if one gave another a licence of pleasure to fish in his river, which in its nature must be revocable. If Carroll had enjoyed the fishery under it, he would have been a licensee, not a trespasser, and the licence would have determined the amount he was to pay as such for the occupation—*Wood v. Tate* (2 N. R. 247); *Mayor of Stafford v. Tull* (4 Bing. 74). And according to the rule already stated, the absence of proof that he did is made up for by the evidence of ownership independent of the licence. The cases relied upon to the contrary are cases where there was some mere assertion of title, or mere direction of an agent to prepare a document, which would have been, if executed, an act of ownership. We know of no case in which an ancient document, coming from the proper custody, and purporting to be an act of ownership, by way of lease or licence over the property, in company with other evidence, showing enjoyment consistent with such ownership, has been rejected upon the ground that the enjoyment could not be referred to the particular document in question. It was suggested, indeed, that the reason why an ancient lease is admitted is because it is signed by the lessee as well as by the lessor, and so is an admission by a third person, and thus that an ancient lease not signed by the lessee is inadmissible. This, however, is contrary to our experience, and to the true reason for admitting such evidence, viz., because of its showing an act or acts of ownership. We are not disposed to narrow the bounds of the law of evidence with respect to ancient possessions, and we think the ruling of that accurate lawyer, Mr. Justice Heath, in *Rogers v. Allen*, (1 Camp. 309) is abundant authority for the admissibility of the entry in question. As to the other document included in the 10th exception, we think it admissible for reasons which may perhaps also apply to that which we have been considering. It is certainly not legitimate evidence of ownership, for it is a mere statement of a particular fact; but we think it admissible for another purpose, namely, to show by an authentic document of the time the meaning of the language used in the licence, and to be found in so many other places, viz., "the Fisher's Stent." The licence relates to the "Net Fishing and Fisher's Stent." The account of arrears speaks of what may be reasonably inferred to be the same property as the "Net Fishing." The amount and effect of the evidence may be small, but the evidence is distinct, so far as it goes, that "Fisher's Stent" and "Net Fishing" were in 1678 interchangeable terms. This is not irrelevant merely because the defendants admit that the corporation are entitled, besides the weir to some net fishing, which, however, they say cannot be defined, and is therefore lost. Having heard the argument in your lordship's house upon the

construction of the words in the charter of 25th Eliz. "Les werres vocat lex werrea, Gurgites, Fysshers Stente," we cannot say that this was not important evidence, nor wonder that the plaintiff preferred relying upon his own proofs rather than upon the defendant's qualified admission. We may consult ancient authors to learn the meaning of "Gurgites," and why not learn of the governing body of Limerick, in 1678, whose genuine language is before us, what was meant by the "Fisher's Stent" in their days. The only remaining question is, whether the 16th, 17th, and 18th exceptions ought to have been allowed. We think all those exceptions ought to have been disallowed. The 16th exception is in substance, that there was no evidence of a several fishery in the tidal part of the river Shannon, a navigable river, to take away or rebut the public right of fishing there. The 17th and 18th exceptions are in substance that there was no evidence of an exclusive or several right of fishery in the place where the defendant fished between the weir and Thomond-bridge. Upon this record no question properly arises with respect to the bed and soil of the river. If the finding as to that was entered by mistake (which, considering that a several fishery may include the soil, we do not say it was), it would have been amended by Lord Chief Justice Lefroy, and by him only, at chambers, from his notes. It is now quite immaterial as between these parties. No exception is founded upon it; and the argument of the learned counsel as to that extraneous matter cannot affect our opinion upon the true question raised by these three exceptions, which is, whether there be evidence of a fishery, as found by the jury, from the Lax Weir on the east to the river Meelick on the west, that being the extreme limit of the county of the city. That such a right may lawfully exist is clear. The soil of "navigable tidal rivers," like the Shannon, so far as the tide flows and reflows, is *prima facie* in the Crown, and the right of fishery *prima facie* in the public. But for Magna Charta the Crown could by its prerogative exclude the public from such *prima facie* right and grant the exclusive right of fishery to a private individual, either together with or distinct from the soil. And the great charter left untouched all fisheries which were made several, to the exclusion of the public, by act of the Crown not later than the reign of Henry II. If evidence be given of long enjoyment of a fishery to the exclusion of others of such a character as to establish that it has been dealt with as of right as a distinct and separate property, and there is nothing to show that its origin was modern, the result is not that you say this is a usurpation, for it is not traced back to the time of Henry II., but that you presume that the fishery being reasonably shown to have been dealt with as property, must have become such in due course of law, and therefore must have been created before legal memory. Some discussion took place during the argument as to the proper name of such a fishery, whether it ought to have been called in the pleadings (following Blackstone) a "free" instead of a "several" fishery. This is more of the confusion which the ambiguous use of the word "free" has occasioned from as early as the Year-Book of Hen. 7, p. 7, folio 13, down to the case of *Holford v. Bailey*,

(Q. B. 13), where it was clearly shown that the only substantial distinction is between an exclusive right of fishery usually called "several," sometimes "free" (used as in free warren), and a right in common with others, usually called "common of fishery," sometimes "free" used as in free port. The fishery as in this case is sufficiently described as a "several" fishery, which means an exclusive right to fish in a given place, either with or without the property in the soil. Much argument also took place with respect to the meaning of the words "gurgites," "gors," and "wear." They appear all to be words of more ample meaning than was allowed to them in the argument against the right. Of course we are principally concerned with the mediæval use of the word "gurges," though inasmuch as the use of the Latin in legal documents has been justified by its unchangeableness, we are at liberty to observe that classic authors applied the word "gurges" to the open sea, to a lake, and to the course of a river, instances of which are collected in a dictionary (Faccioliati, London edition, 850, 851). As to the use of the word in later times, Lord Coke says: (Co. Lit. 5 b) "Gurges, a deep pit of water, a gore, or gulph consisted of water and land, and therefore by grant thereof by that name the soil doth passe, and shall lay his esplees in taking of fishes as beames and roaches." In Doomsday it is called "guort," "gort," and "gors," plurally, as, for example, "de 3 gors Mille Anguilla." To the same effect is the argument in *Throckmorton v. Tracy* (1 Plowden, 154), which shows that "gurges" may stand for pool, and is of wider significance than "wear." Cowell, under the word "gort," finds fault with Lord Coke's statement, that "gurges" and "gort" correspond; and he says that "gort" is old French for "wear." Cowell's criticism, however, is proved too narrow by reference to Kelham's Norman-French Dictionary, p. 116, where "gort," "gorse," or "gorts" is translated "astream or pool, a watery place, a weir, a fish-pond, a ditch, a dam, a gorse." And with respect to the word "wear" itself, although its etymology be different, we find in the Anglo-Saxon dictionary that it had anciently a more extensive application than now. At p. 243 of Bosworth, the word "waer," or "wér," answering to our "wear" is translated: "1. An enclosure, a place enclosed. 2. A fish-pond, a place, or engine for catching and keeping fish, a wear. 3. The sea, a wave." The only reference which we have met with in the old book to the use of the word "wear" is the dictum in the year-book of 14 H. & M. 2, from which it seems that a grant or exception of a wear includes the fishery. Therefore, especially when we bear in mind the conciseness of language used in ancient times we cannot doubt that any criticism founded upon a narrow construction of these words is deceptive. The word "gurgites," used in addition to "Lax Weir," instead of being restricted to imaginary or possible scattered weirs, the existence of which is unproved, and the nature of which is unknown, appears to us more properly to apply to all the streams, pools, and reaches of the river so far as the fishing extends. Probably it ought to be thus translated, and not as "wears" in the earlier documents. There is no improbability in the early appropriation of this

was, or may have been, collusive. If we were to adopt that suggestion, we should be begging a question not touched by the exception which we see no sufficient evidence to raise, and which, if there were, was one for the jury, not the Court. We are of opinion, therefore, that the bill and answer were admissible for the purpose for which they were used at the trial, and that the 9th exception ought not to have been allowed. Your Lordship's next question to judges is, whether the 10th exception ought to be allowed? That exception was to the evidence of "a certain book, purporting to be an assembly-book of the corporation of the year of our Lord 1676," to wit, as of October, 1678, and also another of rents in arrear. We cannot without noting that it treats both admissible or both inadmissible, a question whether it or either of the documents is admissible. We need no language, because, the book, but as one to the end the account such except first entry and Fis' thing streas The wib cr l

the former case it would be a lordship any discussion of by the corporation itself, because, having examined it was an act of the corporation to use it upon this principal part of the other to use it upon our concurrence in the masterly judgment of Baron Fitzgerald, a performance which we grope to improve upon. We are thus of opinion that none of the exceptions to which the question ought to have been allowed.

Our adv. vult.

THE LORD CHANCELLOR.—My lords, the plaintiff in error was also the plaintiff in the Court below, in an action brought by him against the defendants to recover damages for having fished and carried away fish from a fishery in the river Shannon claimed by the plaintiff, the plaintiff being the lessee of the Corporation of Limerick, who claimed to be owners of that fishery. At the trial of the action a bill of exceptions was tendered to the admissibility of documents in evidence, which bill of exceptions was duly received by the learned judge. On the question coming on to be argued in the Court of Queen's Bench in Ireland, the Court disallowed some of these exceptions. From that judgment there was an appeal to the Court of Exchequer Chamber in Ireland, and the Court of Exchequer Chamber differing from the Court of Queen's Bench, allowed the 9th, 10th, 16th, 17th, and 18th of those exceptions. From that judgment of the Court of Exchequer Chamber the present appeal is brought to your Lordships' House. The learned judges who attended your Lordship's House on the occasion of the argument have delivered an unanimous and a very elaborate and learned judgment by Willes, J. The conclusion at which the learned judges arrived was in truth, if I am right, anticipated by your Lordships at the end of the arguments. Your Lordships were wholly prepared for the conclusion at which the learned judges arrived, and I think your Lordships will agree with the learned judges in their conclusion. I cannot forbear from expressing the feeling of admiration with which I have read that judgment, and also the very masterly judgment given by Fitzgerald, B., in the Court below. I entirely concur in the reasons of the judges, and it is wholly unnecessary to repeat them now to your Lordships. I shall therefore move your lordships that the judgment of the Court of Exchequer Chamber be reversed, and the judgment of the Court of Queen's Bench be affirmed.

LORDS CRANWORTH and CHELMSFORD concurred.

Judgment reversed.

Plaintiff in error's attorney—Gregory, Rowcliffe, and Skirrow.

Defendant in error's attorney—H. Cruise.

Court of Chancery.

by Edmund T. Bewley, Esq., Barrister-at-Law.]

TR. v. BRADY.—Jan. 15, 1863.

Laches—Renewal—Pleading.

the parish of T., and proprietor of the estate, was seised in fee of the right of presentation to the living; and to a rent of £28 7s. 5d. per acre out of certain glebe lands by the parish of T. for the time being. The estate of the living, including the advowson, having been put for sale under an order of the Incumbered Estates Court, the printed rental, in giving the particulars of the advowson, stated that there were attached to the living 19 a. 1r. 7p. statute measure, of glebe, valued at £1 10s. per acre (not mentioning that this land was subject to any rent). In the same rental, in the lot which comprised the lands of T., a portion of them was set down as "glebe land not sold;" and in the map attached the glebe land was left uncoloured and marked as "not in the estate." In an advertisement subsequently published for the sale of the advowson, it was again stated that 19a. 1r. 7p. of glebe land, valued at £30 per annum were held with the living. A was a party to all the proceedings in the Incumbered Estates Court. The advowson was sold and conveyed by the Commissioners to B., from whom it was afterwards purchased by C., a clergyman of the Established Church. Previous to this latter sale C. visited the parish of T.; and X., the son of A. on that occasion showed C. a copy of the advertisement before mentioned, and represented the particulars contained in it as being correct. On the death of A., C. presented himself to the living of T. Shortly afterwards a demand for rent of the glebe lands was made of C. by X., the son and devisee of A.; and on his refusing to pay it, an action of ejectment was commenced for the recovery of the lands. In a suit instituted by C. for an injunction to restrain the proceedings at law, on the ground that by the acts and conduct of A., C. had been led to suppose that the glebe lands were not subject to rent, Held that as A. had lain by and not asserted his claim during the proceedings in the Incumbered Estates Court, the relief sought should be granted.

The glebe lands of T. were held under a lease of lives renewable for ever, the last life in which had dropped on the death of A. The petition of C. prayed, first, to have the glebe lands declared to be discharged from any lease or rent; secondly, that, if subject to the lease, compensation should be made to C. for his loss as purchaser; and lastly, that, if necessary, a renewal of the lease should be executed by X. to C. Held—That the frame of the petition was not open to objection, and that the prayer for alternative relief was admissible.

CAPTAIN HENRY BRADY, in and previous to the year 1808, was seised, under certain family settlements, of an estate for life, with remainder to his first and other

sons in tail, in the advowson and right of presentation to the rectory of Tomgreany, in the County Clare, together with several townlands of various denominations in the same county. By an indenture of lease, bearing date the 23rd of June, 1808, made between Henry Brady, Robert Tottenham, then Bishop of Killaloe, and the Rev. William Reade, at that time rector of the parish of Tomgreany, the said Henry Brady, with the consent of the said bishop, granted unto the said William Reade, and to his successors, rectors of the parish of Tomgreany, certain lands therein described, containing 11a. 1r. 12p. Irish measure, to hold as a glebe for the parish for three lives renewable for ever, at a yearly rent of £28 7s. 5d. late currency. On the death of Henry Brady, his eldest son, John Brady, as tenant in tail in possession, suffered a recovery of the advowson and the other estates; and by his will, duly executed, devised the absolute fee so acquired in the advowson and lands to his brother, the Rev. Thomas Browne Brady, a clergyman of the Established Church, and father of the respondent in the present cause. At the time of the death of John Brady, the Rev. William Reade was rector of Tomgreany, and on his death the Rev. Thos. B. Brady was, upon his own presentation, duly inducted into the rectory of the advowson of which he was, as before stated, seised in fee. In the year 1852 a petition was presented to the Commissioners for the sale of Incumbered Estates; and an order for sale was pronounced of the advowson of Tomgreany, and also of the lands of which the Rev. Thomas B. Brady was then seised in fee. In the printed rental prepared for the purposes of the sale the particulars of the advowson which formed lot 2, were thus given:—

"Lot 2.—The advowson or right of presentation to the living of Tomgreany in said county of Clare. Present incumbent, Rev. Thomas Browne Brady, now aged about 62 years. By the attested copy of the tithe applotment book of Tomgreany parish, dated August 9th, 1825, the tithe composition payable to the rector is returned at the yearly sum of £450. By the report of the Ecclesiastical Commissioners, dated June 15th, 1837, the gross income of said parish of Tomgreany, according to an average of three years to December, 1831, was returned as £445 7s. 8½d., made up thus:—

	£	s.	d.
Tithe composition,	415	7	8½
19a. 1r. 30p. statute measure, of glebe land valued at 30s. per acre, ...	30	0	0
	£445	7	8½

In a return made in January, 1836, by the Rev. Thomas B. Brady, the present incumbent to the Ecclesiastical Commissioners, in compliance with the Act 3 & 4 William 4, c. 37, the said Thomas B. Brady stated the entire value of his benefice to be £631 16s. 4d. arising from composition of tithes, save £18 19s. 2d. calculated upon. From the gross amount of tithe composition one fourth is to be deducted to ascertain the present rent charge; but the Commissioners do not guarantee the accuracy of the above returns."

In lot No. 7½ of the rental, which comprised the lands of Tomgreany, at the foot of the columns of

always valuable property, or even a more extensive fishery, either in the time of the Irish princes or in that of the Ostmen, who in this and other parts displaced the ancient inhabitants, and who, no doubt, gave the name of Lax Weir (Leax Waer or Lachs Wehr) to the chief accessory of the fishery, or by Henry II. in his grant to the companion of Strongbow. There is nothing improbable in its having been granted over in later times to the ancient and loyal city of Limerick. It appears by the earlier documents that construed by the light of subsequent user, that the fisheries of the waters of Limerick, which means at least the fishery within the city bounds, were a distinct and separate property from before the time of legal memory, and that they included the Lax Weir and the Shannon so far as the city boundary extended. All that fishery appears to have been granted to the corporation at latest by the charter of 25 Elizabeth, under which rent has ever since been paid, and which granted "les Werres," called "lex Werres, Gurgites, Eyashers Stente," and reserved a rent "de et pro predictis gurgitibus in predictâ aquâ de Shenyn vocatis Fishers Stent," and no rent out of Lax Weir, whereof the corporation had had undisputed possession, showing as distinctly as language can that the Fisher's Stente was something over and above the mere weir; and at least so early as that reign the fishing appears in terms by the Crown rent-rolls and otherwise (for instance, a passage dated A.D. 1577, "The said wear, commonly called the Fisher's Stent, near the city of Limerick, from the wear called the Lax were on the east to the river near the Castle Donel on the west") to have been substantially the same as it is now claimed by the plaintiff. The subsequent dealings with the property do not show that the corporation ever lost any part of the right acquired under the charter to the whole fishery; but on the contrary, they show a long enjoyment of it to as great an extent as the corporation and their lessees seem to have thought it worth their while to enforce their rights, which were, no doubt, considerably interfered with from time to time by reason of the neighbourhood of a large city, and the great extent of the property, making it difficult to watch, especially at night, and by reason of the ample rights which the public are, notwithstanding the several fishery, entitled to exercise upon the river as a public highway and port; making it impossible to warn people off, unless detected in the very act of salmon fishing, but without, so far as we can see, any such acquiescence of the proprietors as to constitute an admission on their part that the property has by surrender or otherwise been diminished since the reign of Elizabeth. In our opinion the evidence strongly preponderated in favour of the

plaintiff. We spare your lordships any discussion of the evidence in detail, because, having examined it for ourselves, we may upon this principal part of the case express our concurrence in the masterly judgment of Baron Fitzgerald, a performance which we cannot hope to improve upon. We are thus of opinion that none of the exceptions to which the question relate ought to have been allowed.

Cur. adv. vult.

THE LORD CHANCELLOR.—My lords, the plaintiff in error was also the plaintiff in the Court below, in an action brought by him against the defendants to recover damages for having fished and carried away fish from a fishery in the river Shannon claimed by the plaintiff, the plaintiff being the lessee of the Corporation of Limerick, who claimed to be owners of that fishery. At the trial of the action a bill of exceptions was tendered to the admissibility of documents in evidence, which bill of exceptions was duly received by the learned judge. On the question coming on to be argued in the Court of Queen's Bench in Ireland, the Court disallowed some of these exceptions. From that judgment there was an appeal to the Court of Exchequer Chamber in Ireland, and the Court of Exchequer Chamber differing from the Court of Queen's Bench, allowed the 9th, 10th, 16th, 17th, and 18th of those exceptions. From that judgment of the Court of Exchequer Chamber the present appeal is brought to your Lordships' House. The learned judges who attended your Lordship's House on the occasion of the argument have delivered an unanimous and a very elaborate and learned judgment by Willea, J. The conclusion at which the learned judges arrived was in truth, if I am right, anticipated by your Lordships at the end of the arguments. Your Lordships were wholly prepared for the conclusion at which the learned judges arrived, and I think your Lordships will agree with the learned judges in their conclusion. I cannot forbear from expressing the feeling of admiration with which I have read that judgment, and also the very masterly judgment given by Fitzgerald, B., in the Court below. I entirely concur in the reasons of the judges, and it is wholly unnecessary to repeat them now to your Lordships. I shall therefore move your lordships that the judgment of the Court of Exchequer Chamber be reversed, and the judgment of the Court of Queen's Bench be affirmed.

LORDS CRANWORTH and CHELMSFORD concurred.
Judgment reversed.

Plaintiff in error's attorney—Gregory, Rowcliffe, and Skirrow.

Defendant in error's attorney—H. Cruise.

Court of Chancery.

[Reported by Edmund T. Bewley, Esq., Barrister-at-Law.]

BELCHER v. BRADY.—Jan. 15, 1863.

Advowson—Laches—Renewal—Pleading.

A., the rector of the parish of T., and proprietor of a neighbouring estate, was seised in fee of the advowson and right of presentation to the living; and was also entitled to a rent of £28 7s. 6d. per annum, payable out of certain glebe lands by the incumbent of T. for the time being. The estate of A., including the advowson, having been put up for sale under an order of the Incumbered Estates Court, the printed rental, in giving the particulars of the advowson, stated that there were attached to the living 19 a. 1r. 7p. statute measure, of glebe, valued at £1 10s. per acre (not mentioning that this land was subject to any rent). In the same rental, in the lot which comprised the lands of T., a portion of them was set down as "glebe land not sold;" and in the map attached the glebe land was left uncoloured and marked as "not in the estate." In an advertisement subsequently published for the sale of the advowson, it was again stated that 19a. 1r. 7p. of glebe land, valued at £30 per annum were held with the living. A. was a party to all the proceedings in the Incumbered Estates Court. The advowson was sold and conveyed by the Commissioners to B., from whom it was afterwards purchased by C., a clergyman of the Established Church. Previous to this latter sale C. visited the parish of T.; and X., the son of A. on that occasion showed C. a copy of the advertisement before mentioned, and represented the particulars contained in it as being correct. On the death of A., C. presented himself to the living of T. Shortly afterwards a demand for rent of the glebe lands was made of C. by X., the son and devisee of A.; and on his refusing to pay it, an action of ejectment was commenced for the recovery of the lands. In a suit instituted by C. for an injunction to restrain the proceedings at law, on the ground that by the acts and conduct of A., C. had been led to suppose that the glebe lands were not subject to rent. Held that as A. had lain by and not asserted his claim during the proceedings in the Incumbered Estates Court, the relief sought should be granted.

The glebe lands of T. were held under a lease of lives renewable for ever, the last life in which had dropped on the death of A. The petition of C. prayed, first, to have the glebe lands declared to be discharged from any lease or rent; secondly, that, if subject to the lease, compensation should be made to C. for his loss as purchaser; and lastly, that, if necessary, a renewal of the lease should be executed by X. to C. Held—That the frame of the petition was not open to objection, and that the prayer for alternative relief was admissible.

CAPTAIN HENRY BRADY, in and previous to the year 1808, was seised, under certain family settlements, of an estate for life, with remainder to his first and other

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plaintiff. We spare your lordships any discussion of the evidence in detail, because, having examined it for ourselves, we may upon this principal part of the case express our concurrence in the masterly judgment of Baron Fitzgerald, a performance which we cannot hope to improve upon. We are thus of opinion that none of the exceptions to which the question relate ought to have been allowed.

Cur. adv. vult.

THE LORD CHANCELLOR.—My lords, the plaintiff in error was also the plaintiff in the Court below, in an action brought by him against the defendants to recover damages for having fished and carried away fish from a fishery in the river Shannon claimed by the plaintiff, the plaintiff being the lessee of the Corporation of Limerick, who claimed to be owners of that fishery. At the trial of the action a bill of exceptions was tendered to the admissibility of documents in evidence, which bill of exceptions was duly received by the learned judge. On the question coming on to be argued in the Court of Queen's Bench in Ireland, the Court disallowed some of these exceptions. From that judgment there was an appeal to the Court of Exchequer Chamber in Ireland, and the Court of Exchequer Chamber differing from the Court of Queen's Bench, allowed the 9th, 10th, 16th, 17th, and 18th of those exceptions. From that judgment of the Court of Exchequer Chamber the present appeal is brought to your Lordships' House. The learned judges who attended your Lordship's House on the occasion of the argument have delivered an unanimous and a very elaborate and learned judgment by Willes, J. The conclusion at which the learned judges arrived was in truth, if I am right, anticipated by your Lordships at the end of the arguments. Your Lordships were wholly prepared for the conclusion at which the learned judges arrived, and I think your Lordships will agree with the learned judges in their conclusion. I cannot forbear from expressing the feeling of admiration with which I have read that judgment, and also the very masterly judgment given by Fitzgerald, B., in the Court below. I entirely concur in the reasons of the judges, and it is wholly unnecessary to repeat them now to your Lordships. I shall therefore move your lordships that the judgment of the Court of Exchequer Chamber be reversed, and the judgment of the Court of Queen's Bench be affirmed.

LORDS GRANWORTH and CHELMSFORD concurred.

Judgment reversed.

Plaintiff in error's attorney—Gregory, Rowcliffe, and Skirrow.

Defendant in error's attorney—H. Cruse.

Court of Chancery.

[Reported by Edmund T. Bewley, Esq., Barrister-at-Law.]

BELCHER v. BRADY.—Jan. 15, 1863.

Advowson—Laches—Renewal—Pleading.

A., the rector of the parish of T., and proprietor of a neighbouring estate, was seised in fee of the advowson and right of presentation to the living; and was also entitled to a rent of £28 7s. 5d. per annum, payable out of certain glebe lands by the incumbent of T. for the time being. The estate of A., including the advowson, having been put up for sale under an order of the Incumbered Estates Court, the printed rental, in giving the particulars of the advowson, stated that there were attached to the living 19 a. 1r. 7p. statute measure, of glebe, valued at £1 10s. per acre (not mentioning that this land was subject to any rent). In the same rental, in the lot which comprised the lands of T., a portion of them was set down as "glebe land not sold;" and in the map attached the glebe land was left uncoloured and marked as "not in the estate." In an advertisement subsequently published for the sale of the advowson, it was again stated that 19a. 1r. 7p. of glebe land, valued at £30 per annum were held with the living. A. was a party to all the proceedings in the Incumbered Estates Court. The advowson was sold and conveyed by the Commissioners to B., from whom it was afterwards purchased by C., a clergyman of the Established Church. Previous to this latter sale C. visited the parish of T.; and X., the son of A. on that occasion shewed C. a copy of the advertisement before mentioned, and represented the particulars contained in it as being correct. On the death of A., C. presented himself to the living of T. Shortly afterwards a demand for rent of the glebe lands was made of C. by X., the son and devisee of A.; and on his refusing to pay it, an action of ejectment was commenced for the recovery of the lands. In a suit instituted by C. for an injunction to restrain the proceedings at law, on the ground that by the acts and conduct of A., C. had been led to suppose that the glebe lands were not subject to rent, Held that as A. had lain by and not asserted his claim during the proceedings in the Incumbered Estates Court, the relief sought should be granted.

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Cur. adv. vult.

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LORDS GRANWORTH and CHELMSFORD concurred.
Judgment reversed.

Plaintiff in error's attorney—Gregory, Rowcliffe, and Skirrow.

Defendant in error's attorney—H. Cruise.

Court of Chancery.

[Reported by Edmund T. Bewley, Esq., Barrister-at-Law.]

BELCHER v. BRADY.—Jan. 15, 1863.

Adwoson—Laches—Renewal—Pleading.

A., the rector of the parish of T., and proprietor of a neighbouring estate, was seised in fee of the advowson and right of presentation to the living; and was also entitled to a rent of £28 7s. 5d. per annum, payable out of certain glebe lands by the incumbent of T. for the time being. The estate of A., including the advowson, having been put up for sale under an order of the Incumbered Estates Court, the printed rental, in giving the particulars of the advowson, stated that there were attached to the living 19 a. 1r. 7p. statute measure, of glebe, valued at £1 10s. per acre (not mentioning that this land was subject to any rent). In the same rental, in the lot which comprised the lands of T., a portion of them was set down as "glebe land not sold;" and in the map attached the glebe land was left uncoloured and marked as "not in the estate." In an advertisement subsequently published for the sale of the advowson, it was again stated that 19a. 1r. 7p. of glebe land, valued at £30 per annum were held with the living. A. was a party to all the proceedings in the Incumbered Estates Court. The advowson was sold and conveyed by the Commissioners to B., from whom it was afterwards purchased by C., a clergyman of the Established Church. Previous to this latter sale C. visited the parish of T.; and X., the son of A. on that occasion shewed C. a copy of the advertisement before mentioned, and represented the particulars contained in it as being correct. On the death of A., C. presented himself to the living of T. Shortly afterwards a demand for rent of the glebe lands was made of C. by X., the son and devisee of A.; and on his refusing to pay it, an action of ejectment was commenced for the recovery of the lands. In a suit instituted by C. for an injunction to restrain the proceedings at law, on the ground that by the acts and conduct of A., C. had been led to suppose that the glebe lands were not subject to rent, Held that as A. had lain by and not asserted his claim during the proceedings in the Incumbered Estates Court, the relief sought should be granted.

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LORDS CRANWORTH and CHELMSFORD concurred.
Judgment reversed.

Plaintiff in error's attorney—Gregory, Rowcliffe, and Skirrow.

Defendant in error's attorney—H. Cruise.

Court of Chancery.

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"Lot 2.—The advowson or right of presentation to the living of Tomgreany in said county of Clare. Present incumbent, Rev. Thomas Browne Brady, now aged about 62 years. By the attested copy of the tithe applotment book of Tomgreany parish, dated August 9th, 1825, the tithe composition payable to the rector is returned at the yearly sum of £450. By the report of the Ecclesiastical Commissioners, dated June 15th, 1837, the gross income of said parish of Tomgreany, according to an average of three years to December, 1831, was returned as £445 7s. 8½d., made up thus:—

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Tithe composition,	415	7	8½
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In a return made in January, 1836, by the Rev. Thomas B. Brady, the present incumbent to the Ecclesiastical Commissioners, in compliance with the Act 3 & 4 William 4, c. 37, the said Thomas B. Brady stated the entire value of his benefice to be £631 16s. 4d. arising from composition of tithes, save £18 19s. 2d. calculated upon. From the gross amount of tithe composition one fourth is to be deducted to ascertain the present rent charge; but the Commissioners do not guarantee the accuracy of the above returns."

In lot No. 7½ of the rental, which comprised the lands of Tomgreany, at the foot of the columns of

always valuable property, or even a more extensive fishery, either in the time of the Irish princes or in that of the Oastmen, who in this and other parts displaced the ancient inhabitants, and who, no doubt, gave the name of Lax Weir (Leax Waer or Lachs Wehr) to the chief accessory of the fishery, or by Henry II. in his grant to the companion of Strongbow. There is nothing improbable in its having been granted over in later times to the ancient and loyal city of Limerick. It appears by the earlier documents that construed by the light of subsequent user, that the fisheries of the waters of Limerick, which means at least the fishery within the city bounds, were a distinct and separate property from before the time of legal memory, and that they included the Lax Weir and the Shannon so far as the city boundary extended. All that fishery appears to have been granted to the corporation at latest by the charter of 25 Elizabeth, under which rent has ever since been paid, and which granted "les Werres," called "lex Werres, Gurgites, Eyassers Stente," and reserved a rent "de et pro predictus gurgitibus in predicta aqua de Shenyn vocatis Fishers Stent," and no rent out of Lax Weir, whereof the corporation had had undisputed possession, showing as distinctly as language can that the Fisher's Stente was something over and above the mere weir; and at least so early as that reign the fishing appears in terms by the Crown rent-rolls and otherwise (for instance, a passage dated A.D. 1577, "The said wear, commonly called the Fisher's Stent, near the city of Limerick, from the wear called the Lax were on the east to the river near the Castle Donel on the west") to have been substantially the same as it is now claimed by the plaintiff. The subsequent dealings with the property do not show that the corporation ever lost any part of the right acquired under the charter to the whole fishery; but on the contrary, they show a long enjoyment of it to as great an extent as the corporation and their lessees seem to have thought it worth their while to enforce their rights, which were, no doubt, considerably interfered with from time to time by reason of the neighbourhood of a large city, and the great extent of the property, making it difficult to watch, especially at night, and by reason of the ample rights which the public are, notwithstanding the several fishery, entitled to exercise upon the river as a public highway and port; making it impossible to warn people off, unless detected in the very act of salmon fishing, but without, so far as we can see, any such acquiescence of the proprietors as to constitute an admission on their part that the property has by surrender or otherwise been diminished since the reign of Elizabeth. In our opinion the evidence strongly preponderated in favour of the

plaintiff. We spare your lordships any discussion of the evidence in detail, because, having examined it for ourselves, we may upon this principal part of the case express our concurrence in the masterly judgment of Baron Fitzgerald, a performance which we cannot hope to improve upon. We are thus of opinion that none of the exceptions to which the question relate ought to have been allowed.

Cur adv. vult.

THE LORD CHANCELLOR.—My lords, the plaintiff in error was also the plaintiff in the Court below, in an action brought by him against the defendants to recover damages for having fished and carried away fish from a fishery in the river Shannon claimed by the plaintiff, the plaintiff being the lessee of the Corporation of Limerick, who claimed to be owners of that fishery. At the trial of the action a bill of exceptions was tendered to the admissibility of documents in evidence, which bill of exceptions was duly received by the learned judge. On the question coming on to be argued in the Court of Queen's Bench in Ireland, the Court disallowed some of these exceptions. From that judgment there was an appeal to the Court of Exchequer Chamber in Ireland, and the Court of Exchequer Chamber differing from the Court of Queen's Bench, allowed the 9th, 10th, 16th, 17th, and 18th of those exceptions. From that judgment of the Court of Exchequer Chamber the present appeal is brought to your Lordships' House. The learned judges who attended your Lordship's House on the occasion of the argument have delivered an unanimous and a very elaborate and learned judgment by Willes, J. The conclusion at which the learned judges arrived was in truth, if I am right, anticipated by your Lordships at the end of the arguments. Your Lordships were wholly prepared for the conclusion at which the learned judges arrived, and I think your Lordships will agree with the learned judges in their conclusion. I cannot forbear from expressing the feeling of admiration with which I have read that judgment, and also the very masterly judgment given by Fitzgerald, B., in the Court below. I entirely concur in the reasons of the judges, and it is wholly unnecessary to repeat them now to your Lordships. I shall therefore move your lordships that the judgment of the Court of Exchequer Chamber be reversed, and the judgment of the Court of Queen's Bench be affirmed.

LORDS CRANWORTH and CHELMSFORD concurred.

Judgment reversed.

Plaintiff in error's attorney—Gregory, Rowcliffe, and Skirrow.

Defendant in error's attorney—H. Cruse.

Court of Chancery.

[Reported by Edmund T. Bewley, Esq., Barrister-at-Law.]

BELCHER v. BRADY.—Jan. 15, 1863.

Advowson—Laches—Renewal—Pleading.

A., the rector of the parish of T., and proprietor of a neighbouring estate, was seised in fee of the advowson and right of presentation to the living; and was also entitled to a rent of £28 7s. 5d. per annum, payable out of certain glebe lands by the incumbent of T. for the time being. The estate of A., including the advowson, having been put up for sale under an order of the Incumbered Estates Court, the printed rental, in giving the particulars of the advowson, stated that there were attached to the living 19 a. 1r. 7p. statute measure, of glebe, valued at £1 10s. per acre (not mentioning that this land was subject to any rent). In the same rental, in the lot which comprised the lands of T., a portion of them was set down as "glebe land not sold;" and in the map attached the glebe land was left uncoloured and marked as "not in the estate." In an advertisement subsequently published for the sale of the advowson, it was again stated that 19a. 1r. 7p. of glebe land, valued at £30 per annum were held with the living. A. was a party to all the proceedings in the Incumbered Estates Court. The advowson was sold and conveyed by the Commissioners to B., from whom it was afterwards purchased by C., a clergyman of the Established Church. Previous to this latter sale C. visited the parish of T.; and X., the son of A. on that occasion showed C. a copy of the advertisement before mentioned, and represented the particulars contained in it as being correct. On the death of A., C. presented himself to the living of T. Shortly afterwards a demand for rent of the glebe lands was made of C. by X., the son and devisee of A.; and on his refusing to pay it, an action of ejectment was commenced for the recovery of the lands. In a suit instituted by C. for an injunction to restrain the proceedings at law, on the ground that by the acts and conduct of A., C. had been led to suppose that the glebe lands were not subject to rent. Held that as A. had lain by and not asserted his claim during the proceedings in the Incumbered Estates Court, the relief sought should be granted.

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quantities, the figures 25a. 1r. 35p. (statute measure) appeared; and opposite to them in the column of tenure were the words, "glebe land not sold;" and in the map attached of the lands of Tomgreany, showing the contents of lot 7, the lands in the description above referred to were not coloured, and were marked with the words, "not in the estate," printed in large letters.

The sale of the above mentioned properties came on in the Incumbered Estates Court in the month of July, 1852, and upon that occasion the lands forming the estate of Tomgreany were sold for the sum of £20,440, but the sale of the advowson was adjourned for want of bidders. The advowson, however, was subsequently set up and sold in February, 1853. Previous to this adjourned sale, printed hand-bills were prepared and extensively distributed for the purpose of obtaining publicity for the sale, which were worded as follows:—

"Advowson.—In the Court of the Commissioners for the sale of Incumbered Estates in Ireland.

In matter of the Estate of the
Rev. Thomas B. Brady,

Owner;
Henry Bruen Westropp and
Bernard Robert Shaw,
Petitioners.

The Commissioners will, on Tuesday, the 1st day of February, 1853, at the hour of 12 o'clock, noon, at their Court,

14, Henrietta-street, Dublin, sell by Public Auction the advowson or right of presentation to the living of Tomgreany, in the county of Clare. The present incumbent, the Rev. Thomas Browne Brady, is now aged about 62 years. The tithe composition book, dated the 9th of August, 1852, returns the tithe composition payable to the rector at the yearly sum of £450. There is an excellent glebe and house, also 19a. 1r. 30p. statute measure of glebe land, valued at £30 per annum. The glebe is subject to a building charge, part of which, amounting to £162 11s. 6d., the present incumbent will be entitled to receive from his successor.

Dated 6th January, 1853.

HENRY CAREY, Secretary."

At this sale William M. Reeves became the purchaser of lot No. 2 in the rental, being the said advowson, for the sum of £1,400, and by a deed poll dated the 26th of February, 1853, Mountiford Longfield and Charles J. Hargreave, two of the Commissioners for the sale of Incumbered Estates, in consideration of the sum of £1,400 granted unto the said William Maunsell Reeves the said lot No. 2, by the description of "the perpetual advowson and right of patronage and presentation of, in, and to the Rectory and Parish Church of Tomgreany, situate in the county of Clare, to hold the same unto the said William M. Reeves, his heirs or assigns for ever. William Maunsell Reeves having died intestate in July, 1857, his eldest son and heir at law, Robert W. C. Reeves, became entitled to the advowson of Tomgreany, which he shortly afterwards advertised for sale. The Rev. Andrew H. Belcher, the petitioner in the present suit, thereupon entered into an agreement for the purchase of the advowson, and afterwards, by an indenture bearing date the 20th of October, 1858, Robert W. C. Reeves, in consideration of the sum of £2,700 granted

unto the petitioner, "All that the advowson and right of perpetual presentation to the Rectory and Parish Church of Tomgreany, in the county of Clare, in Ireland, with the glebe lands, rent-charges, tithes, and portion of tithe offerings, fruits, dues, perquisites, profits, and emoluments appertaining thereto; and also the Prebend of Tomgreany attached to the said rectory and its appurtenances, and all the estate and interest of the said Robert W. C. Reeves, as all the said premises were granted by the Commissioners of Incumbered Estates in Ireland to the late William M. Reeves, to have and to hold the same unto the said Rev. Andrew H. Belcher, his heirs and assigns for ever." Previous to the sale the petitioner, accompanied by his solicitor, went down to inspect the glebe and lands of Tomgreany, where the Rev. Thomas B. Brady was then residing, and on that occasion they had an interview at the glebe-house with the respondent John Brady and his mother. The Rev. Thomas B. Brady was at the time unwell, but the respondent, in the course of conversation with the petitioner and his solicitor, pointed out the glebe lands, and produced a copy of the hand-bill already mentioned as having been printed for the purposes of the adjourned sale, as evidence of the correctness of the statements in the advertisement of the sale then pending which the petitioner had previously shown to the respondent. The petitioner then asked permission to retain this hand-bill, but the respondent and his mother refused to give it, alleging that they had but a single copy; however, another copy of it was subsequently transmitted by the respondent to the petitioner, who shortly afterwards concluded the purchase of the advowson from Robert W. C. Reeves. The Rev. Thomas Browne Brady having died on the 29th of October, 1858, thereupon the petitioner was duly inducted into the living on his own presentation in January, 1859. Some time in May, 1859, the respondent made a claim on the petitioner for rent alleged to be due out of the glebe lands, and in June, 1860, the respondent, claiming as general devisee under the will of the Rev. Thomas B. Brady, served two notices on the petitioner—one demanding possession of 11a. 1r. 12p. plantation measure of the glebe lands, and the other calling upon the petitioner to take out a renewal of the lease under which it was therein alleged this portion of the glebe lands was held. The petitioner having served a notice in reply, refusing to accede to the respondent's demands, and denying all liability to rent, on the ground that the acts and conduct of the Rev. Thomas B. Brady had amounted to concealment or misrepresentation of title, and that he had never had any notice of the lease now put forward by the notice of the respondent, proceedings at law were about to be taken by the respondent, when it was mutually agreed between the parties to submit the matter to the Court of Chancery in the form of a special case under the Chancery Amendment (Ireland) Act, 1850. Negotiations, however, relative to this, were broken off by the respondent, whereupon the petitioner caused a notice to be served on the respondent, declining to pay any rent, and claiming to hold the glebe lands rent free, but, at the same time, reserving the right to take out a renewal of the lease, in case it should be found ne-

cessary to do so. In June, 1862, a writ of summons and plaint in ejectment was issued by the respondent for the recovery of the lands. The petitioner filed the usual defence, but finding that he could not have adequate relief at law, the present suit was instituted. The petition prayed that it might be decreed that, under the conveyance of the 26th of February, 1853, and by reason of the acts and conduct of the Rev. Thomas B. Brady, the petitioner was entitled to the glebe lands as part of the rectory free from any rent and lease; or if subject to a lease, that the petitioner should be compensated for his loss out of the rent of £18 9s. 2d., payable under it, and in such case, that a reference should be made to ascertain the amount of compensation; or that, in case the petitioner should be held bound to take out a renewal, the respondent might be compelled specifically to perform the covenant for perpetual renewal contained in the lease of the 23rd of June, 1808. The petition finally prayed for a perpetual injunction to restrain the action at law, or any other proceeding, that might be taken by the respondent for disturbing the petitioner in his possession of the lands.

Brewster, Q.C., (with him *Norman, Q.C.*, and *A. Henderson*) for the petitioner.—The Rev. Thomas B. Brady was a party to all the proceedings in the Incumbered Estates Court, and therefore this comes within the cases where one party negligently and culpably stands by, and allows another to contract on the understanding of a fact which he can contradict.—*Lord St. Leonard's Vendors and Purchasers*, 14th ed., p. 743. One of the earliest cases on this point is *Savage v. Foster* (9 Mod., 35), where it was held that if a person knowing his own title do not give notice of it to a purchaser, he can never set it up against the purchaser. *Govett v. Richmond* (7 Sim., 1.) is also a strong case. There, A., having a claim on a property, which he knew was the subject of a reference between C. and D., suffered the award to be made, and it was held that he was bound by this award.—*Boyes v. Belion* (1 Jo. & Lat., 370). As by the authorities, therefore, the Rev. Thomas B. Brady would have been debarred from putting forward this demand, it is perfectly impossible that any new rights can have arisen by the transmission of the interest from him to his son, the respondent. But we would go still further, and submit that both the respondent and his mother were agents for the Rev. Thomas B. Brady, and had communication with him on this question on the occasion of the petitioner's visit to Tomgreany previous to his purchase of the advowson.

Serjeant Sullivan (with him *Jellett*) for the respondent.—This petition is irregular, and without precedent in its form. It first prays, at the suit of a tenant, that he should be entitled to an absolute interest by estoppel against his landlord, on the ground of misrepresentation, and then, failing that, it seeks to obtain specific performance of a covenant for perpetual renewal. These two branches of the prayer are inconsistent with each other. In *Glascott v. Long* (2 Phil., 310), it was decided that when a bill made a case of fraud, and this fraud at the hearing is disproved or not established, the Court will not allow the bill to be used for any secondary or inferior relief, to which the plaintiff might otherwise have been enti-

tled. The present case, however, is still stronger, and is not touched by the authorities cited on the other side. Here the respondent, at the time of the alleged misrepresentation, had no estate whatsoever in the lands, being, in fact, only an expectant heir at most, and, as such, in the eyes of the law a perfect stranger. The prayer of the petition is conversant with the acts of the Rev. Thomas B. Brady alone, yet no concealment or misrepresentation is proved against him. *Wilde v. Gibson* (1 H. of L. Cas., 605,) shews that if a purchaser of an estate make no enquiry respecting the title from an agent for the sale, he is not entitled to any relief for non-communication of any defect to him. But in the present case there is no allegation of agency in the petition, and it is expressly sworn by the respondent in his answering affidavit that, on the occasion when the petitioner visited Tomgreany, there was no conversation between them on the subject of the glebe lands, and further that he had no authority from his father to make any statement or representation in reference to them. The advertisement published in England professed to announce the sale of nothing more than the advowson, and the conveyance from the Commissioners of the Incumbered Estates Court to William M. Reeves, purports to grant the advowson alone. Can a purchaser from Reeves be in a better position than Reeves himself, when there was no subsequent concealment? The conveyance from Reeves to the petitioner professes, indeed, to grant "the advowson with the glebe lands appertaining thereto," but land cannot be appurtenant to land, and still less to an incorporeal hereditament such as an advowson. The deed, too, only covenants for what passed by the conveyance of the Incumbered Estates Court of the 26th of February, 1853. Finally, there is no allegation, no evidence, to show that the glebe lands are not worth £30 per annum above the rent. If such be the case, the petitioner is disentitled to any relief.

Jellett on the same side.—This petition should be dismissed, both on the frame of the petition and on the merits. The prayer of the petition is conversant with three matters. The petitioner first claims to hold the glebe lands discharged from rent and lease; in the next place, if the lands should be declared subject to the lease, he seeks for compensation for his loss as purchaser; and lastly, in the event of failing in the previous branches of the suit, he asks for a renewal of the lease. His first demand is a specific charge on the land; the question of compensation is personal, and affects the respondent as personal representative of the Rev. Thomas B. Brady, while the renewal should be made by the respondent, as heir-at-law of his father, to the petitioner, as incumbent of Tomgreany. This prayer of alternative relief is clearly inadmissible, on the authority of *Lindsay v. Lynch* (2 Sch. & Lef., 1). If the petitioner even were entitled to any compensation, the Landed Estates Court is the proper tribunal.

Brewster, Q.C., in reply, was stopped by the Court.

THE LORD CHANCELLOR.—If this case depended solely on the conversations held between the respondent and the petitioner, when the latter visited Tomgreany, perhaps there might be some difficulty in deciding this question. At the same time, it appears to

me that there is such evidence as would lead a jury to infer that, in these conversations with the petitioner, the respondent acted as agent for his father, who was then unwell, and confined to his room. The case, however, goes far beyond a question of agency, and rests on principles of a much higher character. When we look to the title of this property, we find that the Rev. Thomas B. Brady was the owner in fee of the lands and advowson of Tomgreany, and entitled to various lands and rents, and, amongst others, to this very rent of £28 7s. 5d. Irish. How were the globe lands circumstanced? They formed part of the lands of Tomgreany, and were held by virtue of a lease made by an ancestor of the respondent to the then rector and his successors—a grant, in fact, to the rector as trustee for the owner of the advowson. The title to, and possession of, the glebe lands being in reality distinct, it so happens that the petitioner now holds both characters. As such he is damaged in two points—firstly, as rector of Tomgreany, and secondly, as owner of the advowson. He is, therefore, entitled to sue in both characters, and consequently, in point of form, I see no objection to his petition, which treats both of his actual rights, as rector, and his potential rights as owner of the advowson. The lands of Tomgreany having been mortgaged, a petition for the sale of them was presented to the Incumbered Estates Court by the creditors of the Rev. Thomas B. Brady, and an order for sale pronounced. If entitled to sell the lands of Tomgreany, the creditors would have also been entitled to sell the rent to which the glebe lands were subject, but it appears that somehow or other they did not do so. Two rentals were framed, in which the particulars of the advowson were fully set out, and in which the specific value, and the charges on it for building the glebe-house, were given in detail. The Rev. Thomas B. Brady entered an appearance in the matter in the Incumbered Estates Court, and was a party to all the proceedings by his solicitor, until ultimately this advowson was purchased by Mr. Reeves, and passed to him by the conveyance from the Commissioners. If a party having a claim stands by, seeing other parties negotiating in ignorance of it, he should never be allowed afterwards to bring forward that claim to the prejudice of their rights. It has been said that Mr. Reeves never made any demand for compensation, and that the petitioner should not be placed in a better position; but Mr. Brady was in possession during Mr. Reeve's lifetime, and the present question, therefore, could not arise. No damage had then been done. I do not go into the question of misrepresentation, which is not necessary for my decision. This is a plain case for a perpetual injunction to restrain the respondent from proceeding for the recovery of any rent out of the glebe lands.

Decree accordingly.

Court of Common Pleas.

[Reported by J. Field Johnston, Esq., Barrister-at-Law.]

SLATOR V. SLATOR.—April 15.

Practice—Costs.

W. Sidney, Q.C., for the defendant, applied for liberty to plead a plea of privileged communication

to the fourth count of the summons and plaint. The action was one of slander, and the defendant had pleaded to the first three counts that he was desirous of preventing a marriage between the plaintiff and a lady inferior to him in rank, and that he spoke the words complained of to his attorney in confidence. The occasion referred to in the fourth count was subsequent to the marriage, and the defendant now desired to plead that he was endeavouring to get the parties married of the Court of Chancery, and that the words were spoken in a communication had with his attorney with that purpose. The notice of motion offered the plaintiff the costs incurred by the amendment.

M'Causland, Q.C., and Richardson, contra.—The plea is not the same plea. [*Christian, J.*—I understand that this was a communication with the attorney to see whether the parties could not be made responsible for the marriage in the Court of Chancery. *Monahan, C.J.*—You are to get all proper and necessary costs incurred by the amendment.] There has been delay. If the plaintiff had been quicker, the defendant's attorney could have consulted his client and counsel. [*Monahan, C.J.*—There is no doubt that the defendant is entitled to file this plea. *Christian, J.*—If you were in earnest in going to trial, why take any notice of this motion? *Keogh, J.*—We cannot make any other order than in the terms of the notice. *Christian, J.*—It is plain that when leave was given to plead the three pleas, leave would have been given to plead this plea.] We are entitled to a special order from the Court for all the costs occasioned by this, whether there has been a slip on the part of the defendant or not. [*Christian, J.*—You are not entitled to appear here if you get nothing more than was offered you in the notice of motion. Your argument can be used before the taxing officer.] *MONAHAN, C.J.*—Let the order be the ordinary one.

SHALLOW V. SAVAGE.—April 17.

Changing the venue.

There is no general rule that the venue must be in Dublin, whenever some of the witnesses reside in England.

THE defendant in this case (which was an action for a breach of promise of marriage) having applied to change the venue from Dublin to the County Down; upon the grounds of a preponderance of convenience, the motion was resisted by

Whiteside for the plaintiff.—It is a general rule that if some of the witnesses live in England, the venue must of right be in Dublin. The plaintiff is desirous of having the case tried at the ensuing after-sittings.

April 18.—*MONAHAN, C. J.*—There were *prima facie* grounds here to change the venue to the County Down. The plaintiff has made an affidavit, which, if it were not excluded, would be ground to the contrary. It has been said there is a general rule that if some of the witnesses live in England, the venue must be of right in Dublin. There is no such rule. The plaintiff suggests that she is anxious to have the case tried at

the next after sittings, but there is no chance of a single special jury case being then tried. Therefore, if the venue remains where it is, the case must be tried at the Trinity after-sittings. Therefore, there is no reason why it may not be as well tried in the country. There is no case made to show a preponderance of convenience by the plaintiff. But we shall not change the venue to where the defendant pleases, but to the County Antrim.

Rule accordingly.

BLOOD v. BERRIE—April 20.

Practice—Notice for a special jury—Consolidated Nisi Prius Court.

Walter Boyd, for the defendant, applied that this case might be sent to be tried in the Consolidated Nisi Prius Court. He had made the same application unsuccessfully to Mr. Justice Christian.

Concannon, for the plaintiff, stated to the Court that he intended to serve notice for a special jury.

MONAHAN, C. J.—Mr. Concannon informing the Court that he will serve notice for a special jury, we shall say, No rule on the motion.

CHRISTIAN, J.—I refused the application before, because I really do not think that a party ought to be forced into that Court against his will.

No rule on the motion.

MADDEN v. MAXWELL—April 22.

Libel—Setting aside pleadings.

The first count of the summons and plaint complained that the defendant "maliciously contrived, and did contrive to injure the plaintiff." Held, that this must be set aside.

The second count of the same summons and plaint complained that the defendant, wilfully and wrongfully intending to injure the plaintiff, wrote the words, "No one would trust Mr. Madden." The words "falsely and maliciously" were wanting. Held, that this count was not open to objection.

O'Brien for the defendant in this case, moved to set aside the summons and plaint. The first count stated that the defendant "maliciously contrived and did contrive to injure the plaintiff" but did not say how. The second count stated that the defendant "wilfully and wrongfully intending to injure the plaintiff, wrote the words, "No one would trust Mr. Madden." The word "wrongfully" was once decided to mean "with out just cause or excuse." The word "lawfully" has been rejected by the Court upon demurrer. This case is the converse of that. The word "wrongfully" will embarrass the defendant. The defendant would be entitled to every construction of this word which would support his pleading. The words "falsely and maliciously" are omitted. [Monahan, C. J.—When the words on the face of them are libellous, must the words "falsely and maliciously" be inserted?] Yes, the form in the schedule to the Common Law Procedure Act contains them even where the word made

use of is "thief" [Christian, J.—These forms are not imperative.]

Heron, Q.C., *contra*.—In an anonymous case in Style's Reports, 392, Rolle, C. J., said "that in an indictment a thing must be expressed to be done *falso et malitiose*, because that is the usual form, but in a declaration those words are not necessary." The question never was raised since. See also *Stockdale's Case* (22 State Trials, 298). It is a fair inference from the language of this second count, that the words were spoken to injure the plaintiff in his business, which is that of a builder. Neither the word "falsely" nor "maliciously" is of the gist of the libel. The word "wrongfully" in the first count means "maliciously."

O'Brien in reply.—If "wrongfully" mean "maliciously," we are the more embarrassed. If it does mean what is expressed by the form in the schedule, why not use that form? It must mean something else. Bullen and Leake's Precedents of Pleadings give the cases, and refer to the form in the schedule to the English Common Law Procedure Act. Can I plead a plea of privilege of uttering that which may not be false? In *Ruckley v. Kiernan* (7 Ir. C. L. R., 75.) this Court decided that upon demurrer every possible construction would be assumed against the demurrer. [Monahan, C.J.—If you were to demur generally, is it not very likely that your demurrer would be overruled?] Yes. [Christian, J.—If this be a libel, the law presumes, till the contrary be shown, that it is false.] The Court ought not to encourage variations from the forms of pleading. If the statute did not consider the words material, would it have inserted them? [Ball, J.—It has not made them imperative.]

MONAHAN, C.J.—We do not think the second count is open to objection. The first must be struck out. Let the parties abide their own costs.

Rule accordingly.

FYNN v. JENNINGS—June 12.

Demurrer—Bill of exchange—Want of indorsement—Right of action.

The liability on a bill of exchange is a debt within the meaning of the 291st section of the Irish Bankruptcy and Insolvency Act, 20 & 21 Vict., c. 60, and an indorsement to the purchaser of such bill of exchange is not necessary in order to enable him to sue upon it.

THE action in this case was brought to recover a sum of £30 12s. 8d., a portion of which was alleged to be due by the defendant upon a bill of exchange, and the residue for goods sold and delivered. The summons and plaint stated that there had been a bankruptcy, but did not assign a date to the bill of exchange. The defendant lodged the amount of the residue in Court, but demurred to the part of the plaint which set out the bill of exchange, on the ground that the action being brought by a transferee against the acceptor, there was no allegation of an indorsement by the drawer or his assignee to the present plaintiff, and also on the ground that no date was given.

Curtis in support of the demurrer.—There is nothing to transfer the legal estate in this bill. A debt may be assigned under the 291st section* of the Bankruptcy Act, but the assignee must sue upon the debt; he cannot sue upon the bill *quâ* bill. An indorsee alone can sue. In *M'Dowell v. Doyle* (3 Ir. Jur., N.S., 86,) the action was brought under an Act which gave powers similar to the Bankruptcy Act, and it was held the plaintiff could not maintain the action, the note not being indorsed to him. [*Monahan, C. J.*—That case was decided upon the ground that the bill was not made payable to the bank, but to J. S. The bill on the face of it was payable to J. S., and he ought to have indorsed to the bank to enable the bank or the assignee to sue.] That case cannot be distinguished from this. The section does two things; it enables debts and other property to be sold, and it enables the purchaser of a debt to sue in his own name. It does not enable the purchaser of other property to sue in his own name. A bill of exchange is not a debt, but an instrument to secure a debt, therefore it must come under the designation "other property." The law requiring indorsement remains the same. Originally *choses in action* were not assignable; the mischief was, that in the winding up of debts delays occurred; the remedy was to make certain debts transferable which had not been so, but bills of exchange were always transferable by indorsement, and therefore not included in the remedy.

Heron, Q. C., and Beytagh, for the plaintiff were not called on.

MONAHAN, C. J.—There is no doubt that the bill of exchange can be assigned. Being vested in the bankrupt, it passed to his assignee without indorsement. The liability on this bill of exchange is a debt. We decided *M'Dowell v. Doyle* on the ground that the bill was not payable to the bank. The property in this bill passed to the assignee, and from him to the purchaser.

Demurrer overruled.

Civil Bill Appeal.

[Reported by John Norwood, Esq., Barrister-at-Law.]

[CORAM HUGHES, B.]

BOURNE, APPELLANT, v. LONGFIELD, RESPONDENT.

June 11, 16, 1863.

Construction—24 & 25 Vict., cap. 172, "The Dublin Corporation Water-Works Act, 1861," secs. 43, 54, 56, 57, 64—*The public water-rate—Covenant on part of lessee to pay all taxes*—17 & 18 Vict., cap. 103.

The lessee of a house and premises in Dublin, having

* Sec. 291—"If there shall be any outstanding debts or other property belonging to the estate of the bankrupt or insolvent which cannot, in the opinion of the Court, be collected and received without unreasonable or inconvenient delay, it shall be lawful for the assignees, under the direction of the Court, to sell and assign such debts and other property in such manner, and subject to such conditions as shall be ordered by the Court; and any person to whom any of such debts shall be so sold or assigned, may sue for the same in his own name as fully as the assignees might have done."

covenanted to pay the rent reserved in the lease, "without any deduction or abatement for or in respect of any taxes, charges, or assessments, or other dues whatsoever, or for any other matter or thing, ordinary or extraordinary," and, "from time to time, during the term of said lease, to bear and pay all manner of taxes, charges, and assessments, ordinary and extraordinary, and by any power or authority whatsoever to be laid, taxed, or imposed, either on the premises or upon the owners, or occupiers, or landlords thereof, or in respect of the rent reserved, or the premises demised. Held, on appeal, that the lessee was liable to pay "the Public Water-rate" levied under the provisions of the 24 & 25 Vict., cap. 72, sections 2, 54.

THIS was an appeal from a decree of the Recorder of the city of Dublin, pronounced at the last April sittings of the Civil-Bill Court. A summons was issued forth of the Court below at the instance of the respondent, to recover from the appellant the sum of 15s. 7d., being the amount of "the Public Water-rate" due in March, 1862, on the dwelling-house and premises, No. 19 Harcourt-street, Dublin, and which rate the respondent, having paid, sought to "recover from the appellant, who is his landlord, on the ground that the appellant, from whom he holds the premises, as alleged, at a rack-rent, is, under the provisions of the 56th sect. of the 24 & 25 Vic. c. 172, liable to the payment of said "Public Water-rate." Appellant's father, Walter Bourne, Esq., who had been the owner of the said houses and premises, and several adjoining thereto, in the year 1815, executed a lease thereof to J. B. West, Esq., for years renewable for ever, in consideration of the payment of a fine of £1,200, and of the annual rent of £100, of the then Irish currency, being equivalent to a sum of £92 6s. 2d. of the present currency, payable as therein stated. The respondent's father, Richard Longfield, became the purchaser, some time ago, of the interest of the said J. B. West in said lease and premises for a sum of £520. The appellant, as representative of his said father, on or about the 10th day of Feb. 1846, executed a renewal of said original lease for thirty-nine years, under the provisions of the "Church Temporalities Act," to the said respondent, who was the representative of his father, Richard Longfield, Esq. The said annual rent of £92 6s. 2d. was reserved in the said renewal, and the respondent, as such lessee, continued to occupy the house and premises. The said renewal contained, among other provisions and covenants on the part of the lessee, the following:—"Which said yearly rent above reserved is to be paid without any deduction, defalcation, or abatement to be made for or in respect of any taxes, charges, or assessments, ministers' money, parish or other dues whatsoever, or for any other matter or thing, ordinary or extraordinary. And the said William Longfield, for himself, his executors, administrators, and assigns, doth covenant, promise, grant, and agree to and with the said Walter Bourne, his executors, administrators, and assigns, that he, the said William Longfield, his heirs, executors, administrators and assigns, shall and will well and truly pay, or cause to be paid, unto the said Walter Bourne, his executors, administrators, or assigns, the

said yearly rent of £92 6s. 2d. sterling, on the days and times aforesaid, without any deduction, defalcation, or abatement whatsoever, for or in respect of any taxes or assessments whatsoever as aforesaid. And also shall and will, from time to time during the said term, bear and pay all and all manner of taxes, charges, and assessments whatsoever, ordinary or extraordinary, and by any power or authority whatsoever, to be laid, taxed, or imposed, either upon the said demised premises, or upon the owners, or occupiers, or landlords thereof, or any part thereof, for or in respect of the rent hereby reserved, or premises hereby demised." The house and premises are valued at £68, for poor-law purposes. The valuation seems to have been frequently altered, for in 1861 they were valued at £110, in 1852 at £77, and in 1855 at £68. The premises immediately adjoining were valued at somewhat similar amounts. The respondent, when paying his half-year's rent to the appellant, claimed to be allowed the said sum of 15s. 7d., which was apportioned upon the said premises in March, 1862, at 2½d in the pound, and which had been paid by respondent with other rates and taxes. The respondent contended that, as under the poor law valuation, the premises were valued at £68, being less than the annual rent reserved in the lease, the said rent should be considered as being a "rack-rent," and therefore, under "The Dublin Corporation Water Works Act, 1861," he was entitled to deduct from the appellant, as owner of the rack-rent, the amount of public water-rate so assessed on the premises. The Recorder had pronounced a decree in favour of the respondent for the amount claimed, and costs, being of opinion that the appellant, as owner of the rack-rent, was, under the Act, liable to the payment of the said public water-rate.

Osborne, for respondent, appeared to sustain the decree of the Court below.—The question resolved itself into a consideration of certain sections of the Dublin Corporation Water-Works Act, 24 & 25 Vict., c. 172. In section 2 it is stated that "the word *owner*, used with reference to any rate to be paid under this Act, shall mean "the person, for the time being, entitled to receive the rack-rent of any lands or buildings, or who, if such land or buildings were let to a tenant at a rack-rent, would be entitled to receive the rack-rent from the occupier thereof;" and in section 56 it is enacted that "it shall be lawful for the corporation.....in the month of December in every year, by precept, &c., under seal, &c., to order and direct the Collector-General to applot, collect, and levy upon and from the owners of all rateable property within the borough of Dublin, a rate to be called 'The Public Water-rate' on the annual value of such property, as the same now are, or shall, from time to time, be hereafter valued and rated under the provisions of the Act of the 15 & 16 Vict., cap. 63, or any Act or Acts amending the same; and the amount in the pound of such public water-rate shall be one-fourth part of the amount in the pound of the domestic water-rate from time to time apportioned and levied under the provisions of this Act." The appellant, as the owner, is the party entitled to receive the rack-rent, and, therefore, both within the spirit and letter of the statute, is bound to pay "the public

water-rate." As we find no definition in the Act of the word "rack rent," we must seek such in statutes of an analogous nature, and framed for the attainment of objects of similar character.—*Biddulph v. St. John* (2 Sch. & Lef., 521). The first section of the 17th & 18th Victoria, cap. 103, "The Towns Improvement Act," which is an Act *in pari materia*, defines "rack-rent" to be that "which is not less than two-thirds of the full nett annual value of the property out of which the rent arises, and the full nett annual value shall (save as regards any valuation for poor-rates, or valuations for assessments under this Act,) be taken to be the rent at which the property ought reasonably to be expected to let from year to year, free from all quit-rent, head rent, ground-rent, and usual tenants' rates and taxes, and deducting therefrom the probable annual cost of the repairs, insurance, and other expenses (if any) necessary to maintaining the same in a state to command such rent. The effect of adopting this valuation would be to render every one paying a rent equal to, or above, the poor law valuation, liable as owner, and this is an intelligible construction of the statute, and affords an easy method of ascertaining what amounts to a rack-rent. The object of the Dublin Water-Works Act was to make the party in the enjoyment of the beneficial interest liable as "owner," whereas, if rack-rent be held to be the best improved rent in this Act of Parliament, a party who received same, and had only a nominal interest in same—take, for instance a person receiving for premises at the rate of £100 a year, and bound to pay £90 per annum away—would be liable, as "owner," and the party who had the real interest, viz., the receiver of the £90 per annum, would be exempt, there being no clauses relative to the proportions payable, as there are in the Poor-Law Acts, no one is liable, except as "owner," or "occupier." The words "landlord" or "tenant" do not occur throughout this Act; and the tax on the "owner," and that on the "occupier," are distinct imposts, and are not charges on the premises.—*Lally v. Concannon* (3 Ir. C. L. Rep., 557); *Reg. at prosecution of Guardians of Poor of the North Dublin Union v. Scott* (2 Ir. Jur., 246). As to the point relative to the covenant in the lease—*Palmer v. Power* (4 Ir. C. L. Rep., 196).

Norwood, for appellant, *contra*.—Whether we consider the terms of the provisions and covenants on the part of the lessee, to be performed, or the terms and sections of the 24 & 25 Vict. c. 72, we must come to the conclusion that the respondent is not entitled to deduct the public water-rate from his landlord, the appellant. Nothing can be more explicit, stringent, or extensive than the words of the covenants by the lessee. Independently, therefore, of any consideration of the several questions of "rack-rent," of whether the appellant is the owner of such, or on the construction of the statute, the respondent is clearly bound to pay "the public water-rate." The appellant relies most strongly on the terms of his lease. It is to be observed that the Water-works Act does not, and cannot, interfere with or abrogate covenants or agreements between landlords and tenant. It contains no such provision as that enacted in the 77th section of the 1 & 2 Vict. cap. 56 [the Irish

Poor-Relief Act"] nullifying covenants on the part of persons liable to pay rent to forego deductions on foot of poor's-rate from the rent. The 54th section of the Waterworks Act directs the public water-rate to be levied upon and from the "owners" of all rateable property; and the 2nd section enacts, *inter alia*, that the word "owner," used with reference to any rate payable under this Act, shall mean the person, for the time being, entitled to receive the rack-rent of any lands or buildings; or who, if such lands or buildings were let to a tenant at rack-rent, would be entitled to receive the rack-rent from the occupier thereof. Who, then, in the present case is the "owner," and who is entitled to receive the rack-rent? The respondent's contention is, that the appellant is the "owner," that he is in receipt of the rack rent, £92 6s. 2d., and, therefore, liable to pay the public water rate. The appellant, on the other hand, contends that the premises, considering their position in an improving neighbourhood, and the rents sought and paid for houses of a like character, are not let at their best improved annual rent; and that the fact of a large fine having been paid is sufficient to show that the rent reserved is not the rack-rent, and that as the premises, if let by the respondent, would fetch in the market rent larger than the £92 6s. 2d. reserved by the amount of from £7 to £10 per cent. on the amount of fine paid, therefore the respondent is the person entitled, if the premises were let at a rack-rent, to receive that rack-rent from the occupier, and is therefore liable to the public water rate. Observe that the 64th section contemplates the collection of the public water-rate in certain eventualities from the occupier; and the introduction in that section of the words "or from the owner if he be liable," would show that the owner is not in all cases, as the respondent urges, to be held liable for the public water-rate. The way in which use is made of the word "owner" in the 43rd section would lead to the conclusion that persons in the position of the respondent are contemplated. It cannot be contended that the appellant, as "owner," could be compelled under this section to provide "branch-pipes," for the use of the house; and besides, this section enacts that the occupier shall be liable to pay, and shall pay, the water-rates in respect of same, meaning, both public and private rates.—Secs. 2, 54, 56, 64, 66 of the 24 & 25 Vic. c. 17; 15 & 16 Vic. c. 63, s. 11; and 12 & 13 Vic. c. 91; Moore's Poor Law Acts, pp. 368, 510, *et seq.* The provisions of this Water-works Act are loosely framed. The poor-law valuation is no criterion for ascertaining whether a rent be a rack-rent. Many remarkable illustrations might be offered to establish this proposition. If the Legislature meant to adopt the poor-law valuation as the test for ascertaining who were rack-renters, what could be easier than in one sentence to say so? If the poor-law valuation were the criterion of a rack-rent, an occupier might, by getting his premises separately rated for municipal or parliamentary purposes, or by suffering them to fall into disrepair, reduce their valuation, and thus shift his liability to the public water-rate. But this street is actually in a rapidly improving district, and the present valuation is a low one. But in point of fact is this rent a "rack-rent?" The Act itself not having provided any definition of rack-

rent we must see what is its strict legal meaning; and this Act, as being one imposing a public burden, must be strictly construed. In Todd's Johnson's Dictionary it is stated to be the "uttermost rent a tenant can pay," a "rent raised to the uttermost; and a rack-renter is one who pays the uttermost rent." Surely the respondent does not come within that definition—Steph. Com., 1, 676; Wood's Inst. 181, 184; O'Leary on Tithe rent Charge, 157; Sugden on Powers, 777, *et seq.*, Furlong Land & Ten. 60 *et seq.*; *Doe d. Rogers v. Rogers*, 5 B. & Ad. 758. In the several conveyancing precedent books, such as Martin, Davison, &c., we find that the power to lease premises, "reserving the best yearly rent that can be reasonably begotten without taking anything in the nature of fine, premium, or foregift," is treated as an equivalent for the shorter form, "shall demise the said premises at rack-rent." The payment of the fine or foregift is therefore incompatible with the notion of this rent being a rack-rent. A "rack-rent is the best improved annual rent obtainable for premises without fine or foregift. If A. hold a lease, having paid a fine to the landlord, he cannot be held to be a rack renter, for he does not pay to the landlord the full annual value of the premises in the shape of rent. Suppose there was a clause in this lease permitting the tenant to fine down the rent to £10 per annum, could the respondent contend—his relations with his landlord not being altered—that the rent so reduced still was a rack-rent, and that his landlord was still liable to the public water rate? Suppose the rent were extinguished altogether, the other side still would contend that the appellant was liable? The Towns Improvement Act, 17 & 18 Vic. c. 103, is not, as the other side contend, *in pari materia*. It and the present Act do not form part of the same code; and the one cannot be used for the interpretation of the other. If the Legislature had so intended, they should have incorporated it by reference; their not having done so is a strong argument against the attempt to read them as one Act. But the "Towns Improvement Act" is a voluntary Act: to be self-imposed by the suffrages of the inhabitants of certain towns voting under stringent regulations, while this Water-works Act is in the nature of a penal statute, to be construed strictly. The Acts to be incorporated with the Dublin Water-works Act are specifically set forth therein—ss. 3 & 4; and if the 17 & 18 Vic. c. 103, were intended to be incorporated therewith, it should have been so stated. Furthermore, it is to be observed, that by sec. 100 of the "Towns Improvement Act" the city of Dublin is distinctly exempted from its operation. An Act like this imposing burdens is to be construed critically—Dwarris, Stat. 646, 648, 649, 650, 652. As to the rule of construction of statutes, *vide ibid* 560, 561. The law infers rather that the Act did not intend to make any alteration other than what is specified; and besides, what is plainly pronounced—*ibid* 564, 565, 569. Effect cannot therefore be given to a supposed intention not expressed—*ibid* 573, 578. No inconvenience would arise from appellant's construction of the statute—*ibid* 595; and the words of a statute like this one should not be extended beyond their fair import—*ibid* 583, 584, 588, 597, 604, 617. The question whether this is a rack-rent is a question for

a jury, or for his lordship now sitting in the Appeal Court—Davison's Prac. Conv. vol. III., part 1, 394–5. Considering the whole case and the statutes bearing on it, we contend that the appellant is not the owner of the rack-rent; that the occupier is himself the beneficial owner of what, if the premises were let by him, would be the rack-rent, i.e., the present rent, increased by the interest—calculated according to the usage adopted in valuing house property in Dublin—of the amount of the fine he paid; and therefore he is liable to the payment of the public water-rate. But, at all events, he is plainly liable under the terms of the covenants and provisions in his lease. It should be stated that the Recorder had not an opportunity of examining or considering the lease or its provisions. Evidence was then given on behalf of the appellant and of the respondent as to above mentioned circumstances; also as to whether the rent reserved was the best imposed rent obtainable; and with reference to the value of the house and premises as compared with that of premises of a similar character in the same locality, and to show that the street was in an improving district.

Cur. adv. vult.

June 16.—His Lordship having stated that he wished to hear the observations of counsel as to the construction of the covenants in the lease, the case came before him again for re-argument on this day, when *Osborne* was heard for respondent, and *Norwood* for appellant.

HUGHES, B.—This case being one of considerable importance I have attentively considered it, and I feel bound to reverse the decree of the Court below. I am now merely deciding the question, as between the present litigants, upon the construction of the covenants contained in the lease, and which I hold clearly bind the tenant to pay the public water-rate; and I must be understood as not now pronouncing any decision upon the questions raised as to the construction of the words "owner" and "rack rent," as it is unnecessary for me, under the circumstances, to give any opinion relative to those points.

Decree reversed.

Court of Admiralty.

[R. reported by William G. Channey, Esq. Barrister-at-Law.]

THE ARBUTUS.

Collision—Compulsory pilotage—Consequential damages—The Merchant Shipping Act (17 & 18 Vict., c. 104)—Secs. 296, 297, 340, 353, and 388—Costs.

A steam-ship which does not keep at her proper side of the channel, when coming down or going up a river, and which starboards her helm when she should have ported, will, under ordinary circumstances, be held liable, in a suit for collision, to pay both damages and costs.

Where a vessel has come into collision with another vessel, owing to the gross negligence of those in charge of her, her owners will not be liable, in a

suit of collision, to pay damages to the owners of the injured vessel, if it appear that the vessel causing the damage was in charge of a duly licensed pilot at the time, and that the pilotage was by statute compulsory.

THIS was a suit of collision instituted by Messrs. Brundrit and Whiteway, of Runcorn, in the County of Chester, in England, registered owners of the schooner *Duke*, of Runcorn, 120 tons burthen, Samuel Owens, master, against the owners of the screw-steamer *Arbutus*, of Morecombe, William Payton, master, to recover damages for injuries alleged to have been sustained in a collision which took place between those vessels in Belfast Lough, on the 5th of February last, owing, as the petitioners alleged, to the gross negligence of the captain and crew of the steamer, &c. The Court was assisted, on the original hearing, by Lieutenant Ashley La Touche, R.N., and Lieutenant Crosby, R.N.R., as nautical assessors; and the case was heard, by consent, *visd voca*. The facts appear fully in the judgments of the Court.

Doctors Todd and Elrington, for the petitioners, cited *The Unity* (Swaby's Reports, 101), and contended that it was a case for ordinary damages, and also for consequential damages. They also cited, on the question of compulsory pilotage, *The Merchant Shipping Act* (17 & 18 Vict., c. 104, ss. 296, 297, 340, 353 & 388; *The Maria* (1 Wm. Rob., 95); *The Agricola* (2 Wm. Rob. 10); *The Liverpool Pilotage Act* (5 Geo.4, c. 73, s. 24); and *The Girolamo* (3 Hag., 169.)

Doctors Gibbon and Townsend for the steamer, relied on a twofold defence, viz., upon the merits, and secondly, that *The Arbutus* was, at the time of the collision, in charge of a duly licensed pilot under a compulsory statute, and that consequently her owners were not liable. They cited the *Belfast Harbour Act* (10 & 11 Vict., cap. 52, s. 101); *The Attorney-General v. Case* (3rd Price's Reports, 302); *Caruthers v. Sydsbotham* (4 Mau. & Sel. 77); *The Maria* (1st Wm. Rob., 95); *The Agricola* (2 Wm. Rob. 10); *The Johanna Stoll* (Lushington's Rep. 295) *The Waterford Pilot Act* (9 & 10 Vict., cap. 292); and *The Fama* (2 Wm. Rob., 184).

JUDGE KELLY (upon the original hearing, in addressing his assessors, said)—On Wednesday morning, the 5th of February last, between the hours of eleven and twelve o'clock, the weather being bright and clear, and the tide a little more than one quarter flood, a steam tug was proceeding up the Victoria Channel to the town of Belfast, with two vessels in tow about fifteen yards astern of her. One of them, the *Duke*, the petitioner in this cause of collision, a schooner of 120 tons, drawing nine feet three inches, a little on her port quarter; the other on her starboard, a one-masted flat named the *Ellen*, drawing seven feet; the wind was blowing a moderate breeze from W.N.W. to N.W., and there was a fresh in the water. Victoria Channel being a narrow one, the tug and her tow, complying with the provisions of the Merchant Shipping Act, kept to the starboard or north side of it in going up, and nothing was in sight until the master of the tug observed the screw steamer *Arbutus*, the defendant in this cause, about half a mile ahead,

coming down the channel rather on the north side of it, on her customary voyage from Belfast to Bordeaux, with passengers and goods. About the very same time, a smack, named the Nero, with a Belfast pilot on board, was standing over for the north shore on her port tack, but astern of the tug and her tow. The part of the channel in which the tug descried the Arbutus half a mile a-head is straight, and nothing was between them, both being at, or nearly at, the north side of it, and approaching each other at a combined velocity of about ten miles an hour, there being a fresh, and the rate of the tug being between three and four, and that of the Arbutus five miles an hour. In this state of things the master of the tug, according to his evidence, when the Arbutus was yet a half-mile distant, ported a little, and when she was a shorter distance—about thirty fathoms off—put his helm hard a-port, the Duke porting also, and hailed her to keep her own side. In less than a minute after porting, the tug, drawing four feet only, took the ground, and was on the ground, the Duke slantways astern of her under the influence of her port helm, when the Arbutus, then close abreast of them on their port side, clearing the tug, struck the Duke right amidships on her port side with her stem, cutting four or five planks right down above and below the water, and doing her other damage. Under the force of that blow the Duke drove the Ellen, which was alongside of her, ashore, and was herself obliged to hoist canvas and run ashore also to avoid sinking in the deep water, as she had already begun to fill. For that collision the Duke imputes the blame to the Arbutus in not having kept to her starboard side of mid-channel, in compliance with the statute, and in not having ported, as she should have done. The case of the Arbutus, not denying these facts, is, that the petitioners themselves were the cause of the collision, and for two reasons—first, for having ported when it was too late; next, for having ported when they should have continued on their course. With respect to the first, the evidence of Hutchinson, the pilot of the Arbutus, is, that he saw the tug and her tow right a-head about one mile and a quarter off, and the smack Nero further down, at the southward on her port tack, and heaving about on her starboard tack, laying pretty well up the cut; and that when he was between one-quarter and one half mile off the tug, she being right a-head, and the Nero standing on between the tug and the southern bank, he ordered his helm a-starboard, in order to pass to the north of the tug, as he had not room to pass to the south or at the port side of her, on account of the Nero; but that the tug coming on at full speed, when about one ship's length off, put her helm a-port, although he had waved to her to keep her course, and by so porting hove herself and her tow right over the Arbutus hawse, whereupon he ordered to reverse at full speed, but did not succeed in clearing them. Now, as already observed, the evidence of the master of the tug was, that immediately on seeing the Arbutus half a mile off, he ported a little, and then, when he was about thirty fathoms off, he put his helm hard a-port. The porting at the latter distance is here corroborated by Hutchinson, who said he was a ship's length off when the tug ported, the length of the Arbutus being 180 feet, which is

just thirty fathoms. But the material point for corroboration is, did the master of the tug port when he was the half-mile off?—or, in other words, did he port before the Arbutus starboarded, as the latter was done only when the distance between them was between half and one quarter of a mile. Now the evidence of James Mount, the man at the wheel of the Arbutus upon the occasion, leaves no doubt whatever upon the matter. It is this—"When the tug came close to us she ported, and he got orders to starboard. Then the tug put her helm hard a-port. That was the first and only order he got to starboard." With such evidence given by their own helmsman, it seems impossible that the Arbutus can maintain her plea that the tug ported too late, even if the Arbutus can succeed in proving that she herself was correct in having starboarded, her own witness having thus so positively sworn that the tug had ported before the Arbutus starboarded. Another point bearing on this part of the case is also to be observed upon. Holmes, the pilot of the Duke, has sworn that after he had ported her helm he hailed the Arbutus, then coming on under a starboard helm, to port and reverse, and that he then saw her bows go off a little to starboard, but not enough to clear the Duke, as she struck her in the waist a slanting blow. Now this is admitted most distinctly by Hutchinson, the pilot of the Arbutus, his evidence being that, "having starboarded two or three minutes before the collision, he was heading to the north side of the channel and had brought the tug on his starboard bow, and was keeping her on it when she ported; and he then told his mate to put his helm a-port and reverse—that she had not time to reverse, but that her head came to starboard under the port helm, and that was before the collision." Of course, then, there can be no doubt upon the point—an important and material one in its bearings upon the case—and, independently of other views of it, showing at the time the full consciousness of this pilot Hutchinson as to the proper course it was his duty to have pursued that morning. I will, however, ask your nautical opinion, on all these circumstances. There now is to be considered the second plea of the Arbutus, namely that the tug should not have ported, but have continued her course, as there was an unavoidable necessity for the Arbutus to keep to the north side of the channel, there being plenty of room for her, and to starboard her helm to escape the risk of running into the smack Nero, at the time beating up the channel, and that she was justified in so doing to give the tug and her tow greater room. Now this plea, which apparently assigns three distinct grounds for the course pursued by the Arbutus, is in regard of the first and last of them very untenable. If the object of the Arbutus had in reality been to give the tug greater room, she should have left to her the north side, where, according to her own admission, there was more room than to the southward; and that the more readily, because under clause 297 of the Merchant Shipping Act, the northern was the proper side for the tug and the southern the proper side for the Arbutus; and under the 296th section of that Act, the Arbutus was not justified in starboarding for such reason, but should have ported and passed the tug upon the port side. The plea in question then is to be considered

merely with reference to the averment, that there was an unavoidable necessity to escape the risk of running into the smack Nero. Unquestionably there was one point of time in the brief three or four minutes during which this most indefensible calamity was being inflicted, when, as the pilot and mate of the *Arbutus* both admitted, that they could have passed to southward of the tug in safety, and they assigned no reason whatever for not having then done so, and so arose the circumstances which followed. It will be borne in mind that the pilot of the *Arbutus* admitted he saw the *Nero* heaving about on her starboard tack when he first saw the tug. The pilot of the *Nero* deposes as follows:—"That he had gone as close to the north shore as he could go in order to have a long reach when he went round on that starboard tack, and that tacking under the stern of the tug, and going a-head of them, he stood across to the south to run out of the road; he then saw the *Arbutus* coming down five or six lengths of herself a-head of the tug, and rather on the north side. The *Arbutus* was three or four lengths off the *Nero* when the latter was in mid channel, standing right on to the south bank to keep clear of her—the channel there being 250 feet broad. The *Nero* was her own length a-head of the *Arbutus* when she passed her just going to run ashore to keep out of her way, and at that time there was 150 feet of water between her and the *Arbutus*, and that was before the collision. Immediately after running ashore he looked over to see what had happened, as he had seen the *Arbutus* heading right for the tug, or for the northward of her, and he saw the *Arbutus* backing astern from the Duke, but he had not seen the blow struck." The pilot of the *Arbutus*, so far from contradicting or denying, actually confirms that evidence, for he admits that when the *Nero* was abreast of the tug, and on his own starboard, there were 100 feet of water clear between the *Nero* and the tug, and that the *Nero* was still running to the southward, and more out of the way. Now, it was at that very juncture that the *Arbutus*, twenty feet only in beam, with such admitted as well as increasing sea-room between the tug and the *Nero*, starboarded to go to the northward of the tug, where, according to the mate's evidence, there was but sixty feet. I will ask your opinion, if these circumstances embodied an unavoidable necessity. The result of these latter portions of the evidence, when taken into consideration with the running ashore of the tug and her tow immediately before and after the collision, shows how close they must have been to it all along, and that was the evidence of the master of the Duke. It also strongly leads to more than surmise that the course adopted by the pilot of the *Arbutus* in selecting the northern side, was the carrying out of his predetermination, formed when he took charge of the vessel on the morning in question. I will now read the two sections of the Merchant Shipping Act already referred to, and begging you to keep them in mind, put the following questions:—

First—Was the tug with her tow justified in porting, or should she have continued her course?

Second—Did she port in time?

Third—Was the *Arbutus* justified by unavoidable

or any necessity in starboarding and going north of the tug in order to escape the risk of collision with the *Nero*?

Fourth—Was there sufficient sea-room to pass southward of the tug at the time the smack *Nero* was standing over to southward when the *Arbutus* put her helm to starboard?

Fifth—What course should the *Arbutus* have pursued under all the circumstances?

Sixth—To what party do you attribute the blame of the collision, stating your reasons?

His Lordship and the assessors having retired to chamber to consider and confer, returned in an hour into Court, when the following were the answers given to the several questions:—

To the first question—The tug was fully justified in porting, not only to keep on the proper side, but to avoid the risk of a collision.

To the second—We are quite satisfied that the tug did port in time.

To the third—The *Arbutus* was by no means justified, there being ample space to the southward of the tug for the *Arbutus* to pass without any risk of collision.

To the fourth—We are perfectly satisfied that the *Arbutus* had sufficient room to pass to the southward without risk or injury to the vessels on either side when she starboarded.

To the fifth—Having seen the vessels in good time and at a reasonable distance, and having had ample sea-room all through, the *Arbutus* should have kept to her proper side instead of starboarding.

And to the sixth—We attribute the blame of the collision solely to the *Arbutus* for not having kept to her proper side when coming down, and for starboarding when she should have ported.

JUDGE KELLY.—Agreeing in all the opinions now expressed, and under all the circumstances of the case, I pronounce for the petitioners in the cause, subject however, to whatever conclusion I may arrive at upon the plea of exemption on the ground of compulsory pilotage, relied upon by the defendants, and yet to be the subject of argument.

The case was subsequently re argued on the question of compulsory pilotage.

JUDGE KELLY, in pronouncing judgment on that point, said,—This was a cause of collision, in which proceedings were instituted on the part of the schooner *Duke*, of Runcorn, against the screw steamer the *Arbutus*, of Morecombe, to recover damages for injuries sustained by her in consequence of a collision between those vessels in Belfast Lough, on the 5th of February last. The Court was assisted at the original hearing by assessors, and, being so advised, found that the blame of the collision was to be attributed solely to the person in charge of the *Arbutus*, for having erroneously put her helm to starboard; and further found, both on the admission of the petitioners themselves and on all the evidence, that the *Arbutus*, on the morning in question, was under the charge and management of a qualified pilot—that the helm had been starboarded by his order, the officers and crew acting merely in obedience thereto—and that the pilot alone was in fault. Under this state of circumstances the question arose, and has been ably argued on both

sides, whether or not, under the Belfast Harbour Act and the Merchant Shipping Act, as pleaded by the owners of the *Arbutus*, these owners are to be relieved of their liability to make good the loss so occasioned by the act and fault of their pilot, as both these statutes made it compulsory upon them to employ a qualified pilot; and the latter one, in section 388, expressly enacts "That no owner or master of any ship shall be answerable to any person whatever for any loss or damage occasioned by the fault or incapacity of any qualified pilot acting in charge of such ship within any district where the employment of such pilot is compulsory by law." Now, it has been considerably said that this statute should not be extended past its strict construction; for, although founded on the principle of natural justice, that when masters are compellable to take pilots on board, owners should not be responsible for the acts of strangers to whom they are forced to commit the management of their vessels, and over whom they have no control; yet it is at the same time to be remembered that it deprives of their remedy persons who have suffered injury. A Court, therefore, ought to be well satisfied that the shipowner claiming the exemption has brought himself distinctly within the several conditions imposed by the statute before any declaration of his being entitled thereto be made in his favour. These conditions are, that there was a qualified pilot on board at the time—that such pilot was solely in charge—that he was exclusively in fault, and that in the district in which the collision occurred the employment of a pilot was compulsory by law. In the present case the Court is spared the consideration of the three former requirements, having been parts of the finding already come to in this cause, and has to come to a conclusion upon the last named only, namely—whether the employment of the pilot was compulsory or not. The advocates for the petitioners, confining their arguments very properly to this question, urged in regard of it two objections—first, that the case of the *Arbutus* was deficient in substance for not having pleaded or proved in the first instance that the master was not himself a certified pilot, and that in consequence of that defect they should be debarred the plea of compulsory pilotage under the Merchant Shipping Act, and secondly, that under the Belfast Harbour Act pilotage was not compulsory at all. The sections of the Merchant Shipping Act under which the first objection is taken are sections 340 and 353; the former enacting that "The master or mate of any ship may apply to any pilotage authority to be examined as to his capacity to pilot the ship of which he is master or mate, or any one or more ships belonging to the same owner; and, if found competent, a pilotage certificate may be granted to him, and such certificate shall enable him to pilot such ship within the specified district without incurring any penalties for the non-employment of a qualified pilot." And the latter (the 353rd), "That every master of an unexempted ship navigating within any district, who, after a qualified pilot has offered to take charge of such ship, himself pilots such ship without possessing a pilotage certificate enabling him so to do, shall for every such offence incur a penalty of double the amount of pilotage demandable

for the conduct of such ship." Now, it is clear that under the former section a certified master incurs no penalties for the non-employment of a qualified pilot, and that therefore in such case pilotage is not compulsory; and that under the latter section an uncertificated master does incur the penalties, and that pilotage is compulsory. Such being the law, the objection is, that the plea of the defendants, which simply averred "that the *Arbutus* was at the time under the charge of a qualified pilot," should have previously averred, as set out in the 353rd section, "that her own master did not then possess a pilotage certificate;" the intended and avowed object of the objection being, that in the absence of the latter the defendant had not entitled himself to plead or avail himself of the former averment—that is, of the immunity of compulsory pilotage. To this objection the defendants have argued, in reply, that they are not bound to prove a negative, and that it comes too late, and the Court can well admit the reasonableness, and even the strength, of this reply, when it observes that the petitioners have laid no ground, by affidavit or otherwise, to induce a presumption that the master of the *Arbutus* had in his possession, at the time in question, a pilotage certificate, or that their own rights, as ascertained by the Court in its finding on the original hearing, were likely to be defeated by the evasion of the defendants in pleading their case. No difficulty lay in the way of the petitioners, either in ascertaining the fact as to the pilotage certificate, the sections 387 and 349 of the Merchant Shipping Act having made ample provision for the registration and publication of the names of all persons licensed by any pilotage authorities to act as pilots. The Court, however, guiding itself by the rules and practice of pleading, will examine whether the averment contended for by the petitioner ought not rather to have been their own reply to the plea of the defendants than part of that plea itself, being new matter and in derogation of it. In *The Agricola*, (2nd Wm. Rob. 10), where, as in this case, the petitioners merely denied that the Local and General Pilot Act under which the defendants pleaded their exemption, applied, the Court said that their mere denial was defective, inasmuch as it was intended to deprive the owners of the *Agricola* of their exemption under the statute, upon the ground that the pilot was voluntarily and not compulsorily taken on board; it should have been expressly pleaded by them, together with the reasons. This case was further strengthened by a much later one—*The Killarney* (Lushington, 202). In *The Killarney* the petitioners sought to deprive the defendants of their plea of exemption on the ground of compulsory pilotage, by showing that their master had himself a pilotage certificate. And how did they proceed?—By formal pleading, and by raising that issue in their reply to the plea of the defendants. Such is the course then which, in the opinion of this Court, the petitioners here should also have adopted, and not have sought to raise a question of serious importance and of first impression—not even upon motion—not upon notice even, but on a mere surmise long after the trial of the cause, and not until after the argument upon the question at issue had been fully opened by the defendant's advocates. The Court therefore overrules the objection, remitting the

defendants to the full benefit of their plea under that 333rd section. There is now for consideration the objection raised to the Belfast Harbour Act—namely, that under it pilotage is not compulsory. Two sections of this Act—101 and 104—contain the enactments referred to in support of this objection. By the former the master or owner of vessels coming into or going out of the port, harbour, or river of Belfast, shall, for every such vessel, pay as and for pilotage on entering or on leaving a certain rate or sum fixed by a schedule referred to in the Act; and by the latter it is enacted that in case any master or owner who is required by the Act to employ a pilot shall refuse to take on board and employ any such who should offer his services, such master or owner shall pay double pilotage over and above any penalty he may be liable to. Now the argument is, that as the latter clause inflicts the penalty only on such recusant masters and owners as are required by the Act to employ pilots, and as in the only other clause on the subject—the 101st—the compulsion is merely to pay pilotage, not to employ pilots—the penalty falls to the ground, and there can be no compulsion. But the full reading of the section (101st) will set this argument in its proper light; that reading in full, and not as the argument had it in part only, “That every master and owner of a vessel on its entering or leaving the said port, shall pay to the Commissioners of the Harbour as and for pilotage thereof, a rate or sum proportioned to the tonnage of the vessel, and the class of pilot employed by such vessel.” Thus in precise words making compulsory, through the Commissioners of the Harbour, the payment of pilotage for each vessel to those pilots only who were employed by it—compelling them to pay those whom they were required under the Act to employ—for under the Act the whole class of pilots were created and regulated, and to them was exclusively committed the pilotage of the harbour. In *Caruthers v. Sidebotham* (4 Man. & Sel.) weaker expressions were considered compulsory—the words of the Liverpool Act, the subject of that decision, being simply that, if no pilot be taken pilotage shall be paid; and in *The Maria* (1 Wm. Rob. 95), the Court says, “Is not making the neglect to take a pilot punishable with payment of the pilotage itself a compulsion upon the owners?” Suppose the statute had mentioned ten times that amount the difference would be only in the degree of compulsion, but not in the compulsion itself. To these may be added *The Malvina*, which was before this Court and in which the very same question was raised upon the Waterford Harbour Act, identical in its pilotage clauses with the Belfast Act; and the Court, after a very learned argument, decided in favor of the pilotage being compulsory. Under these reasonings the second objection of the petitioners must then be disallowed; and the Court being satisfied that the defendants have fully established their case and claim of exemption under the 398th section of the Merchant Shipping Act, dismiss them from further attendance on this suit, but without costs.

Proctor for the petitioners—Mr. Richardson.

Proctor for the defendants—The Queen's Proctor.

Court of Appeal in Chancery.

[Reported by Edmund T. Bowley, Esq., Barrister-at-Law.]

[BEFORE THE LORD CHANCELLOR AND THE LORD JUSTICE OF APPEAL.]

IN THE MATTER OF THE ESTATE OF HERCULES ST. GEORGE, OWNER; EX PARTE ARTHUR ST. GEORGE, PETITIONER.—May 10, 13.

Term—Jointure—Arrears—“Direction in writing.”

By a deed of settlement, executed in contemplation of the marriage of A. with B., A., the settlor, granted the lands of X. to trustees, to the use of himself for life, with remainder after his death to the use of the trustees for a term of 99 years, if B. should so long live, upon trust, to pay an annual jointure of £400 to B. out of the rents and profits of the lands, and as to the surplus rents, upon certain trusts for the issue of the marriage. It was also provided by the settlement that if the rents and profits should at any time during the term of 99 years be insufficient to pay the jointure of £400 per annum, it should be lawful for the trustees, by the direction in writing of B., to raise the deficiency by mortgage or demise of the lands for any term of years. There was no issue of this marriage. A having died, B., by her will, after reciting that there were due to her arrears of her jointure amounting to 1200L., bequeathed these arrears to C. A petition for a sale of the fee of the lands of X. was presented by the executor of B.:—Held that B.'s will did not amount to a direction in writing to the trustees within the meaning of the language of the settlement, and that there was no estate in the lands which the Court could sell for the purpose of raising the arrears of the jointure.

THIS was an appeal brought against an order of Judge Dobbs of the 14th of February, 1863, by which the cause shown by Edmond Power and Thomas Walsh against the conditional order for sale in this matter was allowed with costs. The charge on foot of which Arthur St. George, the appellant, claimed to be entitled to a sale in the Landed Estates Court, was created by a settlement dated the 3rd of March, 1830, which was executed in contemplation of the marriage of Robert St. George, who was then seised in *quasi fee* of the lands mentioned in the petition for sale, under a lease of lives renewable for ever, bearing date the 1st of May, 1793. This settlement was made between the said Robert St. George of the first part, Rebecca Simpson, his then intended wife of the second part, and Thomas Reeve and Theophilus St. George of the third part. After reciting the title of the said Robert St. George to the lands mentioned in the petition for sale, and stating that a marriage was intended to be solemnized between the said Robert St. George and Rebecca Simpson, and that it was agreed upon the treaty therefor that the said Robert St. George should convey the said premises to the said Thomas Reeve and Theophilus St. George, their heirs and assigns, to the uses and upon the trusts thereafter declared of the same, and particularly to the intent to secure a jointure of £400 per annum to

the said Rebecca Simpson for her natural life in case she should survive her said intended husband, and subject thereto for the benefit of the issue of the said intended marriage as thereafter declared and contained, the said Robert St. George did by the said indenture grant and release the lands in the petition mentioned, that is to say, the lands of Clomanta, Balief, and Adamstown, otherwise Knocknamuck, to the said Thomas Reeve and Theophilus St. George, and their heirs, to the use, from the date of the said intended marriage, of Robert St. George for life, with remainder to the said trustees and their heirs during the life of the said Robert St. George, to preserve contingent remainders, with remainder after the decease of Robert St. George to the use of the said trustees, their executors, administrators, and assigns, for the term of 99 years, to be computed from the death of the said Robert St. George if the said Rebecca Simpson should be then living, and thenceforth fully to be completed and ended, *if the said Rebecca Simpson should so long live*, upon trust to receive the rents thereof, and after paying all expenses, to retain the full annual sum of £400, and pay the same to the said Rebecca Simpson as a jointure, for her separate use and benefit, and be possessed of the surplus rents upon the trusts thereafter mentioned; and subject to the said term and the trusts thereof to the use of the child, if only one; or if more than one, then all or every the children of the said intended marriage as tenants in common in *quasi* tail with cross remainders between them in *quasi* tail, with an ultimate reversion to the use of the right heirs of Robert St. George. The trusts of the surplus rents and profits raisable under the trusts of the aforesaid term were declared to be, that the trustees should invest the same in certain securities therein prescribed, and invest the interest thereof by way of accumulation and stand possessed of the said trust funds and accumulations upon trust, after the decease of the said Rebecca Simpson, for the child if only one, or if more than one, for all the children of the intended marriage as tenants in common, the shares of sons to be vested at their respective ages of twenty-one years, or deaths under that age leaving issue at their respective deaths, and the shares of daughters to be vested on attaining the said age or on previous marriage, and to be payable as soon as conveniently might be after said vesting, and the death of the said Rebecca Simpson, with benefit of survivorship to the other or others of the said children, in case any of them should die before they had attained a vested interest in the said funds. And it was thereby declared that in case there should be no child of the marriage who should obtain a vested interest in the said fund, (an event which happened) that the trustees should transfer the said trust fund and accumulations to the executors or administrators of the said Robert St. George as part of his personal estate. And it was thereby provided that in case by any events whatsoever, the rents and profits of the said premises should not during the continuance of the said term of 99 years be sufficient to raise the said jointure of £400, that then and when and as the same should so happen it should be lawful for the trustees or trustee for the time being under the said settlement, *by the direction in writing of the said Rebecca*

Simpson, to borrow and take up at interest the amount of any deficiency from time to time of the surplus rents or mortgage of all or any part or parts of the said premises, and to secure the sum or sums from time to time so to be borrowed with lawful or other interest for the same by demising the said hereditaments and premises or any part or parts thereof to the person or persons whomsoever so advancing the said sum or sums for any term or terms of years redeemable on payment of the sum or sums so to be borrowed and the interest thereof. The deed further contained covenants for title on the part of Robert St. George in the usual form, and amongst others that the premises should continue and be "to the several uses upon the several trusts, intents and purposes, and under and subject to the several provisions, declarations and agreements therein limited, expressed, declared, and contained, of and concerning the same respectively." The marriage between Robt. St. George and Rebecca Simpson was duly solemnized shortly afterwards, but of it there never was any issue. Robert St. George, the settlor, made his will some time between the years 1830 and 1835, and after reciting that he was seized of or entitled to the lands of Balief, Clomanta, Knocknamuck, Adamstown, and Kyle, charged however with a jointure of £400 a year for his wife, Rebecca, in case she should survive him, the testator devised the said lands, subject to the said jointure and to the other uses of his marriage settlement, to Sir Richard B. St. George and Francis St. George, their heirs and assigns, upon trust, out of the annual rents and profits of the said lands, to pay the head rents and the said jointure of £400 per annum to his wife, and upon trust to permit and suffer his said wife to hold the house, offices, and garden at Balief together with the lawn, provided she should elect and choose to take the same, with the use of all his household furniture, plates, books, and other household effects for her life, in lieu and satisfaction for £100 per annum of her said jointure, and then in trust to permit and suffer the testator's nephew, Hercules St. George, to receive the rents of the said lands for his life, and after his decease to permit his first and other sons successively and their heirs male to receive the said rents, and in default of such issue, in trust for Theophilus St. George, in *quasi* tail male with remainder to the testator's right heirs; and, after making some other bequests, the testator bequeathed the residue of his property, real and personal, to the said Hercules St. George, his heirs, executors and administrators, and appointed him sole executor. Robert St. George died in the year 1840, and his will was duly proved by Hercules St. George in May, 1841. Rebecca St. George, the testator's widow, elected to take the benefits given to her by the will in lieu of £100 per annum, portion of her jointure, which thereby became reduced to £300 per annum. By indenture dated the 9th of October, 1844, made between Hercules St. George of the first part, Rebecca St. George of the second part, Charles Key of the third part, John Maher of the fourth part, and William Dunphy of the fifth part, the said Hercules St. George in consideration of the sum of £1500 paid to him by the said Charles Key, granted to him a rent charge of £102 12s. 6d. for

the life of the said Hercules St. George, charged on the lands of Knocknamuck, subject to redemption on payment of the said sum of £1,500 with interest, and the said Hercules St. George with the consent of Rebecca St. George demised to John Maher, his executors, administrators, and assigns, the said lands for a term of 99 years, provided Hercules St. George should so long live upon trust to secure the payment of the said rent charge, provided that if any default should be made in the payment, it should be lawful for Charles Key to issue execution, or to take such other proceedings as he might be advised for a recovery of any judgment to be entered upon a certain bond and warrant of attorney for £3,000, executed by Hercules St. George to Charles Key as a collateral security for the said sum of £1500; and Rebecca St. George thereby covenanted with the said Charles Key that she and her assigns should from time to time during the life of Hercules St. George or until full payment of the sum of £1500 and interest, postpone payment of her jointure of £400 per annum, so that the trusts therein declared should take precedence of her jointure. By a certain other indenture dated the 24th of December, 1855, and made between Thomas B. St. George of the first part, Hercules St. George of the second part, Rebecca St. George of the third part, and Thomas Walsh of the fourth part, after reciting *inter alia* that Rebecca St. George had at the request of Hercules St. George agreed to postpone the annual sum of £200, part of her jointure of £300 per annum, and all arrears thereof then due. It was witnessed that Thomas B. St. George at the request of Hercules St. George assigned to Thomas Walsh a judgment of Hilary Term, 1843, obtained by the Rev. John Browne against Hercules St. George in the Court of Exchequer, for £3000 debt besides costs, of which the sum of £1500 principal money was then due, subject to redemption on payment to the said Thomas Walsh of a sum of £1130 therein stated to be due to him by Hercules St. George and interest therein; and by the said indenture Hercules St. George granted to Thomas Walsh an annuity of £105 17s. 5d. during the life of Hercules St. George charged on all the lands mentioned in the petition for sale, upon trust to apply the same in payment of the premiums on certain policies of insurance and in liquidation of all interest to become due on the before mentioned principal sum of £1130, and Rebecca St. George thereby covenanted with Thomas Walsh that she would postpone the annual sum of £200 of her jointure of £300 per annum and all arrears thereof, then after to accrue due to the said judgment for £1500, and the yearly rent-charge of £105 17s. 5d. Provided that nothing therein contained should encumber or affect the priority of the sum of £100 yearly, the remaining portion of her jointure, or the right of Rebecca St. George to recover the same off the lands or otherwise; but that this annuity of £100 should have precedence over all the charges, head rent, and tithe rent charge alone excepted. Rebecca St. George, the jointress, died in September, 1861, having previously made her will dated the 31st of May, 1858, and thereby after reciting that there was a sum of £12.0 due to her by Hercules St. George, being arrears due to her of her jointure, chargeable on

the lands of Balief, Clomanta, and Knocknamuck, in the county Kilkenny, she bequeathed the same together with all the arrears of her jointure that should be due at the time of her decease to Margaret Taylor, to her sole and separate use, and she appointed Arthur St. George, the appellant, executor. Margaret Taylor, previous to the death of Rebecca St. George, but after the date and publication of her will, married Hercules St. George, and both were living at the time of the present suit, but there had been no male issue of the marriage. On the 5th of May, 1862, the appellant, as executor of Rebecca St. George, filed a petition in the Landed Estates' Court for the sale of the lands included in the settlement of 3rd March, 1830. A conditional order for sale having been granted, cause was shown against it by Sir John St. George, an infant, by Edmond Power, his guardian *ad litem*, and also by Thomas Walsh. Sir John St. George who was the son of Theophilus St. George named in the will of Robert St. George, the settlor, claimed to be first tenant in *quasi* tail male of the lands subject to the life estate of Hercules Langrishe St. George and subject to the contingent estates in *quasi* tail male limited to the issue male of Hercules Langrishe St. George, and Thomas Walsh claimed not only under the deed of the 24th of December, 1855, but also as assignee of the rights of Charles Key under the deed of the 9th of October, 1844. The points relied upon by Sir John St. George and Thomas Walsh in the affidavit showing cause, were substantially as follows:—First, that on the true construction of the settlement of the 3rd of March, 1830, the jointure was charged only on the term of 99 years determinable on the death of Rebecca St. George, and that the term having expired, the arrears of the jointure were not any charge on the land. Second, that even if such arrears were charged on the lands after the death of the jointress, she had, by the execution of the deeds of the 9th of October, 1844, and the 24th of December, 1855, so dealt with the same as to preclude herself from raising them by a sale. Third, that there was not, in fact, a deficiency of rents during the term to meet this jointure. The petitioner having moved to make absolute the conditional order for sale, notwithstanding the cause shown, and there being no sufficient evidence on either side as to the deficiency or sufficiency of the rents of the lands to meet the jointure during the term, and it being admitted that if the petitioner's right to a sale depended on whether there had or had not been such deficiency, there should be an account of the rents, at the suggestion of the learned judge the question argued was, whether, assuming the rents to have been in fact deficient, and also assuming that if accounts were taken it would appear that some arrears were in fact due to the petitioner after giving credit for the sums received by Charles Key and Thomas Walsh, the petitioner was entitled to have these arrears raised by a sale of the lands. By an order dated the 14th of February, 1863, after stating that the Court was of opinion that even if the rents and profits had been insufficient to meet the jointure on the true construction of the settlement, and the will of Rebecca St. George, the arrears were not charged nor chargeable on the inheritance, and the

cause shown by Edward Power as guardian of Sir John St. George, and by Thomas Walsh, was allowed with costs. From this order Arthur St. George now appealed.

The Solicitor-General (with him *Serjeant Sullivan* and *Palles*) for the appellant.—Having regard to the agreement cited in the settlement that the lands were to be conveyed to the trustees particularly with the intent to secure the jointure to Rebecca St. George, and considering also the power given to the trustees to raise the arrears of the jointure to the extent of the deficiency of the rents of the lands for any term, it is evident that the settlement contemplated charging, and did charge, the jointure upon the *quasi* fee, although the rents of the term were rendered the primary fund for its payment.—*In re Tyndall's Estate* (7 Ir. Chan. Rep., 12; s.c., on appeal, ib., 181); *Harrison v. Mason* (12 Ir. Eq. Rep., 245); *Hull v. Hurt* (2 John. & Hem., 76); *Phillips v. Gutteridge* (32 Law J., N. S., Ch., 1). Upon the construction adopted by the Court below, the trustees could, at their discretion, either charge the inheritance with the arrears, or leave it uncharged, and thus alter arbitrarily the rights of the parties under a power, which, in its meaning, contemplates not the charging of an estate, but the raising of a sum previously charged out of an estate on which it had been charged. The paramount object of the deed being to secure the jointure, the devisees of the settlor, Robert St. George, cannot take anything except subject to the jointure; and the deed amounts at least to a covenant or agreement by Robert St. George, that the jointure should be paid out of the lands. Moreover, if, upon the legal construction of the deed, the jointure is charged only on the term, there is sufficient intrinsic evidence in the deed to induce a Court of Equity to reform it, and, therefore, for the purpose of the present proceeding, it must be taken as reformed. Even though the jointure should not have been charged on the lands by the settlement, it has been made a charge upon them by the will of Robert St. George, which was a ratification of the jointure, and which created a new trust out of the annual rents and profits of the estate. Rebecca St. George having by her will expressed a clear intention not to let the arrears sink, her will must be taken as “a direction in writing” to the trustees to raise the deficiency within the meaning of the language of the settlement. As to the question of the deeds of the 9th of October, 1844, and the 24th of December, 1855, the former did not affect the lands of Balief or Clomanto, and the latter expressly reserved the rights of the jointress to £100 per annum, part of the jointure. Neither of the deeds could operate either as an equitable or legal release of the jointure, and consequently if the arrears were at all a subsisting charge on the lands, they were to the extent of one-third (i.e., the arrears of the £100 per annum excepted in the deed of the 24th of December) charged upon the lands in priority to any claims under these deeds. The entire of the arrears would still be a charge on all the lands, although the priority of part of them might to a certain extent be interfered with by these deeds.

Brewster, Q.C., (with him *Warren, Q.C.*, and *F. White*) for the respondent, Sir John St. George.—

The appellant appears to found his case on one or other of three grounds, viz., that the jointure was charged upon the inheritance by the recital contained in the settlement of the 3rd of March, 1803; by the operative part of the same deed, or by the will of Robert St. George. The question then is, whether by any legitimate construction the inheritance of these lands can be considered as charged with the arrears of the jointure. Now, the insertion in the settlement of a power to the trustees to raise any deficiency of the rents to meet the jointure by mortgage or demise of the inheritance, if directed in writing so to do by Rebecca St. George, clearly shows that it was not the intention of the parties to the settlement that the arrears of the jointure should be charged upon the inheritance in any way other than by the exercise of this power by the trustees in the manner so provided. There is nothing in any part of the settlement to show that there was any mistake or omission in it, or to induce a Court of Equity to reform it. On the other hand, there is intrinsic evidence that the deed was framed designedly in the manner in which it stands. That it was not the intention of the parties to the settlement that the inheritance of the lands should, after the death of the jointress, be charged with the arrears of the jointure by force of the settlement alone, without any further act on her part, or on that of the trustees, is confirmed by the circumstance that considerable property, to which she was entitled in her own right, was thereby settled to her separate use and sole appointment, and, in default of appointment, to her next of kin. There is no covenant in the settlement on the part of Robert St. George for the payment of the jointure, or that the rents would prove sufficient to pay it in full; nor is there any recital or statement of the value of the lands, nor any indication that it was the paramount object of the deed to secure the jointure in any other way than by devoting to its payment the entire of the rents during the lifetime of the jointress, and empowering the trustees, in case she should think fit to direct them, to raise the deficiency out of the inheritance. As to the will of Robert St. George, it only devises the lands “subject to the said jointure and the other uses of the said settlement,” and does not charge or purport to charge the lands with the jointure any further or otherwise than they had already been charged by the settlement. Again, the conduct of Rebecca St. George in postponing her jointure to the charges created by Hercules St. George under the deeds of the 9th of October, 1844, and the 24th of December, 1855, proves that she never intended that the arrears should be raised by mortgage or devise of the lands.—*Baker v. Baker* (6 H. of L. Ca., 616); *Earle v. Ballingham* (24 Beav. 445); *Addcott v. Addcott* (29 Beav. 460); *Stelfox v. Sugden* (1 John. 234); *Scott v. Clements* (8 Ir. Ch. Rep. 1); *Phillips v. Gutteridge* (32 Law Jour., N. S., Ch., 1; 1 New Rep. 4) *In re Gardiner's Estate* (11 Ir. Ch. Rep. 519).

Warren, Q.C., on the same side.—The wife of the settlor is not more an object of the settlement than the issue of the marriage, and the Court has no right to prefer one set of objects to another. The jointure was only charged on the term, and as that has now come to an end, the arrears are not a charge

upon the inheritance.—*Foster v. Smith* (1 Phil. 629; 15 Law J., N. S., Ch., 183).

Flanagan, Q.C., for Thomas Walsh, was not heard.

Serjeant Sullivan, in reply, cited 2 Sugden on Powers, 7th edition, 114.

THE LORD CHANCELLOR.—This case came before the Court on an appeal from an order of Judge Dobbs by the personal representative of Rebecca St. George, who sought to obtain a sale of this property in the Landed Estates Court for the purpose of raising the arrears of a jointure granted to Rebecca St. George by a settlement bearing date the 3rd of March, 1830. Now, there is no doubt but this indenture of settlement gives her £400 a year during her life, and further contains expressions of an intention that it should be paid certainly and fixedly for that period, but, in order to secure it, a term of 99 years is vested in trustees from the date of the settlor's death, "if the said Rebecca Simpson shall so long live." Whatever may have been the intention of this instrument, it appears to me that the order of the Court below was right. There is a clause, however, in the settlement which was insisted on as an argument in support of the appellant's case, viz., "In case by any events whatsoever the rents and profits of the said premises should not, during the continuance of the said term of 99 years, be sufficient to raise the said jointure of £400, that then and when, and as the same should so happen it should be lawful for the trustees or trustee for the time being under said settlement, by the direction in writing of the said Rebecca Simpson, to borrow and take up at interest the amount of any deficiency from time to time of the surplus rents on mortgage of all or any part or parts of the said premises, and to secure the sum or sums from time to time so to be borrowed, with lawful or other interest for the same, by demising the said hereditaments and premises, or any part or parts thereof, to the person or persons whomsoever so advancing the said sum or sums for any term or term of years, redeemable on payment of the sum or sums so to be borrowed and the interest thereon." Mrs. Rebecca St. George, however, in her lifetime did not give any direction to the trustees to raise the arrears of her jointure. It may have been the intention of the parties to the settlement that she might or might not require the arrears to be raised, or allow them to sink in the estate. Such appears to be substantially the meaning of the trust. It was urged that the want of a direction to the trustees might be supplied, or that the will of Mrs. St. George was equivalent to such a direction. Let us consider simply what is done—what is the nature of the will. This lady bequeaths the arrears of her jointure to a third party; and it appears to me that it would be extremely hard to put on this the construction of a direction in writing within the provision of the settlement, this not being in any way addressed to the trustees. But finally, what is this estate? This is a petition to sell the fee of the estate. The trustees have not created any term under the settlement. We do not know what to sell. It would be error on the face of the record to sell the life estate of Hercules St. George; and, in fact, we have nothing that we can sell. Whether it would be practicable or tenable to

sell the estate, if the matter were otherwise brought before the Court, we cannot say, but we do not give any encouragement to the appellant to do so. The fee cannot now be sold, and therefore the appeal must be dismissed.

THE LORD JUSTICE OF APPEAL.—The trustees have never exercised their power of creating a term of years, and the term of 99 years is clearly at an end. There is no certain estate of which a sale could be made. Whether the executor could effect a sale by bringing the trustees before the Court I cannot say; there is not any subsisting estate possible to sell for raising the arrears of the jointure.

Order below affirmed.

Court of Common Pleas.

[Reported by J. Field Johnston, Esq., Barrister-at-Law.]

WHALEY V. MASSEKEENE.

Quare Impedit—Evidence—Admissions against interest—What may be pleaded in evidence under non concessit—Fraud.

Upon the trial of an action of quare impedit the plaintiff went into a rebutting case, and, as evidence of an award by which all matters in dispute between the party under whom he claimed, and the party whom the defendant represented, had been adjusted, offered in evidence two documents, and a duplicate of one of them, which purported to be receipts, dated in the year 1829, acknowledging money paid by the party in the year 1801 pursuant to the award. They were signed by a person describing himself as surviving partner of the firm to which the money was paid, and which firm were also stated in them to have been the attorneys for the party between whom and the plaintiff's ancestor the award was made, and one of the documents expressly professed to be a substitute for a previous lost receipt. The latest evidence of any litigation was in the year 1805. Held (Keogh, J., dissentiente,) that these documents were admissible in evidence to prove not only the receipt of the money, but the fact of the award.

Held, also, (Keogh, J., dissentiente,) that the objection that there was no extrinsic evidence of the character of the party signing the documents not having been taken at the trial, could not be relied on upon the argument of the bill of exceptions.

Upon the plea non concessit, the judge at the trial refused to leave a question of fraud to the jury. Held (the judge himself concurring), that the judge was wrong.

Held, also, that the want of a valuable consideration in the conveyance, want of possession, pendency of a suit, non-presentation upon vacancies in the living, and a conveyance and re-conveyance between the plaintiff and a third party during the continuance of the suit to set aside the original conveyance, were evidence to go to a jury of fraud in the procuring of the original conveyance.

THE first count of the declaration was as follow—The Right Honorable John Skeffington, Viscount Masse-

reene, John Carlisle, Roger Bickerstaff, clerk, and the Right Reverend Robert Knox, Lord Bishop of Down and Connor and Dromore, were summoned to answer Richard William Whaley of a plea that they permit the said Richard William Whaley to present a fit person to the church of Killead in the County of Antrim, which is vacant, and belongs to his gift, and, therefore, the said Richard William Whaley, by Charles Michael Magan, his attorney, complains that, for whereas the Right Honourable Sir Clotworthy Skeffington, Bart., Earl of Massereene, now deceased, was in his lifetime, to wit, on the 17th day of February, in the year of our Lord 1778, at Antrim in the County of Antrim, seised in fee of the advowson in gross of the rectory of the church of Killead in the County of Antrim, and being so seised thereof as aforesaid, he, the said Sir Clotworthy Skeffington, Earl of Massereene, afterwards, to wit, on the 17th day of February, in the year of our Lord 1778, at Antrim in the county aforesaid, presented to the said church, being then vacant, one John Clotworthy Skeffington, clerk, who, upon the presentation of the said Sir Clotworthy Skeffington, Earl of Massereene, was then and there admitted, instituted, and inducted into the same in the time of peace in the time of our sovereign Lord George the Third, late King of Great Britain and Ireland, and being so seised thereof, and the said church being full of the said John Clotworthy Skeffington, clerk, the then incumbent thereof, he, the said Sir Clotworthy Skeffington, Earl of Massereene, afterwards, to wit, on the 12th day of June, 1793, at Antrim in the county aforesaid, by a certain indenture then and there made between the said Sir Clotworthy Skeffington, Earl of Massereene, of the one part, and one William Whaley of the other part, the one part of which said indenture, sealed with the seal of the said Sir Clotworthy, Earl of Massereene, the said Richard William Whaley now brings into Court, the date whereof is of the same day and year last mentioned, for the considerations therein mentioned did give, grant, and confirm unto the said William Whaley, his heirs and assigns, All That the advowson, donation, right of patronage, and presentation, and disposition of, in, and to the said rectory of the church of Killead, with all the glebe lands, tenths, tithes, duties, rights, members, and appurtenances thereunto belonging or in anywise appertaining, and the reversion and reversions, remainder and remainders thereof, and also all the estate, right, title, and interest of him, the said Sir Clotworthy Skeffington, Earl of Massereene, of, in, and to the same, and every part and parts thereof, to have and to hold the said advowson, donation, right of patronage, and presentation, and all the other premises thereby granted unto the said William Whaley, his heirs and assigns, to the only proper use of the said William Whaley, his heirs and assigns, for ever, as by the said indenture more fully appears, and by virtue whereof he the said William Whaley, was seised of and in the said advowson in gross, as of fee and right, and being so seised thereof, to wit, at Antrim in the county aforesaid, and the said rectory and church being full of the said John Skeffington, the then incumbent thereof, the said William Whaley, afterwards, to wit, on the 9th day of August, 1793, at Antrim in the

county aforesaid, by a certain indenture then and there made between the said William Whaley of the one part, and one Bernard Ward, clerk, of the other part, which said indenture having been lost by lapse of time, the said plaintiff cannot bring into Court here, the date whereof is of the same day and year last mentioned, for the considerations therein mentioned, did give, grant, confirm, and convey unto the said Bernard Ward, his heirs and assigns, All That the said advowson, presentation, and disposition of, in, and to the said rectory of the church of Killead, with all the said glebe lands, tenths, tithes, duties, rights, members, and appurtenances aforesaid, to have and to hold the said advowson, presentation, and all the other premises thereby granted unto the said Bernard Ward, his heirs and assigns, to the only proper use of the said Bernard Ward, his heirs and assigns, for ever, by virtue whereof he the said Bernard Ward was seised of and in the said advowson in gross as of fee and right, to wit, at Antrim, in the county aforesaid, and being so seised thereof, and the said rectory and church being full of the said John Clotworthy Skeffington, the incumbent thereof, the said Bernard Ward, afterwards, to wit, on the 1st day of April, in the year of our Lord, 1801, at Antrim in the county aforesaid, by a certain indenture then and there made between the said Bernard Ward of the one part, and the said William Whaley of the other part, which said indenture having been lost by lapse of time, the said plaintiff cannot bring into Court, the date whereof is of the same day and year last mentioned, for the considerations therein mentioned did give, grant, and confirm and convey unto the said William Whaley, his heirs and assigns, All that the said advowson, presentation, and disposition of the rectory of the church of Killead, with all the glebe lands, tenths, tithes, duties, rights, members, and appurtenances aforesaid, to have and to hold the said advowson, presentation, and all the premises thereby, granted unto the said William Whaley, his heirs and assigns, for ever, by virtue whereof he, the said William Whaley, was seised of and in the said advowson in gross as of fee and right, to wit, at Antrim in the county aforesaid, and being so seised thereof, the said rectory and church became vacant by the death of the said John Clotworthy Skeffington, to wit, at Antrim in the county aforesaid, and by reason thereof it belonged to the said William Whaley to present a fit person to the said rectory and church so vacant, but one Right Honourable John Earl of Massereene usurped upon the said William Whaley, to wit, on the 8th day of July, 1801, at Antrim in the county aforesaid, and presented to the said rectory and church so vacant one Bernard O'Doran, his clerk, who, upon the presentation of the said John Earl of Massereene, was then and there admitted, instituted, and inducted into the same, in time of peace in the time of his late Majesty King George the Third, and afterwards the said William Whaley being so seised of the said advowson in gross as of fee and right as aforesaid, the said rectory and church became vacant by the death of the said Bernard O'Doran, to wit, on the 8th of November, 1815, at Antrim in the county aforesaid, and by reason thereof it belonged to the said William Whaley to present a fit person to the said rectory and church so vacant,

but one Right Honourable Chichester Earl of Massereene usurping upon the said William Whaley, to wit, on the 9th day of November, in the year of our Lord 1815, at Antrim in the County of Antrim, presented to the said rectory and church so vacant, one William George Macartney, clerk, who, upon the presentation of the said Chichester Earl of Massereene, was then and there admitted, instituted, and inducted into the same in time of peace in the time of his late Majesty, King George the Third, to wit, at Antrim in the county aforesaid, and the said William Whaley being so seised of and in the said advowson as aforesaid, he, the said William Whaley, afterwards, to wit, on the twentieth day of May, in the year of our Lord 1835, at Antrim in the county aforesaid, duly made and published his last will and testament, and a codicil thereto in writing, bearing date respectively the 7th day of November, 1828, and twentieth day of May, 1835, and respectively signed by him, the said William Whaley, and attested and subscribed respectively in the presence of the said William Whaley by three credible witnesses, and thereby (amongst other things) gave and devised the said advowson of the said rectory and church to the said Richard William Whaley, the plaintiff, and his heirs, and afterwards, to wit, on the 20th day of July, in the year of our Lord 1843, at Antrim in the county aforesaid, died so seised of such his estate of and in the said advowson, after whose death the said Richard William Whaley became and was seised of the said advowson of the rectory and church aforesaid as of fee and right, to wit, at Antrim in the county aforesaid, and being so seised, the said church afterwards, to wit, on the 12th day of November, in the year of our Lord 1858, at Antrim in the County of Antrim, became vacant by the death of the said William George Macartney, whereby and by reason of the premises, it then and there belonged, and now belongs, to the said Richard William Whaley to present a fit person to the said rectory and church so being vacant as aforesaid, to wit, at Antrim in the county aforesaid; but the said John Skeffington, Viscount Massereene, John Carlisle, Roger Bickerstaff, and the said Bishop, will not permit him, but unjustly disturb and hinder him, to wit, at Antrim in the county aforesaid. The second count was similar to the first, save that it omitted the conveyance from William Whaley to Bernard Ward, and the re-conveyance by the latter. The third count was similar to the first, save that it stated the devise to the plaintiff to be for life. The fourth count was the same as the second, save that it stated the devise to be for life. The fifth count omitted the conveyance from Wm. Whaley to Bernard Ward, and the devise by William Whaley, and stated that on the death of William Whaley the advowson descended to the plaintiff as his son and heir-at-law. The Bishop of Down and Connor filed a plea of disclaimer. The first plea pleaded by the other defendants was as follows:—The said defendants, John Viscount Massereene, John Carlisle, and Roger Bickerstaff, by Richard Meade, their attorney, come and defend the wrong and injury when and so forth, and as to all the counts of the said declaration, they say that the church and advowson in the said several counts mentioned are one and the same

church and advowson, and not different, and the supposed causes of action of the plaintiff in the said several counts alleged, are one and the same cause of action, and not different; and they say that the said defendant, the Rev. Roger Bickerstaff, is parson of the said church in those counts mentioned, canonically imparsonated therein upon the presentation and confirmation of the said defendants, John Lord Viscount Massereene and John Carlisle, and they say that the plaintiff ought not to have or maintain his aforesaid action against them, because they say that the Right Honourable Chichester, late Earl of Massereene, now deceased, was in his lifetime, to wit, on the 25th day of November, 1815, and from thence until his death, seised of the said advowson in gross as of fee and of right, to him and to his heirs, of the said rectory of the said church of Killead, to wit, at Antrim aforesaid in the County of Antrim aforesaid, and being so seised, the said church, in the lifetime of the said Chichester Earl of Massereene, became vacant by the death of one Bernard O'Doran, who had been incumbent thereof until his death, and thereupon the said Chichester Earl of Massereene, rightfully presented to the said rectory and church being so vacant William George Macartney, as his clerk, in time of peace, to wit, at the time last aforesaid, at the place aforesaid; and the said William George Macartney, on the presentation aforesaid, was duly and rightfully admitted, instituted, and inducted into the said church, and by virtue of the said presentation, admission, institution, and induction, continued in the seisin and possession of the said church as parson thereof until his death, as herein-after mentioned, and the said Chichester Earl of Massereene afterwards died so seised of the said advowson as aforesaid, to wit, on the first day of May, 1816, at Antrim aforesaid in the county aforesaid, leaving Harriet Viscountess Massereene, his only daughter and sole heiress-at-law him surviving, whereupon all the said advowson of and in the said church descended unto and lawfully vested in the said Harriet Viscountess Massereene, and she became seised thereof, to her and her heirs, as of fee and right, and continued so seised until the time of her death, and afterwards the said Harriet Viscountess Massereene died so seised, to wit, on the 2nd day of January, 1831, at Antrim aforesaid in the county aforesaid, leaving the said defendant, John Viscount Massereene, her eldest son and heir at law, her surviving, whereupon the said advowson of the church aforesaid descended to and became vested in the said defendant, John Viscount Massereene, and he became seised thereof, to him and his heirs, as of fee and right, and being so seised thereof, the said church being full of the said William George Macartney, clerk, the said John Viscount Massereene afterwards, to wit, on the 16th day of May, 1855, to wit, at Antrim aforesaid, by a certain indenture made between the said John Viscount Massereene of the one part, and the said defendant, John Carlisle, of the other part, which said indenture, sealed with the seal of the said John Viscount Massereene, the said defendant brings into Court here, the date whereof is the day and year last aforesaid, the said John Viscount Massereene, for the considerations therein mentioned, granted unto the said John Carlisle All That the next

nomination, presentation, and free disposition of the church aforesaid, which might happen by reason of the vacancy or avoidance of the same, and the said William George Macartney, parson of the said church, afterwards died, to wit, on the 12th day of November, 1858, to wit at Antrim aforesaid, whereupon the said church first became vacant after the execution of the said indenture of the 16th day of May, 1855, and the said Viscount Massereene and the said John Carlisle, jointly and severally duly presented the said defendant, Roger Bickerstaff, clerk to the said defendant, the Lord Bishop of Down, Connor and Dromore being the Ordinary of the said diocese, as parson of the said church, upon which presentation the said Roger Bickerstaff, before the issuing of the said writ of the said plaintiff was duly admitted, instituted and inducted into the said church in time of peace, to wit, on the 14th day of January, 1859, at Antrim aforesaid, and still is the parson of the said church impersonated thereof of the presentation aforesaid without this that the said Clotworthy, Earl of Massereene, in the said declaration mentioned gave, granted and confirmed the said advowson and presentation therein mentioned unto the said William Whaley by the said supposed indenture stated to bear date the 12th day of June, 1793, in manner and form as the said plaintiff has alleged, and this the said defendants are ready to verify, wherefore they pray judgment if the said plaintiff ought to have or maintain his aforesaid action against them. The third plea (pleaded to the 1st & 3rd counts) traversed the grant from Bernard Ward to William Whaley. The fourth plea (pleaded to the 1st & 2nd counts) traversed the devise to the plaintiff in fee. The fifth plea (pleaded to the 3rd & 4th counts) traversed the devise to the plaintiff for life. The eighth plea pleaded that the said indenture of the 12th day of June, 1793, was executed after the passing of an Act of Parliament made in the 6th year of her late Majesty Queen Anne, being an Act for the public registry of all deeds and certain other Acts to amend the same, and that no memorial of the said indenture was ever registered pursuant to the provisions of the said statutes, and that a memorial of the said indenture of the 16th day of May, 1855, was duly registered in the office for registering deeds in Ireland pursuant to the statutes in that case made and provided at the time and place aforesaid, and that by reason of the premises the said indenture of the 12th day of June, 1793, was void as against the said indenture of the 16th day of May, 1855, by virtue of which the said John Carlisle became and was possessed of and entitled to the next presentation to the said church. The ninth plea pleaded a reconveyance from the said Wm. Whaley to the said Earl of Massereene. The plaintiff replied to the first plea that the said Sir Clotworthy Skeffington, Earl of Massereene, did grant the said advowson to the said William Whaley by the said indenture of the 12th day of June, 1793, to the third plea that the said Bernard Ward did grant the said advowson to the said Wm. Whaley by the said indenture of the 1st day of April, 1801, to the fourth plea that the said Wm. Whaley did devise to the plaintiff the said advowson in manner and form in the 1st and 2nd counts alleged; to the fifth plea that

the said Wm. Whaley did devise to the plaintiff the said advowson in manner and form in the 3rd & 4th counts alleged; to the eighth plea that a memorial of the said indenture of the 16th day of May, 1855, was not duly registered in the office for registering deeds in Ireland as therein alleged; and to the ninth plea that the said Wm. Whaley did not reconvey the said advowson to the said Clotworthy, Earl of Massereene, his heirs and assigns, in manner and form as the defendants had alleged. Upon the second trial of this action before Ball, J., at the Spring Assizes for the County of Antrim, 1863, the plaintiff's counsel called as a witness one W. F. Littledale, the plaintiff's family solicitor, who gave evidence of the transmission of the plaintiff's deeds and documents from one family solicitor to another, and also produced what purported to be the deed of the 12th of June, 1793, and what purported to be the deed of the 1st of April, 1801, in the declaration respectively mentioned. The plaintiff himself gave evidence respecting the custody and transmission of the said deeds. The defendant's first exception was taken to the admissibility in evidence of the deed of the 12th of June, 1793, and the certificate of registration thereon, inasmuch as no evidence had been given by the plaintiff of the execution of the said deed, nor any evidence that any possession or enjoyment had accompanied or gone with, or, according to the grant alleged to have been made by said deed. The defendant's 2nd exception was taken to the admissibility in evidence of the deed of the first of April, 1801, and the endorsements of registration thereon upon the same grounds. The plaintiff having closed his case, the defendant's third exception was taken to the judge's refusal to receive in evidence an office copy of the memorial of the deed of the 16th of May, 1855, in the eighth plea mentioned, which memorial was registered on the 9th day of January, 1860, before the pleading of the said plea, but after the issuing of the writ and filing of the declaration. The defendants then gave in evidence an attested copy of a bill filed by the said Clotworthy, Earl of Massereene, against the said William Whaley and Bernard Ward, in the Irish Court of Chancery, on the 1st of December, 1797, and for the purpose of showing that the matters alleged in said bill had there been so alleged, and not as evidence of the truth of the facts read the following portion, "Your orator sheweth unto your Lordship that about the month of June, 1793, the said Wm. Whaley proposed to go over to Ireland in order to effect a loan by way of mortgage on your orator's estate in Ireland, and that the aforesaid living of Killead hath been and is held by John Clotworthy Skeffington, clerk, and that the said Wm. Whaley got some deeds or instruments made ready for execution which he represented to be proper for your orator's granting to him the next right of presentation to the said rectory, and to enable him to raise money for your orator in Ireland, and your orator was prevailed upon by the said Wm. Whaley to execute such deeds without reading the same; but your orator hath since discovered that the same contained or purported to be an absolute conveyance of the advowson to the said Wm. Whaley and his heirs." The defendants further gave in evidence an attested copy of a petition filed in the said Court of Chancery,

in the said suit in December, 1804, by which it was prayed by the said Clotworthy, Earl of Massereene, that the said cause might be heard upon sequestration against the said Wm. Whaley for want of his answer to the said bill, and also the notes of a minute for a conditional decree upon sequestration against the said William Whaley made in the said suit dated 1st February, 1805. The plaintiff then went into a rebutting case and called the said W. F. Littledale who deposed that a document produced by him dated 28th April, 1798, was a compared and attested copy of an order of Court made in a cause in the King's Bench in England, wherein the said William Whaley was plaintiff, and the said Clotworthy, Earl Massereene, defendant, and that he had searched in the records of said last-mentioned Court and had not found any award to have been made a rule of Court pursuant to such order, and also that he had searched amongst the said deeds and papers of the said Richard Wm. Whaley, and had not found any such award, and that he had found amongst said deeds and papers certain paper writings marked respectively "B.," "B.B.," and "C.," and that "B.B.," and "C." were pinned together and that said papers were in one envelope endorsed when so found by him, and that he knew one Henry Toulmin and that he was dead, and that the signature, Henry Toulmin, appearing in the said documents "B.," and "B.B." and "C." was the handwriting of the said Henry Toulmin, and the plaintiff thereupon gave in evidence the said order of the said Court of King's Bench, which was as follows:

"**WHALEY**
v.
SKERRINGTON, Bart.
commonly called
Earl of Massereene.

28th April, 1798.—It is ordered by consent that all the matters in difference between the parties, viz.: the suits in Chancery, both in England and Ireland, the action at law, &c., be referred to the award and determination of John Bayley, of the Middle Temple, barrister-at-law," &c.

The plaintiff then gave in evidence the paper writing marked "C." dated 8th Dec. 1829, as evidence of the receipt of the moneys therein-mentioned, and as secondary evidence of the alleged award. The defendant's fourth exception was taken to the admissibility of this document as secondary evidence of the said award, or as evidence against the defendants upon any of the issues. The paper writing "C." was as follows:—"In the King's Bench, *Whaley v. Earl of Massereene*.—I do hereby acknowledge that William Whaley, Esq., the plaintiff in the above-mentioned cause did on or about the 26th day of March, 1801, give up to the late firm of Plaisted & Davis, as the then attorneys for Clotworthy, then Earl of Massereene, the defendant in the above-mentioned cause, the sum of £509 1s. 2d. which had been levied by the sheriff of the county of Antrim on the goods of the said earl at the suit of the said William Whaley, and which sum of £509 1s. 2d. included the sum of £400 which had been awarded to the said William Whaley by Serjeant Bayley in and by an award made by him bearing date the 22nd of January, 1801, made in pursuance of an order of reference pronounced and that he did at the same time and in pursuance of the said award pay the further sum of £200 to the said firm of Plaisted & Davis, as such attorneys as

aforsaid, and also the costs of the said action, and of the suits in equity in the said award mentioned, and for which a receipt was then given by my late partner, Wm. Davis, who is since dead; but which receipt is now either lost or so mislaid that the same cannot be found, and to remedy or supply which loss I now give this receipt or acknowledgment as witness, my hand this 8th day of December, 1829, S. Plaisted, Witness, W. W. Cole, Henry Toulmin." The plaintiff then gave in evidence a portion of the two paper writings, being duplicates of one another, and marked respectively "B." and "B.B." and dated 8th of December, 1829. The defendants' fifth exception was taken to the admissibility of this portion of the said paper writings as secondary evidence of the said award or of the contents thereof. Their sixth exception was taken to the admissibility of the same save so far as the same contained any statement or admission of the receipt of money. The portion of the duplicates "B." and "B.B." was as follows:—"I do hereby certify and declare and make known (as surviving partner of Plaisted & Davis, late of Hatten-garden, London, attorneys and solicitors) that pursuant to the award of Serjeant Bayley, bearing date the 22nd of January, 1801, made under and in pursuance of a rule or order of the Court of King's Bench, at Westminster, in a certain cause then in the said Court, wherein William Whaley, Esq., was the plaintiff, and Clotworthy, then Earl of Massereene, since deceased, was the defendant, and whereby all matters in difference between the said Wm. Whaley and the said Clotworthy, Earl of Massereene, were referred to the arbitration and final determination of the said Serjeant Bayley, who amongst other things awarded or ordered that the said Wm. Whaley should on or before the 26th day of March then next at his own costs convey the advowson of the rectory of Killead, in the county of Antrim, in Ireland, with all the glebe lands and appurtenances thereunto belonging unto the said Clotworthy, Earl of Massereene, and on the same day at one of the clock in the afternoon should deliver to the said Clotworthy, Earl of Massereene, or his attorneys, Messrs. Plaisted & Davis, in Hatton-garden, all the deeds and documents relating thereto, or that in default thereof the said Wm. Whaley should give up the sum of £400, in the said award directed to be paid to the said Wm. Whaley, and should pay to the said Clotworthy, Earl of Massereene, or his said attorneys, on the 26th day of March aforesaid, at one o'clock in the afternoon, the sum of £200, that the said William Whaley did accordingly pay the last-mentioned sum of £200, and also the costs directed to be paid by him of and relating to the said reference to my late partner, Wm. Davis, deceased." Ball, J. having directed a verdict for the plaintiff upon the 1st, 2nd, 4th, and 5th issues, and that the question of fraud alleged to have been committed by the said William Whaley in and about the said indenture of the 12th of June, 1793, was not open to them upon the pleadings, he defendants excepted to the judge's charge and direction as to the said 1st issue, and so far as by such charge he withdrew from the consideration of the jury upon such issue any question or evidence of fraud of the said William Whaley in the procuring such deed, and insisted that if the jury

should be of opinion that the said deed of the 12th of June, 1793, was obtained from the said Earl of Massereene by the said William Whaley, by fraud the said jurors ought or were at least at liberty to find a verdict for the defendants on the said first issue. The defendants further excepted to the said charge and required the judge to inform the jury that if they believed upon the evidence that the said Clotworthy, Earl of Massereene, by the fraud covin or misrepresentation of the said William Whaley executed the said deed of the 12th of June, 1793, being ignorant at the time of such execution of the contents thereof, and that the same purported to convey the said advowson in fee simple to the said William Whaley, they should find a verdict for the defendants on the said first issue. The defendants further excepted to the said charge and required the judge to inform the jury that if they believed that the said indenture of the 12th of June, 1793, was not executed and delivered by the said Clotworthy, Earl of Massereene, with the intention of being acted upon and operating as a transfer of the advowson in fee simple to the said William Whaley, they should find a verdict for the said defendants on the said first issue. The jury found on the first issue that Clotworthy, Earl of Massereene, did, by indenture of 12th of June, 1793, convey said advowson in fee simple to said William Whaley; on the second that said Bernard Ward did by indenture of 1st of April, 1801, convey said advowson to said William Whaley; on the 4th that said William Whaley did devise said advowson to plaintiff; on the 5th that the indenture of 16th May, 1855, was not duly registered; on the 6th that the said William Whaley did not reconvey said advowson to said Clotworthy, Earl of Massereene.

May (with whom was *Brewster, Q.C.*) in support of the exceptions.—As to the first exception, it is admitted by the pleadings that possession did not go with the deed of June, 1793, but went entirely inconsistently with it. It was not registered till the year 1830, long after the death of the grantor. Though it be true that a deed more than thirty years old is admissible without proof of execution, it must be in a case free from impeachment and suspicion, and where there is something *dehors* the deed itself, *Bac. Abr.*, vol. 3, title Evidence, pp. 296, 304. [*Christian J.*—They gave parol evidence of transmission from one solicitor of the family to another.] Which is the stronger presumption here? The deed of 1793 is a voluntary deed. The deed between Whaley and Ward is not incorporated in the exceptions, but the reconveyance from Ward to Whaley is expressed to be inasmuch as the trusts of the former have been fulfilled. The advowson is conveyed and reconveyed without value. In July, 1801, Clotworthy, Earl of Massereene, presented to the living. If there be a presumption against a deed, that will put the party on proof of its validity. No right was ever exercised under the deed of 1793, and this is a presumption that it was not an operative and valid deed. In *The Ecclesiastical Commissioners v. Holmes* (4 Ir. C. L. R., 606), *Lefroy, C.J.*, says, "It is every day's practice to make a person liable as assignee by evidence showing that he is in possession and has acted as owner without proof being given of

an actual assignment. If by such evidence a party may be shown to be assignee, why may a re-assignment not be proved by like evidence?" 2 Phillips on Evidence, 246; *Doe v. Pulman* (3 Q. B., 622) is not to be compared to this case. The object there was to show that Sir W. Wyndham was seised of certain lands, and it was proved that persons were in possession of the rents and profits who would have been entitled to them if Sir W. W. had been seised of them when he made his will, and it was right to admit the instrument, because every circumstance supported the validity of the lease. In England a counterpart of a lease is not executed by a lessor. So a receipt of purchase money would be evidence that a deed was delivered as a deed by a grantor. As to the second exception, the reconveyance in 1801 from Ward to Whaley came out of suspicious company, and was a very shabby deed, not even drawn on parchment. As to the fourth, fifth, and sixth exceptions, there is nothing to show who *Plaisted* was. The document C. was concocted *post litem motam*. The document B. B. re-admits the liability already admitted by C. [*Monahan, C. J.*—That would not prevent them from giving it in evidence.] The notes to *Higham v. Ridgway* (2 Smith's L.C., 281) give all the law respecting entries against interest. In every such case the document is evidence, because it was not intended to be evidence. [*Christian J.*—How do you show that there was a *lis mota*?] By the bill and decree in the suit. [*Christian, J.*—Was the decree made in 1805 the last thing in that *lis*?] It was. [*Christian, J.*—Then the *lis mota* was twenty four years dormant at the time of this entry.] [*Monahan C. J.*—It appears to have been an entry made expressly for the purpose of giving evidence; it is another matter whether that will make it bad, but it is not an ordinary entry.] We find that everything took place as if there had been a re-conveyance pursuant to this decree. Evidence cannot be made against a party unless it be upon oath, and the party has an opportunity of cross examining the witness. [*Christian, J.*—Is there any case in which declarations against interest were rejected because made for the purpose of giving evidence?] No; there is no case at all approaching the present—*Davies v. Humphreys* (6 M. & W. 153.) There is no statement in the document that *Plaisted* saw the award. For anything that appears to the contrary, Whaley might have paid a sum of £200. In *Doe d. Padwick v. Witcomb* (6 Ex. B. 605), Lord Campbell says, "The only remaining ground upon which the admissibility of the entry is rested is that it is secondary evidence of the lease. But there is no evidence that any such lease ever existed. That cannot be secondary evidence of an original, without proof also that there existed something which was an original." In *Haddon v. Parry* (3 Taun. 303) the words "contents unknown" in a bill of lading were held to render the bill of lading, no evidence. In *Baron de Rutzen v. Fair* (4 A. & E. 53) accounts signed by a person styling himself clerk to a steward were rejected, there being no evidence to show he was such. So here there is no external evidence to show that this man was the attorney of Lord Massereene, or that *Plaisted* was the partner of *Davis*, or that they were accountable to Lord Massereene for the money.

On the broad ground of the officiousness of this document it is inadmissible. [Christian, J.—Suppose that instead of this document, Plaisted was a witness on the table, and stated no more than it does, and could not swear he ever saw or read the award, would that be evidence?] It would not. The first issue was upon *non concessit*, and it was contended at the trial that it was not competent to us to go into a case of fraud. It would be competent upon the plea *non est factum*, 1 Chitty on Pleading, 5th ed.; *Lessee of Blackwood v. Gregg* (Hayes's Rep. 305, 314). The notes to *Lambert v. Atkyn* (2 Camp., 273), *Whelpdale's Case* (5 Coke, 119); *Taylor v. Needham* (2 Taunt., 282). The judge declined to leave any question to the jury upon the first issue, and directed them to find for the plaintiff. There was evidence of fraud. The bill upon the files of the Court of Chancery in Ireland taken by itself is not evidence, but taken along with the conditional decree upon sequestration for want of an answer, there was some evidence to go to the jury—1 Taylor on Evidence, ss. 738, 739, 740; *Kelly v. Wood* (2 Ir. L. Rec., 391); Darley's Rules (of 1843), app. 283. If silence under an imputation be evidence, it ought to be evidence when the party knew that a valuable property was going to be taken from him. Then the statements in the bill are corroborated by this, that in 1815, Chichester, Lord Massereene, acted as if the advowson were his property, and Whaley did not prevent him. [Christian, J.—One would wish an authority for that a decree is evidence of the contents of the bill.] I admit that there is not authority, but if a witness is asked a question which he refuses to answer, that is evidence against him, and why should it not be so here when the consequence is penal to the party? [Christian, J.—We had a case before us under the Act to prevent bribery, in which the witness was an accomplice, and it was contended that his evidence required corroboration as upon a criminal prosecution, and we held that inasmuch as the defendant was present in Court, and was not tendered in evidence, his silence was evidence.] The plaintiff brings his action after seventy years have elapsed, and when the witnesses are dead, and it does not lie in his mouth to say we have not given specific evidence. Every intentment is to be made against him. [Christian, J.—The very circumstance of Lord Massereene having brought a suit for relief against this deed, is an admission that he considered it a valid deed at law.] He was in possession, and the bill prayed to have the deed delivered up to be cancelled, and the advowson re-conveyed to Lord Massereene, or as he should direct, or to such persons as should seem entitled. [Christian, J.—That seems as if he considered the legal estate had passed.] *A fortiori* what may be given in evidence under the plea *non est factum* may be given under the plea *non concessit*.

Falkiner and S. Ferguson, Q.C., contra.—As to the first exception we did prove an act of ownership, the conveyance to Ward. The conveyance of 1793 could not confer a right to present them, because there was no vacancy, and so the only act of ownership possible was such as this conveyance to Ward. As to the exceptions in reference to fraud, the evidence relied on was that of a bill having been filed in

Chancery, a petition in 1804, and the minutes of a decree. Admitting that a bill and a conditional decree would have been some evidence, there is none such. The bill is no evidence in itself. Was it ever heard that the successor of a party should be allowed to say, I went into Chancery sixty years ago, and failed in what I sought to establish, but I will put my abortive statements into the box of a jury, and get them to find that which the Chancellor could not find? Then the minutes are no evidence, no more than a postea would be evidence of a verdict. [Ball, J.—Were they not in evidence at the trial?] That was *quantum valeat*—*R. v. Yeovelly* (8 A. & E. 806); *R. v. Ward* (6 C. & P. 366); Taylor on Evidence, s. 1407; Buller's Nisi Prius, 243, a. The postea is not evidence of a verdict, because *non constat* that the judgment was not arrested. Minutes may be received for the mere purpose of showing there were minutes. [Monahan, C.J.—The defendant's argument is, that Whaley did not answer the bill.] [Keogh, J.—The fact that that decree was not made up is rather evidence to show that the statements were not true]. Silence in a civil case is no evidence against any one, until by judgment it is turned into estoppel. Neither a bill nor a plea in a civil case is any evidence—*Boileau v. Rutlin* (2 Ex. R., 665); *Tomkins v. Ashby* (Moo. & Mal. 32); fraud is only open where the court can finally adjudicate between the parties—*Stewart v. Aston* (8 Ir. C. L. R. 35). As to the admission in evidence of the documents C. and B.B., admissibility is essentially different from weight. There is no case exactly similar to the admission of C, but the principles of admitting statements made against interest will include this, because the document admits the payment of costs for Lord Massereene. It would have been evidence against the attorney who signed it in an action against him. He could not have pleaded the Statute of Limitations. The authority against its admissibility ought to have been shown by the defendant. [Monahan, C.J.—Every judge must go as far as *Higham v. Ridgway*, and that class of cases; but this would carry the doctrine beyond what it has ever gone. This is an admission, not casually recording a transaction, but made for the party on whose behalf it is given in evidence. [Keogh, J.—It would be a very compendious way of proving a whole case. Monahan, C.J.—The proper course would have been to have filed a bill to perpetuate testimony against Lord Massereene]. It was said by Baron Alderson that *Higham v. Ridgway* goes the extreme length, and that the doctrine of that case is not to be extended, but the tendency of the judicial mind in England is to extend it—*Reg. v. Overseers of Birmingham* (1 Best & Smith, 763); a second receipt given where the first is lost is a fair transaction. There is internal evidence of the genuineness of these documents, because the date 1801 is the most dangerous that could have been selected, because that was a time when the sale of the advowson was contemplated. An admission by a person that he is tenant for life is evidence of a higher estate in somebody else. Unless the Court can discover something improper upon the face of these documents which will disqualify them from the credit due to such documents, or unless it

can draw a line as to time, they are admissible.—*Davies v. Morgan* (1 C. & J. 587); *Matthews on Presumptions*, 298; *Eldridge v. Knott* (1 Cowp. 214); *Warren, ex demiss; Webb v. Grenville* (Str. 1129); *Lord Lorton v. Gore* (1 Dow., N.S., 190); *Doe dem Patterhall v. Turford* (3 B. & Ad. 890); *Stead v. Heaton* (4 T. R. 669); *Ros d. Brune v. Rawlings*, (7 East. 279). It is not the rule of law that if one exception be allowed, a *venire de novo* must follow as a matter of course. In *Househill Coal & Iron Company v. Neilson* (9 Cl. & F. 804) the Chancellor says, "when we come to consider a bill of exceptions, we are bound to take a different view of the subject, and if we are of opinion that the law was laid down incorrectly, and if we are of opinion that the jury may have been misled, we have no discretion to exercise." The objection that there was no proof that the party was Lord Massareene's attorney was not taken at the trial and cannot be relied on now—*Milne v. Leisler*, (7 H. & N. 801).

Brewster, Q.C., in reply.—The rule that an objection to the admissibility of a document must be specific, cannot apply to a case of this nature; for in all the cases it is a preliminary point, that the person whose document is given in evidence be proved to have filled a particular character. Nobody knows who Plaisted was, or whether he was an attorney, agent, or stranger. What may be the act of an entire stranger is no more than an unsworn statement by an absolute stranger. The *onus* is the other way. Before the plaintiff can have this document admitted, he must show it was received from a party and under circumstances which entitle it to be admitted. There is no case where what was merely a narrative without any act contemporaneous was held to be evidence. *Warren ex demiss Webb v. Grenville* is good law, because the entry was made by an attorney in his debt-book. *Lord Lorton v. Gore* is nearer the present case. There was sufficient evidence to warrant the judge in concluding that the instrument was destroyed; it ought to have been in the house, which was proved to have been ransacked, and there was an entry against interest. *Stead v. Heaton* has no application. *Ros d. Brune v. Rawlings* has no application. I will say nothing on the cases which were cases of pedigree. If BB. is inadmissible, so is C. Supposing Plaisted ever had been the attorney of Cloteworthy, Earl of Massareene, BB. does not state that the said earl had died in 1801. If BB. be admissible, it will follow that if a man have an attorney, and the attorney after his death give a whole history of his client's life, and couple this with the statement of a payment made to his deceased partner, who may be dead as long as the client, that will for ever after be good evidence against the client, his heirs, and everybody else. I do not mean to say that if money were received in 1801, and a receipt given in 1829, that that receipt would not be evidence; but these documents show that a previous document existed, of which mention is made in one of them. This is secondary evidence of what would be good evidence. It is a statement by a person of his recollection of a long bygone transaction. As to the admission in evidence of the deed of 1793, and the reconveyance from Ward to Whaley, I admit that a deed more than

thirty years old coming out of the proper custody is evidence; and I do not put it so fine as that it must come out of the custody of the person himself, so as it comes out of the proper custody. But possession should have gone with the deed; here it is conceded possession was never in the parties since 1793. In other words these instruments never have had any operation or effect—*Andrews v. Molley* (32 L. J., N. S., C.P., 128). The title to the land would have three times gone by the Statute of Limitations in the interval. There were two deaths, and two opportunities of exercising the right; but it is a mistake to say that these were the only opportunities, for the power of determining the right exists at all times whether the living be full or not. It was competent to the party to assert the right. It was argued at the trial that if we had distinct evidence of fraud it could not be given under the pleading *non concessit*. It is doubtful if *non est factum* can be pleaded by a party to an instrument. The proper pleas are, that the defendant did not enfeoff, or did not grant, or that nothing passed; and under these he may give anything in evidence that avoids the deed at common law; and not only what at the time of execution, but what subsequently avoids it, *ex gr.* coverture, lunacy, drunkenness. A married woman's deed is a nullity under both *non est factum* and *non concessit*. The party may prove that the instrument is not his deed by showing it to be an escrow—*Rolle's' Abridgement*, 13 *Viner's Abridgement*. On one or other of these exceptions relating to fraud, if there was a scintilla of evidence of fraud it ought to have gone to the jury. The case has been withdrawn from the jury and dealt with upon the pleadings. There is no valuable consideration stated in the deed of 1793. Past services are the alleged consideration, and they are not a consideration. There are extraordinary transactions here. We were entitled to say to the jury that the intent of this deed between Whaley and Ward was to remove the advowson further off from the possession of the rightful owner. Then the bill filed against both Whaley and Ward, and the fact that the earl, and not Whaley, presented in 1801, were evidence to go to the jury.

Our. adv. ult.

June 12.—*MONAHAN, C.J.*—The first objection to the admission in evidence of the document C. is, that no proof was given that the party who signed it was the attorney of Lord Massareene. If that objection had been taken at the trial it would have been fatal. We were referred during the argument by Mr. Falkner to a case which very recently and very accurately lays down the law that where the admissibility of a document is objected to on the ground that some external matter should be proved to make it evidence, the objection should be taken specifically at the trial, because it may be then met. In *Milne v. Leisler* (7 H. & N. 801), the plaintiffs tendered in evidence a letter written by themselves to their agent, which *prima facie* would not be evidence; but it was a letter directing inquiries about the solvency of a person; and it was said that it looked to have been acted on. Baron Wilde, in giving his judgment, says, "If the matter had stopped there, I can well understand that there would be ground for contending that it was no part

of the *res gestæ* but a mere conversation between the plaintiff and his clerk. If, however, that was the ground of the objection it ought to have been taken at the trial. No doubt, since the case of *The Irish Society v. The Bishop of Derry* (12 Cl. & F. 642), if a party objects at the trial to the admissibility of evidence on one ground he may sustain the objection on another ground. But that rule is subject to this exception, that if the evidence is not admissible because of the absence of something which ought to be supplied, that must be pointed out at the trial, in order that the other party may have an opportunity of supplying it. That case is the same in principle as the present. If there was no evidence that Plaisted and Davis were the attorneys of Lord Massereene, it should have been so put at the trial, and the point is now untenable. The question, then, is, is the document *per se* admissible in evidence? It is written, or it purports to be written, on the 8th December, 1829, admitting the receipt of money in 1801. The first question is, if the only material thing to be proved was, whether the money had in fact been paid, was it admissible. By the general rule such documents are not evidence; but there are exceptions to this rule, and one of them is, that if an entry be made in the course of business by a man whose duty it is to do an act, it is evidence against the whole world that he did that act. The familiar instance is the case of serving a notice to quit. If the clerk endorses upon the notice that he did serve it, and if he dies, his statement is evidence against the whole world, and is evidence against the tenant. Another exception to the rule is, where a party makes an entry in a book belonging to him, or now, (though that was long questioned) if he makes a parol statement against his interest, that written or parol statement is to be received after his death. The question, then, arises, when must the entry be made? Must it be made contemporaneously with the fact? If so limited this document is not admissible in evidence, because the early part of it is an admission that in March, 1801, a sum of money was paid to the party and his partner. Does the fact of twenty-eight years intervening prevent its being received in evidence? This has not as yet been the subject of actual legal determination, but in *Doe dem. Patteshall v. Turford* (8 B. & Ad. 890), the judgment of Parke, J., refers to it. It appeared at the trial that an attorney was instructed to serve notices to quit. Instead of the partner employing his clerk, and the clerk endorsing, the partner served the notice and made the endorsement. It was argued that if the clerk had made it, it would have been part of his business, but that this might be the first time the partner ever did it himself. The Court rejected this argument, and properly rejected it. Parke, J., says, at page 497, "It is to be observed that in the case of an entry falling under the first head of the rule, as being an admission against interest, proof of the handwriting of the party and his death is enough to authorize its reception. At whatever time it was made it is admissible; but in the other case it is essential to prove that it was made at the time it purports to bear date: it must be a contemporaneous entry." This statement is no more than a dictum; but in every text-book on evidence

since published, in Taylor and in Smith's Leading Cases, and all that I have had an opportunity of consulting, reference is made to it; and the rule stated to be, as Parke, J. says. Therefore if this document were to be given in evidence merely to prove the receipt of the money, the interval is no objection to its admissibility. Its effect with the jury is quite a different thing. But one must be satisfied it is a document against the pecuniary interest. If any proceedings were to be taken by Lord Massereene or his representatives in relation to their attorneys, this document would, beyond doubt, be evidence against the surviving partner. Therefore, if it did not refer to a former receipt it is an admission against the interest of the party. If all accounts were settled between the parties it would have no effect; but if a question did arise it would bind the parties. It is to that extent an acknowledgment against interest. An entry by an attorney that he has been paid his bill of costs, we all know, is a statement against his interest. But the question comes, is this document receivable to show for what purpose the money was paid? It states that the money was levied by the sheriff on the goods of the earl. It offered to prove the money was paid in obedience to an award, and therefore that an award was made and as evidence of the contents of the award. Is it admissible for this purpose? It would be useless to go through all the cases which establish that where a document is admissible to prove money was paid, it is also admissible to prove the other matters in it. The well-known case is *Higham v. Ridgeway* (2 Smith's L. C. 270) where a doctor made an entry that a lady was delivered, and that he got his fee. The question was, when was the child born? The day of the birth was totally unconnected with the receipt of the money. A case coming nearer the present is *Warren ex dem. Webb v. Grenville* (2 Str. 1129). It was a trial at bar in the Queen's Bench. By a family settlement a portion of the lands was limited in jointure to the mother, and the son had an estate tail. There was no evidence that the mother had surrendered her life estate; but the cost-book of the attorney was offered in evidence, which charged the sum of £32 for the suffering the recovery in question, and this included two little items of £1 for drawing a surrender, and £1 for engrossing two parts of it; and all, by the book, were paid. The entry was held to be evidence against the interest of the party, and evidence that the surrender had been prepared and executed. The document is evidence in the present case that the money was paid, and paid on foot of an award made by Serjeant Bayley. The matter is one of considerable difficulty, but we think the document admissible. There is no evidence that there was then a state of matters which would render it a document made *pendente lite*, or *post litem motam*. I do not think it necessary to go in detail through B. and BB., because what I have said of C. applies to them. The exceptions to their admissibility must be overruled. But, then, at the close of the case comes the charge of the learned judge. The judge informed the jury that upon the first issue it was not competent to them, having regard to the pleadings, to consider whether the deed of June, 1793, was invalid by reason of fraud, but that they should find a verdict for the

plaintiff upon that issue. The party was not allowed to impeach the deed on the ground of fraud. In the same way with the deed of 1801. The defendant's counsel excepted in these words as to the first issue, so far as by such charge the judge withdrew from the consideration of the jury any question or evidence of fraud in the procuring such deed; and insisted, if the jury should be of opinion that the said deed was obtained from the said earl by fraud, the jury ought, or were at least at liberty to find a verdict for the defendants on the first issue. The course taken at the trial was this: the judge told the jury that upon the pleadings no such issue was open to them, but that there was the question open if Whaley did not re-convey the property to Lord Massereene. It occurs to us that if a party executes a deed, the contents of which he is not aware of, believing it to have one operation when it has another, through the representations of a party, that is not his deed, and that is open to show upon *non est factum*, and also upon *non concessit*. It is said here that there was *prima facie* evidence of execution, and that there was no evidence to show that the deed was fraudulently obtained, or that it was executed as an escrow. We are unanimous that there has been a miscarriage, and that upon the following grounds these exceptions must be allowed. What is the evidence that the deed of June, 1793, was not binding? In the first place it is a peculiar deed on looking at it. It purports to convey this advowson in perpetuity in consideration of love and affection, and valuable services hitherto rendered. There is nothing to prevent a party from executing a conveyance for such considerations, or for none. But it challenges investigation. Next it appears that shortly after it was got for nothing, it was conveyed for nothing to Bernard Ward; next that the deed by which Ward re-conveys to Whaley, states the purposes for which it was conveyed to him to have been all answered. So far as we see, there was no purpose expressed in the deed itself. But bear in mind that a bill was filed in 1797 by Lord Massereene, alleging this deed to have been fraudulently obtained, and under circumstances which rendered it waste paper. I do not say that this bill is evidence of any of the matters stated in it, but it is evidence that at the time Lord Massereene did file a bill making those charges, and claiming the advowson under circumstances which, if true, would render the deed a mere nullity, and justify the plea *non est factum*. It is said there was evidence, and we have decided that there was, that an award was made in 1801, declaring Whaley entitled to this advowson, but we have not decided that the jury are bound to believe the truth of that evidence. Soon afterwards there was a vacancy in the living, and John Lord Massereene, without challenge by Whaley, was allowed to present his clerk to it. In 1815 another presentation was made unchallenged by Whaley. We think that upon the whole of this want of possession, the pendency of this suit, the non-presenting immediately after the award, the deed of 1793 itself, there was a question of fraud for the jury. If there was evidence of a re-conveyance by Whaley, *a fortiori* there was evidence that the deed of 1793 was fraudulently obtained, and was not the deed of the Earl of Massereene. We think that these

exceptions, which I need not go through in detail, must be allowed, and a *venire de novo* awarded.

BALL, J.—Having tried this case I wish to say one word with regard to the alleged fraud. Upon the trial I entertained a conviction which I thought warranted me in refusing to send to the jury an issue of fraud in respect to the deed of 1793. After the trial, and particularly after hearing Mr. Brewster's argument, I became of opinion that I was wrong in not sending that question to the jury, and I concur with the other members of the Court.

KEOGH, J.—I concur as to the fraud in the procuring of the deed of 1793. I differ from the other members of the Court as to the admissibility of the documents C. & B. and B. B. I will take it as in the case of C. I am of opinion that this document was not evidence against the defendants on two grounds. In the first place there is no extrinsic evidence to show the character of the party who signed it. It is conceded, I say the Chief Justice has so taken it, that some such evidence should have been given, and that if the objection were taken at the trial it should have been given. It is said it should have been so, and the party might have supplied it. The Chief Justice cited an authority to show the objection should be pointed. I am struck by the circumstance, that the document is not *prima facie* evidence; it must be brought within some rule which takes it out of the doctrine of hearsay evidence. This not being done, I think it is enough for the party to say, it is not evidence against me, without pointing it more particularly. If there were extrinsic evidence, the *onus* would be the other way. But upon the main ground I entertain a much stronger opinion that this document is not evidence at all. Why is it necessary to give extrinsic evidence? Surely it must be in order to connect the party in some way, and to show he had means of knowledge in connexion with the subject-matter of the entry. Why is this evidence ever admitted? Because it is stated if a party acknowledges money received against his interest, that is a guarantee that he is doing an honest transaction, and therefore a certain amount of faith is to be placed which will supply the want of cross-examination. Is this an entry made by a party charging himself with the receipt of money, and is he actuated by the sole motive which gives it this character of honesty? In the case in B. & Ad. it is said the entry may be made at any time. I concede that—it may, that is to say it is no matter when made if made under the influences and circumstances which would render it evidence at the time it is made. But if made under other influences, is not the ground taken away? Look at the document itself—it is dated 1829, 28 years after the transaction of which it speaks. Who signs it? One who describes himself Plaisted, the surviving partner in a firm of P. & D., who were the attorneys 28 years previously of Lord M. Is he merely making an entry which exonerates one and charges the other as between Lord M. and himself? Now, as plain as light, this was made to be used for a then pending litigation. It is headed, "*Whaley v. Earl of Massereene*." That may fairly be said to be the old case. But the party heads it as of the old case. Does a party merely honestly seeking to bind himself and ex-

onerate another, head his document in that way? Then "the late firm as the then attorneys." Then there is no allegation that they continued such after that time. He says the money was received 28 years before, and the receipt is so lost or mislaid that it cannot be found, and to remedy this loss he gives this. It is as plain as light that this is a certificate (as happily designated a *narrative* by Mr. Brewster). Such a document is admitted, because the motive is to charge the party himself. But where shall we stop, 25, 30, 50 years? Is a man, in order to remedy a loss, to give a certificate?—give a certificate that a firm which does not exist got money for a man who long since died, and make statements which, by a rule of law, shall take away the property of nobody? There is no case in the books in which such a document as this was admitted. It is said the award put an end to the litigation, but that is not so. There is evidence of a *lis mota* after that, for though the bill was filed in 1797 in this country, the petition is not filed till 1804, three years after the time referred to by this document. I cannot but think the admissibility of such a document rests upon the ground that, being made by a person honestly charging himself with the receipt of money, and exonerating another, is a substitution for the cross examination.

CHRISTIAN, J.—I was long impressed by the view expressed by my brother Keogh. Further consideration has drawn me in the opposite direction. I think the safer course is, where there is a doubt, to lean to the admissibility of the document. The Court is now unanimously of opinion that the exceptions to the judge's refusal to send an issue of fraud must be allowed. If the plaintiff has nothing to produce but these deeds voluntary, unregistered, and unacted on, though there were opportunities to act on them, impeached for fraud, with a conditional decree in 1805, he will be under difficulties. But if he can make out that this suit was compromised by arbitration, that a reference offered an election to pay certain sums of money to Lord M., or to give up the advowson, and if there be evidence that he did pay the money, then he will have a strong case in answer to the *prima facie* case of impeachment, though still he will have the fact against him that he has allowed the conveyance to remain a dead letter. Therefore, the admissibility of this document is of great importance to him. I assume as a fact P. filled the office of attorney of Lord M. at the time of the arbitration. I assume as a fact that this P. is the same P. who at the time was partner of the man who received the money. A jury might so infer fairly. This is a document which, if it does not charge him with liability for the receipt of these monies is a step towards doing so, and therefore admissible. The purpose for which the money was paid is also in evidence, and if, after the death of P., an action was brought between Whaley and Lord Massereene, this document would be evidence against Lord Massereene. Doubtless, this is a narrative rather than an act, as stated by Keogh, J., but that applies to every receipt not made contemporaneously with the payment. No one denies that a day or a week would not make a difference. Here there were nearly 30 years. But according to the *dictum* of Parke, J., distance of time makes no

difference as to the admissibility. It may yet be shown that Parke, J.'s, *dictum* goes too far, may be pushed too far, but if so it ought to be so declared by a higher tribunal. The considerations stated by Keogh, J., will be very strong to go to the jury to make them refuse to act on the documents; but I think our determination will be more likely to be in accordance with justice if this, with all its infirmities, be received, which is the only evidence the plaintiff has to go on. Therefore, with very great doubt, I change from my former opinion.

Venire de novo.

Court of Appeal in Chancery.

[Reported by Edmund T. Bowley, Esq., Barrister-at-Law.]

[BEFORE THE LORD CHANCELLOR, THE LORD JUSTICE OF APPEAL, AND BARON HUGHES.]

BELCHER v. BRADY.—May 13.

Advowson—Laches—Renewal—Pleading.

A., the rector of the parish of T., and proprietor of a neighbouring estate, was seised in fee of the advowson and right of presentation to the living; and was also entitled to a rent of £28 7s. 5d. per annum payable out of certain glebe lands by the incumbent of T. for the time being. The estate of A., including the advowson, having been put up for sale under an order of the Incumbered Estates Court, the printed rental, in giving the particulars of the advowson, stated that there were attached to the living 19a. 1r. 7p. statute measure, of glebe, valued at £1 10s. per acre (not mentioning that this land was subject to any rent.) In the same rental, in the lot which comprised the lands of T., a portion of them was set down as "glebe land not sold;" and in the map attached the glebe land was left uncoloured and marked as "not in the estate." In an advertisement subsequently published for the sale of the advowson, it was again stated that 19a. 1r. 7p. of glebe land, valued at £30 per annum were held with the living. A. was a party to all the proceedings in the Incumbered Estates Court. The advowson was sold and conveyed by the Commissioners to B., from whom it was afterwards purchased by C., a clergyman of the Established Church. Previous to this latter sale C. visited the parish of T.; and X., the son of A., on that occasion shewed C. a copy of the advertisement before mentioned, and represented the particulars contained in it as being correct. On the death of A., C. presented himself to the living of T. Shortly afterwards a demand for rent of the glebe lands was made of C. by X., the son and devisee of A.; and on his refusing to pay it, an action of ejectment was commenced for the recovery of the lands. In a suit instituted by C. for an injunction to restrain the proceedings at law, on the ground that by the acts and conduct of A., C. had been led to suppose that the glebe lands were not subject to rent, Held, that as A. had lain by and not asserted his claim

during the proceedings in the Incumbered Estates Court, the relief sought should be granted.

The glebe lands of T. were held under a lease of lives renewable for ever, the last life in which had dropped on the death of A. The petition of C., prayed, first, to have the glebe lands declared discharged from any lease or rent; secondly that, if subject to the lease, compensation should be made to C. for his loss as purchaser; and lastly, that, if necessary, a renewal of the lease should be executed by X. to C. Held—That the frame of the petition was not open to objection, and that the prayer for alternative relief was admissible.

THIS case came before the Court on appeal from the decision of the Lord Chancellor, whose judgment, together with the full particulars of the case in the Court below, will be found *ante*, p. 265.

Brewster, Q.C., (with him *Norman, Q.C.,* and *A. Henderson*), for the respondent, the petitioner in the Court below.—The appellant maintains that he was not an agent authorised to make representations for his father, the Rev. Thomas Brown Brady, on the occasion of Mr. Belcher's visit to Tomgreany. We are willing to admit this; we never thought to make him liable as agent for his father. The case is rather that of a party standing by, and allowing others to contract, on a mistaken idea that he might have corrected.—*Foster v. Savage* (9 Mod., 37); *Wright v. Smee* (2 De G. & Sm., 321); *Beresford v. Milward* (2 Atk., 49); *Govett v. Richmond* (7 Sim., 1); *Boyd v. Belton* (1 Jo. & Lat., 730); *Cairncross v. Lorimer* (3 Maoq., 827); *Reade v. Armstrong* (3 Ir. Jur., N. S., 305; a. c., 7 Ir. Ch. Rep., 266; Drury's Rep., [temp. Napier,] 55).

Serjeant Sullivan (with him *Jellett*) in support of the appeal.—The form of this petition is without any precedent, containing, as it does, inconsistent prayers of the most contradictory characters. Such a prayer for alternative relief is bad upon the authority of *Lindsay v. Lynch* (2 Sch. & Lef., 1). This point in itself is fatal. Again, the right to relief is rested on the representations of the Rev. Thomas Browne Brady, and on his acts and conduct, but it is never alleged nor suggested that the appellant or his mother were the agents of the late incumbent, or even authorised by him to make any statements as to the value of the living. As the authority to act as agent has not been ever stated in the petition, it cannot now be relied on by the petitioner.—*Mortal v. Lyons* (8 Ir. Ch. Rep., 112). There is no evidence (that the handbill, which has been put forward as a strong point in the case, ever reached the Rev. Thomas Browne Brady, or was ever heard of by him. Assuming that he was bound by the rental, in the enumeration of the lots no land is stated to be attached to the advowson; and though in every other case the lots are set down to be sold as they are represented in the rental, in the case of the advowson the following words are appended, "but the Commissioners do not guarantee the accuracy of the above returns." Again, there is not a particle of evidence to show that the interest in the lease of these glebe lands is not worth £30 a year. The maxim, *caveat emptor*, is applicable to the present case. The Commissioners did all in their power to supply the purchaser with correct informa-

tion as to the value of the advowson, but, at the same time, they put him on his guard as to taking their statements as conclusive. £1,400 was all that was given by Mr. Reeves for the advowson. If he had come subsequently to the Incumbered Estates Court seeking compensation on the ground that the glebe land, which the Commissioners never purported to convey to him, was subject to a head-rent, would his application have been listened to for a moment? Suppose the Rev. Andrew Belcher had presented some one else to the living, could the presentee have had a right to refuse payment of this rent?

Jellett on the same side.—The different parts of the prayer of the petition seek for inconsistent kinds of relief. First, there is a repudiation of the tenancy; then a prayer for compensation; and lastly, a prayer for a renewal of the lease under which the lands are held. [*The Lord Chancellor.*—As incumbent, the petitioner may be entitled to one kind of relief, and as owner of the advowson, to another. The case is different from that of *Lindsay v. Lynch*.] It has been established that when a tenant disclaims his landlord's title, all right to a renewal is at an end. [*The Lord Chancellor.*—Does a man lose his right to a renewal by endeavouring to prove that, subsequently to the execution of the lease, the landlord assigned his interest to the tenant?]*—Long v. Long* (11 Ir. Ch. Rep., 252; 6 Ir. Jur., N. S., 49); *Rice v. O'Connor* (12 Ir. Ch. Rep., 424; 7 Ir. Jur., N. S., 109). The Rev. Thomas B. Brady, though nominally a party to the proceedings in the Incumbered Estates Court, had not any control over them. As to the handbill which, it is alleged, the appellant shewed the respondent on the occasion of his visit to Tomgreany, as has been already stated, there is no evidence that the lands are not worth £30 per annum, and again, even if the appellant unintentionally made any inaccurate representation, as he had not then any interest in the lands, he cannot be held bound thereby. In *Thompson v. Simpson* (2 Jo. & Lat., 110), a father conveyed an estate to a purchaser for valuable consideration, under the impression that he was the owner in fee, whereas he had only a life estate, with a power of appointment amongst his children, the son being present at the transaction, and assenting to the conveyance; and it was held that the interest which the son had in the lands at the time of the conveyance, but not that which he subsequently acquired, was bound by his assent to the conveyance to the purchaser.

Norman, Q.C., in reply, cited *Wilde v. Gibson* (1 H. of L. Ca., 605).

THE LORD CHANCELLOR.—I am of opinion that the decree should be affirmed. The proceedings in the Incumbered Estates Court were, without any doubt, binding on the Rev. Thomas B. Brady. The effect of the conveyance executed by the Commissioners to Mr. Reeves, does not enter into the present question. It was in fact a mere conveyance of the advowson, giving to the purchaser the right to present to the living, but at the same time giving to the clerk presented all the benefits and emoluments attached to or appurtenant to the rectory. The description in the deed of conveyance only purports to include the advowson, but we all know that the true test of the value of an advowson is the income of the living, mo-

dified, of course, by the effect of the age of the incumbent for the time being. Nothing, however, as I have already stated, turns upon the effect of this conveyance; but the representations of the Commissioners made on the occasion of the sale, appear to me conclusive on all parties. My mind is clear that the advertisement and handbill reached Mr. Brady at the time at which the sale took place. I do not dwell on the representations made by the appellant at the time of Mr. Belcher's visit to Tomgreany. It might be hard to fix them on him, and although liable perhaps in a Court of Law for the effect of his statements, it is unnecessary to consider this matter here. He acts, however, plainly as agent for his father, and this I cannot doubt from his conduct on the occasion. He gives just the information that he has. I do not mean to say that either he or his father intentionally kept back the existence of this rent: certainly, however, the estate is sold without it being included, the descriptive particulars in the schedule expressly declaring that the glebe is not any part of the estate. In all this account, no mention is made of any rent payable: this is a case in which the Commissioners represent to a purchaser the value of a property, and get from him a certain price, under the idea that the land is worth 50s. per acre. It turns out to be worth little or nothing, and under such circumstances the respondent is fairly entitled to relief. As to the frame of the suit, the party is thrown into a difficulty by the conduct of his landlord. Cannot he claim an exemption from rent without giving up his right to a renewal? It would be very hard to hold this. Must two bills be filed to protect his interests? I think that there is no inconsistency in such a prayer for different kinds of relief.

THE LORD JUSTICE OF APPEAL.—This case, I am of opinion, admits of no manner of doubt. The question is simply, what was the value of the living represented to be at the sale in the Incumbered Estates Court. This is a mere matter of fact. It is perfectly plain that, no matter what the document may be in itself, the suppression of any mention of rent in the schedule (which was quite silent on the subject) led parties to suppose that the glebe land was free from rent. Mr. Thomas B. Brady was a party to these proceedings, and is clearly fixed with notice of the statements as to the value of the rectory. The second document also does not contain any allegation that any rent would issue out of the glebe lands, and consequently the conveyance executed has given the land to the respondent discharged from rent. With respect to the objection brought against the form of the petition, the case is perfectly distinguishable from *Lindsay v. Lynch*. The frame of the present suit has arisen, not from two states of facts, but from different inferences from the same state of facts.

HUGHES, B.—The representation of the handbill alone, is sufficient, in my opinion, to decide the present question. It is, in fact, equivalent to a rental, and was under the hand of the secretary to the Incumbered Estates Court. It is unnecessary to consider whether Mr. Brady had notice of it or not; he is as much bound by it as by the order for sale. I concur wholly in the judgment already pronounced by the Lord Chancellor and the Lord Justice of Appeal.

Decree below affirmed.

Court of Queen's Bench.

[Reported by William Woodcock, Esq., Barrister-at-law.]

HAMERTON v. GREENE.—May 23, 27.

Libel—Privileged communication.

In an action by a solicitor for libel contained in a letter to the Secretary of the Law Society the defendant pleaded, setting out certain conduct of the plaintiff which he said he believed to be improper and unprofessional; that he believed it to be his duty as a member of society, and, as such interested in the good conduct of the profession, to bring the plaintiff's conduct under the notice of the Society, who, he believed, had the power and duty of instituting inquiry so as to prevent the repetition of the conduct complained of; and that he wrote the letter for the bona fide purpose of procuring inquiry and preventing the repetition of the conduct. Held—(dissentiente Fitzgerald, J.) that this defence was good, and that the communication was privileged.

DEMURRER.—The first paragraph of the summons and plaint complained that, whereas the plaintiff for a long time before, and at the time of the committing of the grievances by the defendant thereafter mentioned had been, was, and still was an attorney at law, a solicitor in the High Court of Chancery and her Majesty's proctor in Admiralty causes in Ireland, and had exercised and carried on his said profession and business of an attorney, solicitor, and proctor with great credit and reputation; and whereas the said plaintiff was at the time of the committing of the said grievances by the said defendant, a member of the Incorporated Society of Attorneys and Solicitors of Ireland, which society was composed of the leading members of the plaintiff's said profession; and the said plaintiff always hitherto was held in great esteem and respect in said society, and by the members thereof; and whereas the said plaintiff, as such attorney as aforesaid, had been retained and employed by one Salvatore Casiero, captain of the brig "Salem," to prosecute an action against the said defendant to recover a claim which the said Salvatore Casiero had against the said defendant for freight; yet the said defendant, knowing the premises, but contriving and intending to injure the said plaintiff in his said credit and reputation, and also in his said profession and business, and to cause it to be suspected and believed, and especially by the members of the said society, that the said plaintiff had conducted himself dishonestly and improperly in relation to the said action, and that the said plaintiff was unfit to be a member of the said society, on the 26th January, 1863, falsely and maliciously wrote and published a false, scandalous, and defamatory libel of and concerning the said plaintiff, and of and concerning him in respect to his said business and profession in a certain letter addressed to the secretary of the said Incorporated Society, that is to say, "Sir," (meaning the said secretary of the said Incorporated Society of Attorneys and Solicitors of Ireland) "we," (meaning the said defendant) "now beg to inform you" (meaning thereby the said Incorporated Society of Attorneys and Solicitors) "that on or about the 1st December last we"

(meaning the said defendant)" "engaged John T. Hamerton" (meaning the said plaintiff) "to act for us" (meaning the said defendant) "in a case then pending. *Cafiero v. Greene*," (meaning the said case in which the said plaintiff had been concerned for the said Cafiero)." "We," (meaning the said defendant) "can prove the said Mr. Hamerton, of Sackville-street," (meaning the said plaintiff) "agreed to act for us," (meaning the said defendant, and meaning thereby that the said plaintiff had been retained and employed by the said defendant to act as his the said defendant's attorney, and had consented and undertaken to act as such attorney)" "and were astonished some time afterwards to find he" (meaning the said plaintiff) "had, without any notice whatever, changed his" (meaning the said plaintiff's) "mind and taken up the case for the plaintiff" (meaning the said Cafiero, and meaning thereby that the said plaintiff had betrayed his duty as an attorney and solicitor; and that after the said plaintiff had been retained by the said defendant to act as his the said defendant's attorney in the said action of *Cafiero v. Greene*, and after the said plaintiff had been entrusted with the case of the said defendant, that the said plaintiff wrongfully and without any just cause, and contrary to his duty as an attorney, and in betrayal of the confidence placed in the said plaintiff by the said defendant, acted as the attorney for the said Cafiero in the said action). "This circumstance, coupled with his" (meaning the plaintiff's) "conduct since," (meaning that the said plaintiff had since acted improperly and in a manner unbecoming his said profession as an attorney, solicitor, and proctor) "induced us" (meaning the said defendant) "to lay the case before your respectable body," (meaning the said Incorporated Society of Attorneys and Solicitors of Ireland) "trusting you" (meaning the said society) "will deal with it as it deserves" (meaning thereby that the said plaintiff's conduct was so bad that it deserved the censure of the said Incorporated Society of Attorneys and Solicitors of Ireland, and that the said plaintiff ought to be punished by the said society). "We" (meaning the said defendant) "shall be glad to give you" (meaning the said society) "any further information on the subject" (meaning thereby that the said defendant had in his possession and could give further information in relation to the conduct of the said plaintiff which would prove that the said plaintiff was an unfit and improper person to be a member of so respectable a body as the said Incorporated Law Society, and that it would be a pleasure and gratification to the said defendant to communicate such information to the said society), "and are yours respectfully, Green, Brothers" (meaning the said defendant). The second paragraph set out the same letter again, but without innuendoes, and the summons and plaint concluded by complaining that by means of the several grievances the said plaintiff had been and was greatly prejudiced in his credit and reputation, and especially amongst the members of the said Incorporated Society, and was suspected to have acted dishonestly and improperly in his said business and profession, and to have been guilty of the misconduct so as aforesaid mentioned to have been imputed to him, to the damage of the said plaintiff of

£1000. To both these paragraphs the defendant pleaded, thirdly, that the letters in the said first and second counts respectively set forth were one and the same letter, and not other or different letters; and that before the writing or publishing of the said letter, as in the said first and second counts respectively alleged, one William Richardson, as attorney for and on behalf of the said Salvatore Cafiero, in said plaint mentioned, had applied to defendant for payment of a certain balance of freight claimed by the said Salvatore Cafiero to be due to him by defendant; and that thereupon the defendant had engaged the plaintiff, and the plaintiff had agreed to act as attorney for defendant in reference to the said claim of the said Cafiero, and any proceedings that might be taken at suit of said Cafiero against defendant on foot thereof; and defendant said that the plaintiff afterwards and without notice to the defendant changed his mind and took up the case of the said Cafiero, and acted as attorney for the said Cafiero against defendant; and defendant said that after the plaintiff had so taken up the case of the said Cafiero, and acted as attorney for him against defendant as aforesaid, and after the defendant, at the request of plaintiff, had named an attorney on the part of defendant, to wit, the said William Richardson, to accept service on behalf of defendant of a writ of summons and plaint at the suit of said Cafiero against defendant, the plaintiff, nevertheless, did not nor would send said writ to said William Richardson to accept service for defendant as aforesaid, but employed and instructed a common bailiff to serve said writ publicly on defendant; and defendant said that he felt aggrieved by the aforesaid conduct of the plaintiff, and *bona fide* believed that the same was unprofessional and improper, and calculated to affect injuriously the character of the profession to which the plaintiff belonged; and that it was the duty of the defendant as a member of society, and as such, interested in the good conduct of the members of said profession, to bring the said conduct of the plaintiff under the notice of those who were also interested in the good conduct of said members, and had the power and duty of preventing the repetition of improper or unprofessional conduct on the part of any of said members; and defendant said that at and previously to the writing and publishing of the said letter the Incorporated Society of Attorneys and Solicitors of Ireland was a society composed of the leading members of said profession, and had been incorporated for the general benefit of said profession; and that defendant, *bona fide* believing that the said society had full power, and that it was the duty of the said society to make such inquiry as aforesaid into the conduct of the members of said profession, and to prevent the repetition of improper or unprofessional conduct on the part of any of said members, wrote and sent to the said society the said letter in the said first and second counts respectively mentioned, with the *bona fide* object of procuring such inquiry as aforesaid to be instituted into the said conduct of the plaintiff, and for the purpose of preventing the repetition thereof in case it should be found to be improper and unprofessional, which was the writing and publication complained of in the said first and second counts respectively; and defendant said he wrote and pub-

lished said letter, being a privileged communication, and on a lawful occasion; and that he wrote and published the same in good faith and without malice, and believing the statements therein contained to be true in substance and in fact. To this defence the plaintiff demurred on the ground that the matters and circumstances therein stated, in manner and form as the same were pleaded, were not sufficient at law to constitute the writing and publishing of the said letter a privileged communication.

Todd (with him *M'Donogh, Q.C.*) for the plaintiff in support of the demurrer.—The occasion stated in the defence was not sufficient to make the publication privileged. The authorities shew that in order to make a communication privileged, the party making it must have a duty to perform either legal or moral, public or private, or the communication must be in a matter concerning his own affairs, and in which he has himself a personal interest. The duty or interest which will bring a communication within the protection of the law must be personal to the person making the communication: it must not be merely a duty general upon all mankind.—*Toogood v. Spyring* (1 Cr. M. & Rose, 181); *Harrison v. Bush* (5 Ell. & Bl., 344)—it must be obligatory on the party to make the communication.—*Proeger v. Shaw* (4 Ir. C. L. R. 650); *Ede v. Scott* (7 Ir. C. L. R., 607); *Bell v. Parke* (10 Ir. C. L. R., 279); *Coxhead v. Richards* (2 C. B., 569). A mere belief of the existence of a duty is not sufficient: the duty must in fact exist.—*Blackham v. Pugh* (2 C. B., 611). If this defence is held to be good, then every information of a common informer must be held to be privileged.—*Martin v. Strong* (5 Ad. & Ell., 535); *Fairman v. Ives* (5 B. & Ald., 642); *Blagg v. Sturt* (10 Q. B. 899).

Purcell and Sidney, Q.C., for the defendant.—It is not necessary in order to make a communication privileged that there should be that personal duty which involves a legal obligation on the part of the defendant. The first question here is whether or not the Incorporated Society of which the plaintiff is a member was a proper tribunal for the defendant to make a complaint to with a view to an inquiry. The second is, whether, if the defendant honestly believed that it was such a tribunal, although in fact it was not, he would be protected. The society was incorporated by royal charter in 1852. [*Fitzgerald, J.*—Is that a matter that we can take notice of? The charter is not referred to in the pleadings]. We will not press the matter now, but we are entitled to push it to this length that we find on the record a body of a profession incorporated for the general benefit of the profession, and we submit that that was a proper tribunal for a party aggrieved by misconduct on the part of a member of the body, to lay his complaint before. It is not necessary that the body should have the power of giving redress. It is enough if the channel through which the communication is made can put the matter in a train of investigation so as to have it set right. There are cases in which this Incorporated Society interfered in motions. [*Hayes, J.*—I think there is a rule of Court requiring that a motion shall not be made for the admission of an attorney without notice being served on the Incorporated Society.]. *Fairman v. Ives* shews that it is not ne-

cessary that the complaint should be made to a tribunal having power to give redress. Further the defendant had an interest.—*M'Dowell v. Claridge* (1 Campb. 267); *Blagg v. Sturt*; *Harrison v. Bush*; *Blackham v. Pugh*; *Wenham v. Ash* (13 C.B. 886); *Turnbull v. Bird* (2 F. & F., 508). The gist of the action of libel is malice, and *Harrison v. Bush* shews that the ground of privilege really is that that presumption of malice is rebutted.—*Taylor v. Hawkins* (16 Q. B., 308). The authorities are clear that if the party had reasonable grounds for believing that a power of redress did reside with the tribunal which he addressed, the communication would be privileged. Here then were reasonable grounds. There are many cases in which the party had no direct individual interest in the communication.—*Todd v. Hawkins* (8 C. & P., 88).

M'Donogh, Q.C., replied, citing the rule laid down by Lord Campbell in *Dickson v. The Earl of Wilton* (1 F. & F., p. 426).

Cur. adv. vult.

June 2.—*FITZGERALD, J.*—This case came before us on the 27th May, and the question arose upon demurrer to the third defence to the summons and plaint. The action was for libel, and the summons and plaint contained two counts. The libel complained of consisted of a letter which purported to be addressed by the defendant to the Incorporated Society of Attorneys and Solicitors in Ireland, and that letter is in these words. (His Lordship read the letter which is set out in the pleadings given above). That is the letter which is charged to be a defamatory libel, and which is the subject of the action. The plaint contained two counts, and it is only necessary to advert to them for the purpose of pointing out that in the first count the innuendoes are of an extensive character. For instance, after stating that the true meaning of part of the letter was that "the plaintiff had in taking up the case of Mr. Cafiero betrayed his duty as an attorney and solicitor, and that after the plaintiff had been retained by the said defendant to act as the defendant's attorney in the action of *Cafiero v. Greene*, and after the plaintiff had been entrusted with the case of the defendant, that the plaintiff wrongfully, and without any just cause, and contrary to his duty as an attorney, and in betrayal of the confidence placed in the plaintiff by the defendant, acted as the attorney for the said Cafiero in the said action; it then in another innuendo charges that the meaning of another part of the letter was, "that the plaintiff's conduct was so bad that it deserved the censure of the Incorporated Society of Attorneys and Solicitors in Ireland, and that the plaintiff ought to be punished by the said society," and again it contains a further innuendo, "that the defendant had in his possession, and could give further information in relation to the conduct of the plaintiff, which would prove that the plaintiff was an unfit and improper person to be a member of so respectable a body as the said Incorporated Law Society, and that it would be a pleasure and a gratification to the said defendant to communicate such information to the said society. The second count is founded on the same libel, and differs from the first simply in this,

that it contains no innuendoes, and a defence is pleaded to both. I advert to the extensive nature of the innuendoes in the first count, not for the purpose of founding my judgment upon them, but to point out one of the difficulties which arise in the case, for since the Common Law Procedure Act, and the 65th section of it, two cases have been decided, namely, *Hemmings v. Gasson* (Ell. Bl. & Ell. 346; s.c. 27 L.J., N.S., Q.B., 252) and *Lavelle v. Orammore*, in this country (not reported), according to which it is for the jury alone to decide, whether the words were spoken with the meaning put upon them, and that the court is not to decide whether the words are capable of the meaning ascribed to them; in other words the innuendo is wholly for the jury, and where the defendant justifies, he adopts the meaning stated by the pleader on the opposite side. The third defence here is not a defence in justification, but in excuse; it is what is commonly called a defence of privileged communication. [His Lordship here stated the substance of the defence]. That is in substance the whole of the defence, and it would appear on the face of it as I have stated that it is a defence not in justification, but in excuse. It does not justify the defamatory publication as true, and, in fact, it falls short in stating the truth in a material particular, for while the plaintiff sets out the libel as stating that the plaintiff had accepted the retainer of the defendant in a pending suit, and had changed sides, it appears, from the plea in excuse that no suit was pending, but that one being contemplated in respect of a demand then existing, the defendant applied to the plaintiff to be his attorney in that suit, and the plaintiff agreed to do so, but that a suit being subsequently instituted, it was instituted by the plaintiff himself, and that the defendant employed another attorney, namely, William Richardson, who had been acting as attorney for Oafiero. In fact it would appear from the pleadings that there was a breach of engagement in the case of both attorneys; but the point in which the defence falls short in alleging the absolute truth of the libel is that the statement is applied not to the pending action, but to one that was contemplated. In truth, if the defence had amounted to a statement of the absolute truth of the matters charged in the publication, it would be open to an objection as being embarrassing, and would be set aside as double in its character; but it being presented as a defence in excuse, the question for us now is, whether this defence ranges within the class of conditionally privileged publications, known popularly under the name of privileged communications. The law in all cases of libel or defamation, as in other cases of wrongs, assumes, in the first instance, as an inference of law, that the wrong-doer has in his proceeding been actuated by malice. But in reference to defamatory publications, it admits a class of defences which we now know as defences of privileged communication, and which are based on this, that the publication has taken place under such circumstances, that the inference of malice against the wrong-doer is rebutted, that malice is displaced from the case; that the publication not being malicious becomes excused, and that an essential ingredient, namely, the existence of malice, either legal or in fact being rebutted, the action is not maintainable. The

question in the present case, assuming the matters stated on the pleadings to be true, is whether these matters pleaded in the manner in which they are pleaded, bring the defence within the class of cases known as privileged communications. This class of cases is very wide and extensive indeed, but for the purpose of applying the rule to the present case I shall adopt the exposition of it, which has been quoted by both sides, which is of great weight, and the most recent; I mean the rule laid down by Lord Campbell in *Harrison v. Bush*, and subsequently repeated by him in *Dickson v. Earl of Wilton* (1 F. & F. 412), in the year 1859. The rule in *Harrison v. Bush* was stated at the bar in argument, relied on by counsel on both sides, and finally expressly adopted by the Court of Queen's Bench. It is as follows:—"A communication made *bona fide* on any subject matter in which the party communicating has an interest, or in reference to which he has a duty is privileged if made to a person having a corresponding interest or duty, although it contain criminating matter, which, without the privilege would be slanderous and actionable." I have said that Lord Campbell has adopted that again in *Dickson v. The Earl of Wilton*, where he says that the law on this subject was most properly laid down in *Harrison v. Bush*. A similar definition is given in *Somerville v. Hawkins* (10 C.B., 588) in the Common Pleas, in which it is laid down that a privileged communication "comprehends all cases of communications made *bona fide* in performance of a duty, or with a fair and reasonable purpose of protecting the interest of the party using the words." It will be seen that there is a difference of opinion in the Court, but I apprehend that upon the rules which I have abstracted, or on the principles there is no difference, and that it is agreed that the true rule is furnished by those authorities, but the point of difference is on the question whether the present case is within the rule. The opinion at which I have arrived with much hesitation, is that this defence does not disclose a privileged communication within the rule laid down in *Harrison v. Bush*. And first, we must recollect that that rule states that the communication may be privileged if the party has an interest, or if he makes the communication in pursuance of a duty, and I apprehend that that is either a legal duty or a moral duty, therefore it must be made either in the furtherance of personal interest or in obedience to some legal or social duty. It will be observed in the defence here that the defendant does not allege that he made this communication in consequence of personal interest or to procure redress for a personal grievance. It is not for me to say, whether for this breach of duty, the defendant could have obtained redress anywhere. It may be possible that he might. Possibly an order might have been made to restrain the plaintiff from acting for the opposite party. It might be that a remedy in damages might have been obtained on an action, but it is not necessary for me to say what might have been the result if the defendant had taken the proper course, as on the face of this defence it is obvious that he does not rest his answer on an effort to obtain redress or to procure any remedy against the plaintiff. If on the face of this defence it

had been stated that Mr. Green feeling himself aggrieved had sought redress from the tribunal which he had reasonable ground for believing could give redress, that is, had sought redress for a personal wrong, then possibly the defence would have been presented under a totally different aspect, though it is true that in England the question of privileged communication arises on the general issue, yet our rule is different, and I think wisely, which requires the defendant to state the facts on which he rests his excuse, or his defence, and accordingly the defendant here, after some of the preliminary matter, goes on to state that he believed that the conduct of the plaintiff was unprofessional and improper, and calculated to affect injuriously, not the defendant, but the character of the profession to which the plaintiff belonged, and that it was the duty of the defendant as a member of society, and as such, interested in the good conduct of the members of said profession, to bring the conduct of the plaintiff under the notice of those who were also interested in the good conduct of said members, and had the power and duty of what? not of giving redress for the grievance, but "of preventing the repetition of improper or unprofessional conduct on the part of any of said members." So far from pressing it as a personal grievance, the defendant seems to have acquiesced in what was done. I have pointed out the modes by which he might have obtained redress, but instead of adopting any of those modes, the action being instituted, the defendant appoints another attorney. The question now is, the defendant claiming the privilege, on the ground of social duty, whether there was such a duty imposed on the defendant as that which he states? I have pointed out that he does not rest his privilege on any personal wrong, but on public duty, on the ground it was his duty to prevent a repetition by any other member of the profession of the same conduct. The conclusion I have arrived at is that no such legal duty and no such moral duty was cast on the defendant. We must distinguish between duties legal and social, and the right to institute a complaint. If a wrong has been done, in this country any person may take measures to have it redressed, but where the wrong falls short of a crime, no person has a duty cast on him of bringing the case forward, and if he does so he must take care not to transgress the limits of truth. If he has an interest in the matter, and seeks to redress the wrong, there may be an excuse; but if not, and he has no public duty to perform, he stands in the position of one who comes forward as a mere volunteer. The law gives him no protection, and if he exceeds the limits of truth, he becomes liable. It has been urged that the public had an interest in the good conduct of the members of the profession of the law. No doubt the public has an interest in their acting professionally, in the propriety of their conduct as persons who assist in the administration of justice, who are the officers of the Courts. It is also true that the public has an interest in the good conduct of every profession, of the medical profession for instance, even, to go farther, of the members of the clerical profession. But any member of the community might as well have brought forward the charge as the defendant, because, he says, it was as a mem-

ber of society that he did so, and the only difference is, that the defendant had peculiar knowledge of the facts. I have yet to learn that if a barrister, a doctor, or a clergyman, is guilty of unprofessional conduct, there is a social or a legal duty on any member of the community to become the accuser of the party. No doubt the recent current of authorities since the case of *Toogood v. Spyring* has been very much to extend the rule as to privileged communications; but we have it bounded by the declaration of the Court in *Harrison v. Bush*. No case has gone beyond that, and in reference to the case before the Court, the conclusion I have arrived at is that the defendant who might perhaps have based his case on personal interest, does not do so. He alleges his duty to be that of any member of the community. In my opinion no such duty was cast upon him. He had the right, but he stands as a mere volunteer. Round him the law casts no protection, and he is only justified if he has adhered to the strict limits of truth. It may be very convenient to extend the rule in *Harrison v. Bush*; but there must be some limit, and I am prepared to say that there is one duty, the duty of not injuring one's neighbour on insufficient grounds, and that is so clear and cogent that no exception to it ought to be sanctioned except in cases of urgency and gravity. I do not think this is a case of urgency and gravity, in which we ought to extend the rule, and the defendant has neither shewn an interest nor established a duty. There is one point in the case which was urged by the plaintiff, namely, that according to the second branch of the rule in putting forward a public complaint, the defendant was obliged to shew that the Incorporated Law Society was competent to give redress. The statement in the defence was that he believed that the society had the power of instituting inquiry. What the statement may mean it is difficult to suppose. The defendant does not go beyond that to shew that he had grounds for believing that the tribunal had authority to give redress. The point is, no doubt, a very formidable one, but on the grounds on which I go it is not necessary for me to say whether this argument was well founded. In my opinion the defence fails, and there ought to be judgment for the plaintiff.

HAYES, J.—It is for the purpose of repelling the presumption of malice that the plea of privileged communication is had recourse to. In the absence of proof to the contrary, the law presumes that the publication of such a character has been made knowingly and wilfully for the purpose of inflicting injury, in a word, that it has been done maliciously. Though the party may not be prepared to prove that the publication is true, yet if he can state facts and circumstances from which it can be inferred by a jury that the publication was not made from malicious motives, but that the party acted *bona fide* under a cause of interest or social duty, these facts will form the ground of a plea in excuse by way of a plea of privileged communication. We find that several rules have been established by judicial authority as affording instances of privileged communications. Thus, where a person having an interest to protect, or a social duty to perform, makes a communication honestly to one having a corresponding interest or duty, he will be protected. That was the decision in *Harrison v. Bush*. So

again, it has been held that, if one having an interest to protect or secure, makes a communication to one whom he *bona fide*, though mistakenly, believes to have a power of redress, he is protected; that is the decision in the case of *Fairman v. Ives*. Other cases might be put, as in giving characters of servants, words spoken by counsel in a case. But all these cases are mere illustrations, and in none of them do the judges mark out limits beyond which a privileged communication shall not extend. It appears to me to be a fair result of all that the defence in this case does in fact disclose a sufficient ground of privilege, and if proved to the satisfaction of a jury, would rebut the presumption of malice, and that whether we consider the person making the communication, the party to whom it is made, or the nature of the communication, the defendant here says that, having engaged the plaintiff to act for him, he afterwards found that he had become the attorney of his adversary, and feeling himself aggrieved by what he believed to be unprofessional conduct, he, as a member of society, and believing it his duty to do so, wrote the letter, which contains a simple and temperate statement of the facts which led him to the opinion he had formed, and is conversant only with the grievance in question. But to whom is it written? To the Law Society, or Society of Attorneys and Solicitors incorporated for the general benefit of the profession. But this is not a mere voluntary society, having in view only the interest of the profession. It has entrusted to it by the judges the duty of assisting them in many matters which import both them and the public. There is a general rule on the subject. Long before the enactment of this rule, the Courts have found themselves ready to take advantage of the assistance of the Law Society: thus in *Re McConnell* (1 H. & Jo., 206), Joy, C. B., says, "I do not think we would act wisely if we were to resist a fair investigation solicited by men anxious for the respectability of their profession. Where a person thus acts without any private motive in a matter in which the interests of the public are concerned, it would not be the duty of the Court to stifle the inquiry. We shall not presume that the Law Society has been influenced by any improper motives." So, in *Anonymous* (10 Ir. L. Rep., 111), notice of an application to re-instate a gentleman on the roll of attorneys was required to be served on the society. So, too, in *Anonymous* (Glass., 55), two attorneys convicted of crimes were struck off the Rolls at the instance of the Society. And lastly, by a rule of the benchers made in January, 1843, it is enacted that copies of the memorials of all persons seeking to be admitted as attorneys, shall be lodged with the secretary of the Law Society. What is the rule to be drawn from all this? That the benchers and the Courts have, for the public benefit, invited and engaged the Law Society to render them their valuable assistance by bringing before them such matters as they may think to materially affect the character or conduct of the persons who seek to be admitted as attorneys, and I may say that the benchers and Courts look to the Law Society as the source from which information is to be obtained. But from whom is the information to be given? Is it only from attorneys, or is it also from persons of respectability not belong-

ing to the legal profession; and is it not natural, when it becomes known to the public that the Law Society is the authorised medium of communication with the Court, that a person feeling himself aggrieved should make the communication to the body on whom he has reason to believe the Courts rely, and through whom redress, he believes, is to be given? But it is said the attorney is a private individual who ought to be allowed to practice his profession as he requires, and that he does not stand in the position of a public man. I conceive that to be a mistake. The attorney, in the practice of his profession, is a public man, as an officer of the Courts. He enjoys certain privileges; his profession has been instituted and regulated by public laws, enacted for the public good. The good conduct of the profession is one of the most precious possessions of the public, and one of the best grounds of the public peace and liberty. It is to the attorney we confide our secrets, and from him we expect advice to regulate our conduct in the most important moments of our lives. While other professions are allowed to regulate themselves, very special rules are applied to the attorney. The charge of his labours is under the protection of the Courts. He is not allowed to disclose secrets, and his conduct may be made the subject of an objection, not merely of the client, but of any person. I regard this as the authoritative announcement by Courts of Justice that the welfare and good order of society is, to a great extent, based on the good conduct, propriety, and uprightness of attorneys, and that every individual not only serves an interest, but performs a duty, when he does his best to keep the profession in its purity. It is true there is no case on the subject, but I think that we have principle enough, and I should hold it to be lamentable if our decision should be otherwise than what I believe it ought to be. It is for the best interests of society that every member of society should be not only at liberty, but should feel himself under a social obligation to communicate with such a body as the Law Society, who will be ready, by an application to the Courts of Law or otherwise, to seek for that remedy which they may think is called for; and I am of opinion that not only the Law Society, but the individual who, without malice, and in good faith, sets the Society in motion, should have the protection of the law in what he does, and, therefore, my judgment is, that the demurrer should be overruled.

O'BRIEN, J.—I concur that the judgment should be for the defendant, holding the defence good. Independently of the grounds stated by my brother Hayes, which are peculiarly connected with the nature of the profession to which the plaintiff belongs, the importance of maintaining the profession and the interest which everyone of the public has in the proper discharge of its duties, I think there is a ground on which this defence might be sustained. The defendant in this communication states: (his Lordship read the letter). Now, with the exception that he states in that letter that the suit was pending, I do not find anything in it which is not warranted in point of fact by the admitted statement of facts in the defence. The difference to which I have adverted may be such as would render it difficult to sustain a plea of justification, but certainly it may have that effect. On a

plea of justification it should, in my opinion, not disentitle the defendant from relying upon the facts as rendering the communication privileged under other circumstances. The statement in the letter is, that the defendant engaged the plaintiff as his attorney in a cause pending. The statement in the defence is, that Richardson had applied for payment of a demand and that thereupon the defendant engaged the plaintiff. Well, the letter goes on to state that the plaintiff, without any notice, changed his mind and took up the case of the other side. That statement is also supported as true, in fact, by the statement in the defence; and the defence goes on to state, that he acted against him and served a writ personally in a manner which the defendant appears to have thought harsh and offensive. But I have this shewn that with regard to the matters of fact stated in the letter they are all with the difference to which I have adverted supported by the defence. Well, the defence says that the defendant felt aggrieved by the conduct of the plaintiff, and that he believed it was unprofessional. I must own, so far as that goes, the facts as stated fairly warranted the defendant in this feeling. But then he goes on to state that he believed it to be as a member of society and as such interested in the good conduct of the members of the profession to bring the conduct of the plaintiff under the notice of those who were also interested in their good conduct, and had the power and duty of preventing the repetition of improper or unprofessional conduct. He then states that this Incorporated Society of Attorneys and Solicitors of which it appears the plaintiff is a member, was a society composed of the leading members of the profession, and had been incorporated for the general benefit of the profession. He then states that he believed that they had full power and that it was their duty to make inquiry into the conduct of the members of the profession and prevent the repetition of improper conduct. Now it is alleged that he puts his case here by his plea on the ground of duty, that, he says, there was a duty, a social and moral duty on his part, to make the communication to the Law Society, and that they had the power to institute an inquiry and prevent the repetition of such conduct. We can infer that this society composed of the leading members of the profession, incorporated for the benefit of the profession, that it was not an unreasonable thing for a person to suppose that a complaint of the conduct of a member of the society might properly be made to the society itself. They stood at all events in a position that distinguishes this communication from those in which it is held that a publication generally and made to everyone in the community would not be privileged. Well, that being so, it is true that the defendant here rests his case on the ground of duty. Now our attention has been directed during the argument to the difference of practice in this country and in England as to the mode in which this question arises. In England it would arise on the plea of not guilty, at *Nisi Prius*, where the whole of the facts would be open, and it would be for the judge to tell the jury the grounds on which the communication might or might not be privileged, but in consequence of the Common Law Procedure Act here, the defence must be pleaded specially, and I

must own that if there were on the defence facts stated which would give a privilege, I would not be disposed to hold the defence bad because he has grounded the defence on a particular claim of privilege which I might think bad. There may be a difficulty in considering the plea on the grounds which he has relied upon, for he puts it on a social duty as a member of the public, disconnecting that from the circumstance that he is the party aggrieved, but I do not think we are going too far if we hold that if the facts appear to give him the privilege on another ground, we should give him the benefit of them. If it appears on the pleading that he suffered a grievance, and that it was that grievance which he communicated, though he does not in that part of the plea repeat the words, we are at liberty, I think, to take that into account. In the case of *Bell v. Parks* there are some observations of the Chief Baron applicable to the manner in which the defence was there pleaded that appear to me to bear upon the question. Without referring to the facts of that case, it is enough to say that there was a considerable controversy during the argument how far the allegations of duty in the defence were sufficient or not, and the Chief Baron having noticed the omission of an averment that the communication was made with a particular object, says, "It is said that there should have been an averment that the defendant made the communication *with the intention of performing the duty*; but I am not aware that in a plea of this kind it is necessary to make such an averment. It appears to me that if the duty exists, and the act done corresponds with the duty, and is done upon an occasion calling for the exercise of the duty, a judge, if the question arose under the general issue, according to the old forms, ought not to have speculated upon the motives which actuated the defendant, but to have held that the occasion warranted the speaking of the words, if no malice were shewn, and to have left the question of malice to the jury, if the evidence warranted his so doing; and in dealing with a special plea of privilege, alleging that the speaking of the words was *bona fide*, and without malice, the Court is, in my judgment, bound to treat the words as privileged, if the occasion warranted the speaking." Applying that, if it appears to us that the privilege existed, this person being interested in the subject matter of the communication, being the person aggrieved, if he conceived he had the privilege, and that the act done corresponded with it, then though it is not distinctly averred that it was done in that character, it is competent to us to hold that the communication was privileged. He does not by his letter claim any specific redress. He says, "I trust they will deal with the matter as it deserves," and he does not by his defence state that he did it for the purpose of obtaining any particular redress, but with the *bona fide* object of procuring an inquiry. He states his grievance, and says, "I make this statement to you for the purpose of your dealing with it as it deserves." If he is entitled to a remedy, I think that is a sufficient prayer for the remedy, but it is said that he does not state he did it with that object. Now, I have been looking into the authorities; I shall refer to a few of them. They have been discussed at

great length; and, I believe, owing to the assiduity with which counsel have prepared themselves, they have all been cited. Can it be said that the rule in *Harrison v. Bush* establishes the proposition in the strictest sense that no other communication shall be privileged except those that fall within the strict terms of it, namely, that it must be made by a party having an interest or duty to a party having a corresponding interest or duty. Does this mean that so far as the party making the statement is concerned this privilege arises from interest? Does it mean that the party to whom it is made should also be interested, or is it sufficient that interest was on one side and duty on the other? Taking the proposition to mean that if a party interested makes a communication to another whose duty or interest it is to investigate the matter, the communication is privileged, I should say it is enough. It was not the intention of Lord Campbell in *Harrison v. Bush*, to overrule any of the previous cases. The only case he quarrels with is *Start v. Blagg*; and, certainly, looking at that case, and the circumstances under which the Court refused the rule, it is impossible, I think, in considering the conflict with the various other cases, to come to the conclusion that it is an authority for the proposition that unless the party is legally authorized to institute an inquiry and give redress the communication is not privileged. But I do not see that Lord Campbell in his judgment, or in *Dickson v. The Earl of Wilton*, does anything to controvert the doctrine in the cases to which I will advert. Nor was the case of *Fairman v. Ives* overruled. Holroyd, J., there says, referring to *Cleaver v. Sarrande*, "It was expressly held that no action was maintainable for matter contained in a written communication made *bona fide* to a friend, and not for the purpose of slandering." That is not the case here, but it shews that the rule has not been considered to be confined within the strict limits of *Harrison v. Bush*. So in the same case Best, J., "The defendant seems to have felt that the plaintiff had treated him very ill; and the letter contains such expressions as an avry man was likely to use, and such as would have rendered the letter a libel if it had been sent into general circulation or to any individual without a sufficient cause to justify the sending of it. But the circumstances under which this letter was sent rendered it a privileged communication." He then refers to *King v. Bayley*. However, the case which goes decidedly in favour of the defendant here is that of *Tobgood v. Spyring*; and on looking to the facts of that case it appears that the defendant there was tenant to the Earl of Devon. One Brinsdon was a master carpenter in the constant employment of the Earl, and the plaintiff had been in his service. Certain works had to be performed on defendant's house, and pursuant to Mr. Brinsdon's orders the plaintiff went to defendant's house to make the repairs. The defendant made a complaint to Brinsdon of the conduct of the plaintiff. He made that complaint to the plaintiff himself in presence of a person named Taylor, and a similar one to Taylor not in presence of the plaintiff. The Court held that the communication to Taylor when alone was not privileged, but that the communication to Brinsdon was privileged. It did not appear that there was the slightest object to be

achieved by the complaint to Brinsdon, or that Brinsdon had authority over the plaintiff, or that any redress was sought, because the tenant had the power of dismissing the plaintiff when he thought fit; but the Court held that the communication to Brinsdon was privileged and that to Taylor was not; and Parke, B., giving judgment, and going a great deal into the general law of the case, says, "In general, an action lies for the malicious publication of statements which are false in fact and injurious to the character of another (within the well-known limits as to verbal slander); and the law considers such publication as malicious, unless it is fairly made by a person in the discharge of some public or private duty, whether legal or moral, or in the conduct of his own affairs in matters where his interest is concerned. In such cases the occasion prevents the inference of malice which the law draws from unauthorized communications, and affords a qualified defence depending on the absence of actual malice. If fairly warranted by any reasonable occasion or exigency, and honestly made, such communications are protected for the common convenience and welfare of society; and the law has not restricted the right to make them within any narrow limits." I do not find that that opinion has been ever found fault with. Assuming, therefore, that the communication here made was not made by a person in discharge of a public duty, was it not made in the conduct of his own affairs in a matter where his interests were concerned, and on conduct which certainly I must take it on the pleadings did certainly give good cause of complaint? He makes the communication to the members of a select body to which the plaintiff belonged, his grievance being the conduct of the plaintiff; and he says he did it for the purpose of preventing a repetition of that conduct. I ask does he lose the privilege because he cannot enforce a legal remedy? Here is a matter which may not be the subject of an action; it may not be worth while to make it the subject of an action, but he says "I make a complaint to you, a select body, that you may prevent a repetition of this conduct." I would say that it was as reasonable a course as could well be suggested. But let it not be thought that in extending the privilege thus I at all deprive the individuals of the public of the protection to which they are entitled against every species of exaggerated charges, intentional or made through harshness, for the defence here goes on to say that what he did was done *bona fide* and without malice under the belief which he mentions. I do not rely on the belief, but if a jury found it was not done *bona fide* on an issue, and that it was done maliciously, meaning for any indirect motive, then the plea of privilege is gone and the result would probably be that the defendant would be maliced of heavier damages than he otherwise would. On these grounds I think, notwithstanding the mode in which the matter is pleaded, the soundest conclusion to come to is what I have stated, independently of the other ground stated by my brother Hayes.

LEROY, C. J.—In this case I hope I may be able to express shortly the grounds on which I have come to the conclusion that the defendant is entitled to our judgment, not on the strength of his own defence, but because on the whole record taken together the plain-

tiff shews himself disentitled to our judgment; and the general rule of law is, that if the plaintiff fails to establish his case in point of law and fact, the judgment must be against him, and the defendant is not put to establish his defence. Now, I do not mean to say that this defence of privileged communication has failed; but I think, not on the authority of the cases which have been cited upon this doctrine of privileged communication, but upon the principles of the common law, the plaintiff is disentitled to our judgment. I do not mean to say that I am clear that the defence of privileged communication has not been made out, but I will state the difficulties that occur to me in saying that it is. I agree that it is said that this society, the communication to which is made the great ground of defence, is a chartered society, chartered for the benefit—the general benefit—of the profession. Now we have not anything more of the charter set out. There is no allegation of either common law or statutory right that they have to give redress in cases of this sort where one of the body has violated the duties of the profession, and done an act calculated to bring disgrace upon it. There is nothing either to shew that they have it, neither is there any allegation on the pleadings that they had not such right or power to give redress to the party who has applied to them, and justifies his publication of this charge upon the grounds that he believed *bona fide* that they had it. It is not enough to allege that a party *bona fide* believed anything, for how can issue be taken for a man's belief? If a man gives a reason, if he states facts shewing that they had authority to give redress, I could understand it; but I confess that the stumbling-block in the way of my assenting to the view that some of my brethren have taken is, that it is necessary to rest on *bona fide* belief. I do not think we can import into this the various cases in which there is a sort of relationship established between the judges and this body, where they are called on to certify to the character of a candidate for admission to the profession of attorney. I therefore feel a difficulty in my way which prevents me from saying that the public or anyone injured is justified by virtue of its being to this body that he addresses his publication. I think it would be imposing a hardship on the body of attorneys if there was any distinct authority for it, were we to say that an attorney was to be libelled on easier terms than any other member of the community. I confess, therefore, I feel a difficulty in saying that this case comes within the principle of or analogy to any of the former cases on which this protection of privileged communication has been established or acted upon. Well, then, that is the ground on which I feel a difficulty; without differing at all from the very able argument that has been offered by my brothers Hayes and O'Brien, I cannot rest merely on the ground of privileged communication. At the same time, from the nature of what has occurred in this case on the part of the plaintiff, it is right to say that I think this publication is not without excuse, though it may not have a justification; and why do I say that? The defence states, "I engaged you, and you were acting as my attorney in a suit instituted against me. Consequently, you were in possession of all that it is important for my attorney to know confidentially

and in every other way; and being in possession of all this you went over to my adversary, taking with you all that related to my defence;" and, furthermore, it goes on to state a peculiarly harsh proceeding which I would not dwell upon except to shew a great hardship upon this party who was so treated. Well, he states this, and what course does the plaintiff take? Instead of coming to the Court for leave to reply and demur he demurs simply, and thereby admits on the record the statements in the defence. I say that the plaintiff by this course, on the principles of the common law, has disentitled himself to damages, because it is a *damnum absque injuria* of which he complains. He has brought the injury on himself; it is by his own default he has exposed himself to it, because he admits on the record the truth of the charge against him; a charge which, take it to be aggravated to the uttermost, as it is by the innuendoes, is a charge that disentitles him to any relief when he has brought it on himself, and which, he admitting it to be true, makes this a case upon which we cannot, upon the principles of the common law, give judgment against the party that is so treated. It is, as I have said, *damnum absque injuria*. But, besides, I think it right to add, viewing it as a question of privileged communication, does not the defence repel the imputation of malice in a double way? First, the plaintiff does not say it is false that he deserted his original client. Secondly, can the party who has done so, who is impugned for doing so by a publication, say that it is a malicious injury without excuse as well as without justification? Is it without excuse? Is it no excuse to a man who has been treated so to charge his adversary? Is it not a species of plea of *son assault demene*, as it would be in an action of trespass? Above all, does it not take away that which is the essential ground here for recovery, namely, the charge of malice? For an excuse repels the imputation of malice as much as truth would do, for malice means an injury done without justification or excuse; but the moment there is a justification or an excuse, there is an end of malice, and therefore an end of the action. Now, that is the ground on which I have come to the conclusion that, this plaintiff by his demurrer admitting the facts, there should be judgment against him.

Rolls Court.

[Reported by John Munroe, Esq., Barrister-at-law.]

BLAKE v. BLAKE—Nov. 12, 1863.

Receiver appointed—Petitioner's security impeached.

A general power of appointment given to V. J. B., enabling him to charge the respondent's estate with £1,500 and interest, had been exercised in favour of petitioner, his only son by a second marriage, who now sought to have a receiver appointed over the estates, as no interest had been paid for fifteen or sixteen years. The respondents impeached petitioner's security, it being alleged that the deed by which the power of appointment was given was meant to carry out the terms of a prior contract; that the power was too general and should have

been confined to the children of the first marriage; and that a cross bill had been already filed to remedy the mistake. Held—that notwithstanding the impeachment of petitioner's security, a receiver should be appointed pending the litigation.

THIS cause came on by way of appeal from an order of Master Litton in so far as it directed a receiver to be appointed over the estates of the respondent, Sir Thomas Edward Blake, under the following circumstances:—By indenture of lease and release, dated respectively the 29th and 30th July, 1803, the lands of Menlough and Ballindulagh, in the county of Galway, and other hereditaments in the same county and elsewhere, were conveyed to trustees to the use—subject to certain charges in favour of Sir John Blake and his second wife, Dame Rose Blake—of Valentine John Blake for life, remainder to his first and other sons in tail male, with an ultimate remainder, after divers other limitation, to Sir John Blake in fee. A power was also given to the said Valentine John Blake to charge the lands with the sum of £300 as a jointure for any wife with whom he might intermarry; and also with a sum of £3,000 as a portion for the younger children. By deed executed on his marriage, and dated 28th August, 1803, Valentine John Blake exercised his power to its full extent, and directed the portions for the younger children who should be born to him by his then intended wife to be raised as he should by his last will direct. In default of appointment it was to be equally divided between them; and if only one, the whole to go to such child. The lands contained in the settlement of July, 1803, had been mortgaged in 1802 to secure a very large sum of money. The mortgagee having obtained a decree for foreclosure and sale, it was agreed, if he consented to forego such right, that the estate tail then vested in Thomas Edward Blake, eldest son of Valentine John Blake, should be barred; but all the other estates, except Menlough and Ballindulagh, should be conveyed absolutely to the mortgagee free from the jointure; that the lands of Menlough and Ballindulagh should continue subject to the mortgage as an indemnity for good title and freedom from incumbrances; and that the younger children should exonerate their estate to some extent from the charge in their favour in order to better the mortgagee's security. By deed dated 2nd December, 1834, and reciting an intention to make provision for the wife and younger children by a settlement to be executed pursuant to the power of appointment thereafter given, this agreement was carried out; and the lands of Menlough were, after other limitations, conveyed to such uses as Valentine John Blake and Thomas Edward Blake should jointly appoint. By a subsequent deed of the same date this power was exercised, and the lands conveyed to Sir Valentine for life, remainder to Thomas for life, remainder to his first and other sons in tail male; and a term of 500 years was limited to trustees to raise £1500 for the younger children of Sir Valentine, or any one of such children should but one survive him. This sum was directed to be paid in such manner as Sir Valentine should by deed or will appoint, and was to bear interest at the rate of six per cent. from and after his death. There were four children by Sir Va-

lentine's first marriage—Thomas Edward, the eldest, and therefore tenant in tail, and three younger children, only one of whom survived his father. In 1847 Sir Valentine died, having by his will appointed the whole sum of £1,500 to the petitioner, who was the only son by the second marriage. No interest having been paid from Sir Valentine's death up to the present, an application was made to the Master on behalf of the petitioner, who was a minor, to appoint a receiver over the estate. The application was granted, and against this order the present appeal came on to be heard.

Brewster, Q.C., Sherlock, Q.C., and Oliver Burke, for the respondents.—There can be no reason for appointing a receiver under such circumstances as the present. The security is ample, and the petitioner's claim to the sum appointed is extremely doubtful. There can be no question on the first point since the charge, if it be a proper one, is a charge on the inheritance; and the rental of the estate is upwards of £500 a year. On the second point there seems to be as little doubt. The two deeds of the 2nd December, 1834, are to be read as one, according to a host of authorities. The evident intention, when those deeds were executed, was to give a power to Sir Valentine Blake to compensate his younger children by his first marriage for having exonerated the estate from the charges in their favour. It was clearly the conveyancer's mistake to give such an absolute power of appointment and thus enable the father, if he so chose, to rob the younger children by his first marriage. It was never contemplated to give any power of appointment in favour of any children by a second marriage. A cross bill has been already filed to rectify the mistake, and to make the limitations of the deed conformable with the intention. This view is borne out by the existence of a contract under seal, bearing date 1st April, 1834, which was the real contract intended to be carried out by the deed of 2nd December, 1834, and which gives no power of appointment to the father, but ascertains and limits their several proportions to the children of the first marriage. It is admitted that the copy of the agreement now produced is not legal evidence, as the original has not been properly accounted for; but the Court will not in such a case let a mere technical difficulty stand in the way. It has never been the practice of the Court to appoint a receiver when such doubts are thrown on the petitioner's title.

The Solicitor-General and Wm. Smith, for the petitioner.—The Master's order for appointing a receiver was perfectly correct. Since 1847 not a shilling of the interest on £1,500 has been paid although required for the infant's maintenance. No valid objections have been urged which throw the slightest doubts on the petitioner's claim. There is no legal evidence whatever that the alleged contract under seal, dated 1st April, 1834, ever existed. Even if it were proved it must be further shown that the intention of carrying out its terms continued up till the execution of the deed of 2nd December, 1834. The witnessing part of the deed is perfectly plain, and being plain cannot in any way be controlled by the recitals, so as to confine the power of appointment to the children of the first marriage. Putting the case in the strongest light against the petitioner, even if any valid objec-

tion could be made against petitioner's title, it is the practice of the Court to appoint a receiver pending the litigation.

THE MASTER OF THE ROLLS.—I can have no hesitation in saying that the appeal must be dismissed, as it has been presented to the Court. There is no legal evidence before me as to the existence of any contract under seal executed in April, 1834, nor any evidence whatever that the deeds of December were intended to carry out any prior contract. The recitals in this deed would seem to point to a provision for the children of the first marriage. If the witnessing part of the deed were doubtful the recitals might of course be looked to; but I cannot permit the language of the witnessing part of the deed, where it is as clear as possible, to be controlled by the recitals. The power given by the deed of December, 1834, was properly exercised by Sir Valentine Blake, and that was in favour of the petitioner. As yet, no doubt has been thrown on petitioner's title. I am aware a cross bill has been filed to remedy the alleged mistake in the deed of the 2nd December, 1834; but even if I were of opinion that a grave doubt rested on the title of the petitioner I should be slow to reverse the Master's order. I adopt entirely the language of Sir M. O'Loughlin in *Smith v. Egan* (S. and Scl.). On counsel stating that where the security was impeached a receiver was never appointed, the Master of the Rolls replied, "That is not the practice of the Court. If it were there never would be a case in which a debtor would not set up some case against his creditor. Impeaching the security might be a good reason against distributing the fund, but not against appointing a receiver. . . . If the respondent intends to impeach the security he must take proceedings for that purpose, but in the meantime the rents must be secured." I entirely approve and adopt that language, and I shall therefore affirm the Master's order and dismiss the appeal.

Court of Common Pleas.

[Reported by J. Field Johnston, Esq., Barrister-at-Law.]

COLVILLE v. HALL.—May 7, 8, 22; June 10.

Ejectment—Construction of covenant—Waiver—Legal eviction—Right of re-entry—Liberty to change verdict reserved at the trial.

An indenture of assignment of certain premises in the vicinity of Dublin contained a covenant by the assignee to expend within a certain number of years a certain sum of money in the erection of dwelling-houses on the premises conveyed, the sum to be expended within each year being also fixed, and a clause of re-entry for breach of the covenant. An indenture of subsequent date between the same parties, and endorsed upon the back of the former, after reciting that the assignee had built one house, and was desirous to let the portion of the premises not built on, contained the following covenant by the assignor: "that in case any penalty or forfeiture shall be incurred under and pursuant to and for non-performance of the clauses, covenants, and

agreements within reserved, that in such case such penalty or forfeiture shall not in any manner affect the interest of the persons who may be tenants to said within demised premises so as in any manner to deprive such persons of the full benefit of their respective holdings; and it is covenanted, &c., that in case of any such penalty, &c., and that proceedings be taken on account thereof, then he, the said assignor, instead of the said assignee, shall be entitled to recover and receive the rents payable by such persons; and that such persons shall not become liable to pay any greater sum." Upon an ejectment brought upon a forfeiture incurred by breach of the former covenant or condition, and a motion to turn the verdict for the defendant into one for the plaintiff, Held (per Monahan, C.J., and Ball, J., Christian, J., giving no opinion, and Keogh, J., having been absent during the argument) that the second indenture did not operate as a release of the condition in the first.

Held, also, a portion of the premises being set, and a portion unset, that the appointment of a receiver upon foot of a judgment for rent due obtained by the assignor against the assignee, was not such a legal eviction as would excuse the assignee from performing the condition in the original indenture.

Held, also, that the receipt by the receiver from an undertenant of rent accruing due out of the premises subsequently to the bringing of the ejectment, did not operate as a waiver of the forfeiture.

Held, also, that a termor who assigns upon condition may re-enter for condition broken.

If a judge reserve liberty to turn a verdict for one party into a verdict for the other, and there be a point which would render that reservation nugatory, and which, if made at the time, might be met by evidence and yet was not made, it cannot be made afterwards.

This was an ejectment brought to recover possession of premises on the west side of Ballybough-lane, in the county of Dublin, for the breach of a condition in an indenture between W. C. Colville and J. H. Hall, dated 5th May, 1856, which indenture was as follows:—
"Whereas by an indenture of lease bearing date the 20th Oct., 1824, made between the Venerable John Torrens, Archdeacon of Dublin, and the Rev. John Lewis, Rector of Howth, (trustees appointed pursuant to the provisions of the will of Joseph Love, Esq., deceased) of the one part, and the said W. C. Colville of the other part, they for themselves and their successors, as trustees, did grant, demise, set, and to farm let unto the said W. C. Colville, his executors, &c., all that and those the two new brick dwelling-houses and gardens situate on the west side of Ballybough-lane, in the county of Dublin, formerly in the possession of Michael Bourke, but then late in the possession of John Forster, and over and against a walled garden called Spring-garden, containing four acres and thirty-eight perches, together with the several cabins thereon, as the same are more particularly set forth and described by a map or survey thereof thereon delineated, with the appurtenances, to hold from 29th

September last for 500 years at the yearly rent of £80, and in which indenture is contained a covenant that the said W. C. Colville, his executors, &c., should, within five years, expend on said premises in building a good and substantial dwelling-house or houses, or in making other valuable and lasting improvements thereon, £2000, under penalty of further rent of £50 a year, same to commence and be computed at the end of said term of five years, and to continue for ever after during said demise, the said W. C. Colville doth grant, bargain, sell and assign, transfer and make over unto the said J. H. Hall, his executors, &c., all and singular the said dwelling-houses, ground, and premises, that is to say, all that and those the two new brick dwelling-houses and gardens situate on the north side of the road now called Ballybough-road, but in said recited lease stated to be situated on the west side of Ballybough-lane, as formerly in the possession of Michael Bourke, and afterwards in the possession of John Forster; and over against a walled garden commonly called Spring-garden, containing four acres and thirty-eight perches, together with the several cabins thereon, and the other messuages, out-buildings, and offices erected and built thereon, more particularly described on the map traced on said recited lease, and all the estate and interest of the said W. C. Colville in the said premises. To hold for all the residue of the said term of 500 years, wanting twenty-one days, subject to the payment of the rents, and observance, and performance of the covenants, conditions, and agreements reserved in said lease, and also subject to the tenancies hereon endorsed. And the said J. H. Hall, for himself, his heirs, executors, administrators, and assigns, doth hereby covenant and agree with the said W. C. Colville, his executors and administrators, that he the said J. H. Hall, his heirs, executors, administrators, and assigns, shall and will, at his and their own proper costs and charges lay out and expend, within the space of seven years, to be computed from the 1st day of September, 1855, a sum of at least £2,000 in the erection, building, and completely furnishing such number of dwelling-houses and premises as he the said J. H. Hall shall deem most suitable to the locality in which the land and premises hereby assigned are situated; such houses and premises to be built in a good, substantial, and workmanlike manner, fit for habitation and use, and not to be less than two storeys high over the pathway of Ballybough-road, such outlay to be made on an average of not less than £285 for each and every year of the said term of seven years. Provided always, that if it shall happen that default shall be made in the observance and performance of the aforesaid covenant for building in manner aforesaid, and in making the aforesaid outlay and expenditure as hereinbefore required to be computed, from the 1st day of September, 1855, then and thenceforth, and at the expiration of the said term of seven years it shall and may be lawful for the said W. C. Colville, his executors or administrators, into and upon the said hereinbefore mentioned premises, or any part thereof, in the name of the whole, to re-enter, and the same to have again, re-possess, and enjoy in his or their first and former estate, and as if these presents had never been made, anything herein contained to the contrary thereof in

anywise notwithstanding." Upon this deed was endorsed the following covenant:—"This indenture made the 12th day of November, in the year of our Lord 1856, between the within-named W. C. Colville of the one part and the within-named J. H. Hall of the other part, Whereas the said J. H. Hall has caused a new brick house to be erected and built on the south-western angle of the within demised plot of ground; and whereas the said J. H. Hall is minded and desirous to let the remainder yet not built on of said within demised premises for building ground; and it has been agreed upon between said W. C. Colville and said J. H. Hall that the person or persons respectively who have become, or who shall hereafter become, tenant or tenants for any portion or portions of said demised premises under said J. H. Hall, his executors, &c., shall not be liable to any greater sum than the yearly rent to be reserved by agreement or lease for their respective holdings, provided such rents be at the fair and full setting value for the then time being of said land, and provided also that the dwelling-houses to be erected by the tenant or tenants of said J. H. Hall, his executors, &c., be of the description required by the within deed, now this indenture witnesseth that the said W. C. Colville doth hereby for himself and his heirs, executors, administrators, and assigns covenant, promise, and agree to and with the said J. H. Hall, his heirs, executors, administrators, and assigns that in case any penalty or forfeiture shall be incurred under and pursuant to and for non-performance of the clauses, covenants, and agreements within reserved and contained, or any of them, by the said J. H. Hall, his executors, &c., that then and in such case such penalty or forfeiture shall not in any manner whatever interfere with or affect the interest or interests or property of the person or persons, or any of them, their executors, administrators, or assigns, who may be tenant or tenants to said within demised premises or any part thereof under said J. H. Hall, his executors, administrators, or assigns, so as in any manner to deprive such person or persons or any of them of the full benefit and advantage of their respective buildings and holdings upon the premises; and it is hereby further covenanted and agreed that in case of any such penalty or forfeiture as aforesaid being incurred, and that any proceedings be taken and rendered effectual on account thereof by the said W. C. Colville, his executors, &c., then he, the said W. C. Colville, his executors, &c., instead of said J. H. Hall, his executors, administrators, or assigns, shall be entitled to recover and receive the rents to be payable by such person or persons so becoming tenant or tenants to said premises in manner aforesaid; and that such person or persons so becoming tenant or tenants to said premises as aforesaid shall not be rendered or become in any manner liable to pay any greater sum anything in the within written indenture contained to the contrary of these presents or any portion thereof notwithstanding" Upon the trial, before Monahan, C. J., at the Hilary after sittings, the defendant entered in evidence an attested copy of Chancery proceedings under which the plaintiff procured a receiver to be appointed on the lands, and an attested copy of a judgment for £219 4s. 1d. obtained by the plaintiff against the defendant in the Court of

Exchequer, Michaelmas, 1857, on which judgment the proceedings in Chancery were founded. At the close of the defendant's case the plaintiff gave evidence that the judgment had been duly registered as a mortgage on the 11th day of December, 1857. The defendant called on the judge to nonsuit the plaintiff, on the ground of the deed of the 5th May, 1856, being an absolute assignment of all the plaintiff's interest in the lands; also because the endorsement amounted to a waiver of the re-entry covenants in the deed of 1856. The judge directed a verdict for the defendant, reserving (by consent of the parties) leave to the plaintiff to move the Court above to turn it into a verdict for the plaintiff should the Court be of opinion that the endorsement did not destroy the right of re-entry under the forfeiture clause. A conditional order having been obtained,

Bourke, Q.C. (with him *McMahon*) now showed cause against it.—This is an ejectment for breach of the condition, not an action for violation of the covenant; and as the ejectment has been brought it is to be assumed that the defendant is still in possession. It naturally became a serious object to Hall to be relieved from the consequences of not strictly complying with the terms of the condition, and accordingly this covenant was endorsed upon the deed, the effect of which is now to be considered. It is a waiver of the forfeiture. Conditions are to be strictly scanned. They are odious to the law. A condition cannot be waived in part and preserved in part. A covenant for payment of rent may be apportioned, but the new Landlord and Tenant Act will not affect this; and a condition gone in part is gone *in toto*. It has been decided that where the language of an instrument like this endorsement is the language of contract, in order to accomplish the object of the parties it will be construed as language of annihilation. To avoid circuity of action the Court will hold this endorsement to be a release. It provides that in case any penalty or forfeiture be incurred, the subordinate interests shall nevertheless be preserved. If that be the primary object of the parties, and this endorsement be treated as a covenant and not a release, how can that object be carried out? These interests would perish. It may be argued that this is a waiver so far as Hall may have let the premises, but not so far as he has not; but the condition cannot be divided. If it be partially discharged it is totally discharged. If Colville succeeded by having this construed as a covenant, the result would be that Hall would be under the necessity of bringing an action against him for violating his contract. The deed affords within itself the means of construing it. Besides there is an estoppel *in pais*, because Colville stood by. [*Ball, J.*—What is there more than that the party has the power to enforce his covenant, and abstains from doing so?] If a man sells another man's horse before his eyes, and the owner does not prevent him and says nothing, he cannot afterwards bring an action of trover for the horse against the buyer. [*Christian, J.*—Have you any case which decides that a right under a deed can be estopped by estoppel *in pais*?] No. [*Christian, J.*—Many authorities go to show that no instrument is treated with so much latitude as a lease. If an instrument can be made out to be a lease through its

declared intentions, it will be.] Bringing an action for rent accruing subsequent to the breach and subsequent acceptance of the rent in that action amounted to a waiver—*Dendy v. Nicholl* (4 Com. Bench, N.S., 384).

Darley, Q.C., and *Sidney, Q.C.*, contra.—The deed must be taken altogether. This indorsement is only a covenant which we admit may be treated as if it were part of the original lease. It would expose to an action of covenant. [*Ball, J.*—Who would sue upon that covenant? You will not argue that the under-tenants would sue?] They would have a remedy in equity. If this be treated as a release, it will follow that a judgment for non-payment of rent would be impossible. [*Christian, J.*—Your argument is, that the right to evict for breach of the condition was not gone, but that if Colville acted on it, he would be bound to re-demise to the under-tenants at the rents reserved by Hall in his under-leases. *Ball, J.*—Colville might have incumbered his interest in the meantime. *Monahan, C.J.*—Any new demise does not appear to be contemplated. *Christian, J.*—There are two intentions apparent, and the question is, which of these incompatible intentions is to prevail.] The construction we contend for will not interfere with the rights of anybody. If a party enter into a bond with one other party, and that other afterwards covenants not to sue, the Court, where there are only the two parties, will allow that covenant to be pleaded as a release. [*Christian, J.*—If the covenant be indefinite as to time.] But if there be two obligors, and the obligee covenants with one of them, the covenant cannot be pleaded as a release, and the remedy will be by action over. It is not a release, because if it were, it would extinguish the right of the obligee against the other obligor with whom he has not covenanted.—*Bac. Ab. title Release*, vol. vi., p. 604; *Dean v. Newhall* (8 T. R., 168). A covenant not to sue one of two joint debtors does not operate as a release to the other. *Hutton v. Eyre* (6 Taunton, 289). In *Lacy v. Kinaston* (1 Lord Raymond's Rep., 688), there was a covenant not to sue one of several, and it was held not to be a release. It was said, "This covenant in its nature is not a defeasance, for in case of a defeasance the words are, that the thing to be defeated shall be void, and since there are no such words here, it must be understood to be a defeasance from the nature of the thing, and not from the words; and the consequence of that would be to leave Lacy without remedy." So, here, if this indorsement be a release, it must be understood to be so from the nature of the thing, and the consequence would be to leave Colville without remedy. [*Monahan, C.J.*—The plaintiff may have foolishly entered into this.] The Court will strive against such a result. The under-tenants could compel a re-demise to themselves by going into a Court of Equity. [*Christian, J.*—Would not Colville, upon this, be deprived of one of the things this indorsement provides for, viz., that it should be lawful for him to recover the rents from the under-tenants? The object is two fold; it is to benefit the tenants and to benefit Colville. He should be able to recover the rents.] The latter part of the endorsement is also for the benefit of the tenants. The object of this

ejectionment is not to disturb the under-tenants, but to get rid of Hall. Hall has scarcely paid any rent, and Colville has to pay rent himself to the party from whom he holds the premises. He served a notice on the under-tenants, explaining the reason of joining them, and warning them not to defend, and none of them have taken defence. The first thing that Colville will do will be to demise to these under-tenants, and if he does not, he can be compelled to do so.—*Mann v. Stephens* (15 Simon, 377). [*Monahan, C. J.*—Your argument is this, that it was the intention that Colville should retain his rights against Hall, and if we construe this to be a release, Colville will lose his rights. On the other hand it was the intention that the tenants should be protected, and this can be done by remedies in equity, or by Hall being treated as a trustee in a Court of Law.] By the 5th section of 8 & 9 Vict., c. 106, the benefit of a condition or covenant, respecting any tenements or hereditaments may be taken, although the taker thereof be not named a party to the same indenture. The tenants never executed this, but if they come to claim protection under it, they can get only what is co-extensive with that given to the landlord. There is nothing in the indorsement which says the leases shall be upheld; the words are, "such penalty or forfeiture shall not in any manner whatever interfere with or affect the interest or interests," &c. In *Willis v. De Castro* (4 C. B., N. S., 216), the replication was that the deed in the plea mentioned contained words purporting, if considered without reference to any other part of the deed, to release as in the plea pleaded, but that in another and earlier part of the same deed, it was agreed and declared in the words following, that is to say, "that it shall be lawful for the creditors to execute these presents without prejudice to any mortgage, lien, or security, which they may have for their respective debts, or any part thereof, or to any claim against any surety or sureties, or any other person or persons, who may be liable for the payment thereof." That was an action for goods sold and delivered, and the defendant pleaded that he was liable jointly with A, B., and C., and that the plaintiffs had released A., B., and C., and Lord Campbell is mentioned in the case as having said in another case, "It is clear that an absolute release in terms, followed by a clause saving remedies against certain parties, cannot be treated as a release, if the effect of so doing is to prevent the operation of the saving clause." And Crowder, J., in giving judgment in *Willis v. De Castro*, says, "To hold that the deed thus disclosed upon the whole record enured as a release, would be manifestly giving it an effect contrary to the intention of the parties." "The covenant in question amounts only, in my opinion, to a covenant not to sue the persons mentioned in the plea, and not to a release." In the present case, Hall may be liable to the under-tenants, if he has given them leases which may be evicted, and so will the plaintiff be liable to them, but there is no circuity of action.

M. Mahon in reply.—The indenture of the 5th of May, 1856, is an assignment of the entire estate of Colville, and there is no right of re-entry at common law. The *habendum* is inconsistent with what goes

before it, and is to be rejected as to the twenty-one days reserved.—2 Saunders on Uses, 5th edition, p. 154, note; *Throckmerton v. Tracy* (Plowden's Rep., 152). No one can take advantage of this forfeiture but Colville's lessor. [*Christian, J.*—Why could not a grantor or his executor take advantage of a condition in an assignment of a term?] It is not an incident of such an estate. [*Christian, J.*—If my recollection serves me right, it was never doubted, during all the discussions in the case of *Pluck v. Digges*, whether a termor who assigns upon condition could not, by a formal demand and re-entry, bring his ejectionment at common law. *Monahan, C. J.*—There might be a difficulty about assigning the right of re-entry.] That he could not do in any case. [*Monahan, C. J.*—This will apply to fee-simples, but where is the authority for saying that a termor could not re-enter?] There is no precedent of his having done so. This condition is not apportionable.—*Croft v. Lumley* (5 El. & Bl., 648); *Knight's Case* (5 Rep., 54, b); *Rawlyn's Case* (4 Rep., 52, b); 2 Platt on Leases, 332. The estates cannot be re-vested in the under-tenants. There has been no proof of re-entry, and there are no such words in the indenture as that "the lease shall be null and void." [*Sidney, Q. C.*, for the plaintiff, here argued that the plaintiff was in possession through the receiver; but, *Per Curiam*—That will not do; that is the possession of the Court. *Sidney, Q. C.*, conceded this, but urged that this point could not be raised now, as it had not been made at the trial. *Christian, J.*—If a judge reserve liberty to turn a verdict for one party into a verdict for the other, and there be a point which would render that reservation nugatory, and which, if made at the time, might be met by evidence, and yet was not made, it cannot be made afterwards.] Where, by a condition, a party is required to build a house, or do any other act, and the lessor prevents the performance of the act, the condition is gone. Colville became mortgagee, and obtained a receiver, and Hall could not have ventured upon the premises. Rent has been received after the 21st November, 1862, and the receipt of this rent is a waiver of the forfeiture; so, also, the notice to the under-tenants that they would not be disturbed, is a waiver.

The case stood over until the ensuing term, in order that the two last points, that of a legal eviction by Colville, and that of a waiver of the forfeiture by the receipt of rent, might be argued, the Court determining that the indenture being an assignment made no difference as to the right to re-enter for condition broken.

May 22.—*Darley, Q. C.*, cited *Doe dem. Griffith v. Prichard* (5 B. & Ad., 765); *Doe dem. Morecraft v. Meux* (1 C. & P., 346); 1 Furlong's Landlord and Tenant, 566; *Jones v. Carter* (15 M. & W., 725); *Lessee Blakeney v. Higgins* (4 Ir. Jur., 17). The payment here was by an under-tenant to a receiver. As to the other objection that the proceedings in the Court of Chancery prevented Hall from carrying out his improvements, the first thing that Hall did was to assign the entire of his interest in May, 1856. A half-year's rent became due in the November following, and Colville got a portion of it

with difficulty. The half-year's rent due in the following March was paid, and since that, Colville has never got any rent out of the premises. He obtained a judgment by default, and an inquiry to assess damages, and under the 15th section of the Chancery Regulation Act, a receiver was appointed in October, 1858. [*Christian, J.*—Is there any authority for this proposition that if a tenant such as Mr. Hall was is interfered with by the due process of law to recover a just debt, that this will excuse him from carrying out his contract?] That is the correct view of the question. *Groome v. Blake* (8 Ir. C. L. Rep., 428) decided that a title acquired by the Statute of Limitations is not prevented by the appointment of a receiver. Although the receiver here was over the entire of the premises, yet Hall's possession of the unset portion of them was not disturbed, because there were no rents to be received out of it.

M. Mahon, contra.—*Jones v. Carter* is overruled so far as the principle of it applies to this case. *Dendy v. Nicholl* (4 C. B., N. S., 376) shows that it makes no difference whether the ejectment be brought prior or subsequent to the waiver. [*Christian, J.*—The only act subsequent to the forfeiture was the receipt of the rent.] The continuance of the waiver was itself an act. [*Christian, J.*—If that receipt of rent had been by Colville, and not by the receiver, it would be open to you to suggest that Colville was landlord in fact, though not in law, and, to preserve the covenant to the sub-tenants, gave that receipt, but it is signed by the receiver, not by Colville.] *Cole on Ejectment*, 408. As to the other point, the receiver was over the whole of the premises. [*Ball, J.*—It was elementary law in my time, that until there was an order to let, and that order acted upon, and a tenant obtained, the appointment of a receiver did not interfere with the possession of the party.]

Cur. adv. vult.

June 10.—*MONAHAN, C. J.*—An objection was taken during the argument, which was not made at the trial, that there had been no proof of re-entry. But this point was not saved at the trial, and therefore we do not think we are called on to determine one way or the other whether there ought to have been a re-entry. Another objection is, that the appointment of a receiver was a legal eviction, such as prevented the plaintiff from availing himself of his clause of re-entry. Colville having become a creditor of Hall, and having got a receiver appointed, we do not think that this was such an eviction. With respect to the residue of the premises, they remain in the possession of the party until set, and we are quite satisfied that if Hall had had the means, and was willing to lay out the money, the receiver would not have prevented him. Another objection is this, that the receipt of the quarter's rent due on the 1st of November, being some three weeks after bringing the ejectment, was a recognition of the tenancy as still subsisting, and, therefore that the plaintiff could not proceed with the ejectment. It occurs to us that the receipt by a receiver in a cause differs from the case of tenancies. No principle exists which should lead us to hold the receipt of this rent equivalent to a receipt of rent due by the middle-man to the head land-

lord. The real question in the case is the true construction of the indorsement. The question has had considerable discussion. We have given it a great deal of attention. We decide with very great doubt and difficulty, and I am very glad that the case is upon the record in such a state as that without any permission of ours the parties can take it to another Court. The permission would be granted if it were necessary. My own opinion is very different from what it was. I must state the contents of the lease a little fully. The deed from Colville to Hall is in form an assignment; it is an absolute assignment of all Colville's interest, subject to the rent payable to the landlord, and there is a covenant by Hall. [His Lordship read the covenant and the clause of re-entry.] It is quite clear that under this, with the mere exception of a right to bring an action of covenant, what Colville reserved was the right to re-enter, and Colville was himself under a covenant with the trustees of Love's Charity to expend a considerable sum of money, and in fact it was to indemnify Colville that this covenant was entered into between him and Hall. [His Lordship read the indorsement.] That is a material clause, "provided such rents be at the fair and full setting value." What is the true construction of this instrument? Does it operate as a release of the original condition in the original lease, or does it operate as a covenant not to prejudice the occupying tenants in the event of a forfeiture? In the first place, what was the intention of the parties? It was that Colville, in the event of a forfeiture by Hall, should retain his right of putting in execution that forfeiture so far as Hall was concerned, but it was also the intention that the occupying tenants should not be prejudiced, but remain, not as tenants of Hall, but as tenants of Colville, provided that the rents were fair. It is quite plain that all this cannot be observed. If we hold this indorsement to be a release, it operates for the benefit, not of the tenants merely, but of Hall, and the release cannot be partial. Therefore, Hall would continue to hold, and the right of re-entry is gone altogether. But if we do not construe this as a release, the effect will certainly be that we cannot give to the tenants the full benefit they were intended to get. Neither do we serve all the intentions expressed, and clearly expressed, by holding it to be a release. There is no more numerous a class of cases than what decide what instruments are releases, and what are covenants not to sue. It would be idle for me to comment on all the cases from the earliest times. I shall refer to one only, because it is recent, and because it contains the others.—*Willis v. De Castro* (4 C. B., N. S., 216). It was an action for goods sold and delivered. The defendant pleaded that the goods were sold to him jointly with others, and that there was no joint and several contract, and that his only liability was along with the others, and the others being released, that he was released also. A replication was put in stating that the part of the deed given in the plea was given correctly. It amounted to saying, No doubt, I released the other three, but it was agreed by another clause in the deed that though I did I reserved all rights against every other person, and against the defendant, therefore this does not operate

as a release, and the question was this, though these were words of release, would the deed operate as a release, since, in the same deed, the right to sue a third person was reserved, which would not be of avail if the deed were a release? The Court of Common Pleas decided unanimously, first, that the doctrine of absolute release applied to where the debtors were merely joined; and secondly, that though there were words of actual release, the deed could not have that operation, because the party reserved a right which he could not have if it were a release. Here there are no technical words of release. I do not say that an instrument will not operate as a release without technical words. But I say we are asked to hold that to be a release which has no technical words. The intention cannot be effectuated if we hold this to be a release. Colville would then have no rights, and Hall would continue a tenant. On the other hand, what mischief do we do to the occupying tenants? We do not give them everything by construing this not to be a release, but no one can doubt but that if Colville were to execute a *habere* against the occupying tenants, an injunction would issue against him. There is another matter. Would a Court of Equity enforce this covenant for the benefit of the occupying tenants? I give no opinion, but I am not satisfied that if these tenants could show they became so on the faith of this agreement that Hall would not be a trustee for them, and that they could not maintain a bill for specific performance. But this very queer Act, which provides for so many things that no one ever expected to find in an Act of Parliament, provides in its 94th section that the *habere* and decree may be executed without disturbing the possession of the under-tenants, so that if the parties choose to hold to their agreement, the tenants will go on to hold at the same rents. But we think we effectuate the intention of the parties by holding this indorsement not to be a release. I was mistaken at the trial. It is not a case for costs. The verdict must be entered for the plaintiff.

CHRISTIAN, J.—I will express no opinion as to whether Hall's under-tenants could get relief in a Court of Equity. I see great difficulties in the way. I am glad that the Chief Justice and my brother Ball have felt themselves strong enough upon the point to construe this deed in the way they have done, and so get over any doubts I might have; and to give a decision so truly in accordance with justice.

BALL, J.—I entertain all the doubts, and see all the difficulties, but think we shall best effectuate the intention of the parties by holding this not to be a release.

Rule absolute.

KEOGH, J., had been absent during the argument.

Court of Exchequer.

[Reported by Oliver J. Burke, Esq., Barrister-at-Law.]

HAYES v. STIRLING.—Nov. 6.

Pleading—Demurrer to summons and plaint—Personal liability of promoters of projects becoming abortive before incorporation.

The summons and plaint complained that the defendant,

with others, caused a prospectus to be issued and circulated stating the object the company had in view; and that the plaintiff paid to the company's banker, to wit, &c., the agents of the defendant in that behalf, a sum of £400; and that the scheme so detailed in said prospectus thereupon failed and became abortive. To this count of summons and plaint the defendant demurred, on the ground that no personal liability existed in his sole and individual capacity; that no promise had been given by defendant to plaintiff to refund said sum of £400. Held that money paid on behalf of a project which subsequently failed and became abortive must be treated as money had and received by the promoters in their sole individual capacity, and that the persons who paid the money were entitled to proceed against said promoters for its recovery.

Held also, that payment to the bankers was payment to the defendant.

THE third count of the summons and plaint complained "That heretofore, to wit, on the 1st day of May, 1862, the defendant and certain other persons, whose names are to the plaintiff unknown, agreed together to form a joint stock company called the "Rolling Stock Company of Ireland—Limited:" and the defendant, to wit, on the day and year last aforesaid, caused to be issued, and published, and circulated a prospectus of said company called the "Rolling Stock Company of Ireland—Limited," in which prospectus the name of the defendant appears as director, and which prospectus contained, amongst other things, the words and figures following: "The Rolling Stock Company of Ireland—Limited, for the building, sale, and letting on lease or otherwise Railway carriages and waggons. Capital £200,000 in 20,000 shares of £10 each; deposit on application £1 per share, and on allotment £1. Calls not to exceed £1 per share, and three months interval between two successive calls. Bankers, London Metropolitan and Provincial Bank, Cornhill, Dublin Provincial Bank of Ireland and its branches. Temporary offices, London, Old Broad-street." That the defendant, in and by said prospectus, further stated and represented that the operations of the said company would be commenced in Dublin, and that many of the existing railway companies in Ireland were prepared to avail themselves of the facilities which the said company would place at their disposal; that the company would be prepared to undertake the supply of the entire rolling stock of railways or to lease the working of lines; and that the deposit of £1 must be paid to the company's bankers upon each share previous to the application being sent in. That thereupon confiding in the representation and statements so made by the defendant in said prospectus, the plaintiff applied for 200 shares in said company upon the conditions and for the purposes set forth in such prospectus and none other. That, to wit, on the 28th day of July, 1862, plaintiff paid into the said company's bankers, to wit, the said Metropolitan and Provincial Bank, who were the agents of the defendant in that behalf, in pursuance of said prospectus a sum of £200, being a deposit of £1 per share upon shares so applied for; and said shares were allotted to plaintiff. That, to wit, on the 3rd day of Novem-

ber, 1862, plaintiff paid to the defendant's bankers, to wit, the said bank, in pursuance of the same prospectus a further sum of £200, being the payment in accordance with the said prospectus upon the said shares. And plaintiff saith that said scheme so detailed in said prospectus by the defendant thereupon forthwith wholly failed and became abortive, and has been totally abandoned, whereby an action hath accrued to the plaintiff to demand and have from the defendant the said sums amounting to £400 so paid as aforesaid by the plaintiff to the said bankers of the defendant pursuant to the said prospectus; and the plaintiff has demanded said sum from the defendant, and defendant has refused to pay same, to the plaintiff's damages of £400." To this count defendant demurred, on the ground firstly, that same did not disclose any cause of action good in substance, because same does not disclose any personal liability on part of the defendant in his sole individual capacity. Secondly, because the liability, if any, as stated in said first count was the liability of the company in said prospectus mentioned and not that of the defendant solely. Thirdly, because said alleged payments were stated in said count to have been made on the faith of the representations contained in the prospectus of the company in said count mentioned. Fourthly, because said count did not disclose any promise or liability on behalf of the defendant to refund said sums of money or either of them so alleged to have been paid to the company's bankers in the events in said counts mentioned. Fifthly, because it did not appear by said summons and plaint that the scheme became abortive or failed through or by any act or default of defendant.

Serjt. Armstrong and G. O. Malley, in support of demurrer.—A provisional committeeman who has not himself received the deposit, or by any person on his behalf, and who appears only to be a provisional committeeman and a member of the committee of management is not liable to a shareholder of an abortive scheme in an action brought to recover the deposit—*Burmish v. Dayrell* (5 Ex. 227). The receipt of the banker to whom plaintiff paid the money sought to be recovered must show that it was on behalf of defendant that the money was received—*Watson v. The Earl of Charlemont* (12 Q.B. 856). No doubt can exist but that if the company was incorporated, in such case the plaintiff could not recover; and it is not shown on the plaint that the company was not incorporated, for the scheme might have become abortive and wholly failed after incorporation. The plaint should have alleged positively that the company never was incorporated.

Palles (with Heron, Q.C.), on the part of the plaintiff.—There is sufficient allegation of the receipt of the money by defendant. The plaintiff alleges that the defendant circulated the prospectus, and the prospectus directs the money to be paid to the bankers specified. It is submitted that payment to those bankers is payment to the defendant. In *Lindley on Partnership*, p. 69, the cases are all collected.

FRITZGERALD, B.—This case comes before the Court upon demurrer taken by the defendant to the first count of plaintiff's summons and plaint [reads the count]. It will be seen that in substance this is merely an expanded form for a count for money had

and received; and the insertion of this special count was wholly unnecessary. At the argument there was little, if any, difference between the counsel as to the principles of law bearing on the case. It was admitted that to sustain the action it should be shown that the money paid by the plaintiff had actually come into the hands of, or was under the disposition of, the defendant, and that such a company as was contemplated by the prospectus had never in fact existed. The defendant alleges that neither of those allegations are stated with sufficient precision or certainty in the summons and plaint. We are of opinion that, as the count avers that the money was paid to the bankers named in the prospectus as the persons to receive it, that that prospectus set forth that the bankers were the defendant's agent in that behalf, there is sufficient allegation of receipt by the defendant. We are also of opinion that there is sufficient allegation that the company never existed, the words of the allegation being that the scheme detailed in the prospectus wholly failed and was abandoned, and therefore the demurrer must be overruled.

TRANT v. IRWIN.—Nov. 10.

Landlord and Tenant Consolidation Act—Writ of restitution.

Defendant, in ejectment for non-payment of rent, applied for a writ of restitution, and thereupon lodged in court the rent and arrears of rent endorsed on the habere, together with the costs of the action, which sums plaintiff declined to accept, on the ground that a subsequent gale should have been lodged with said sum. Held—that the sum marked on the habere was sufficient, and that the writ of restitution should thereupon issue, the defendant undertaking to pay such sum, if any, as the Master to whom the case was referred should report.

THIS was an application on behalf of John Irwin, of &c., one of the defendants herein, and a party having an interest in the lease of the lands, the subject-matter of the ejectment in this cause, and served with said ejectment, that a writ of restitution should issue forth of the Court to restore the said John Irwin to the possession of said lands and premises, the defendant having lodged in Court all rent and arrears of rent endorsed upon the *habere*, together with the costs thereof; and, further, that an account should be taken of the profits made, or which might have been made, of said lands during plaintiff's possession of same, and that it should be referred to the Master of the Court to take an account of same. It appeared from the affidavit of the defendant's solicitor that the lands in question were held under a lease made on 10th of April, 1846, for three lives or 31 years, from 1st April, 1845, at the yearly rent of £115; that judgment was obtained in said cause on 7th May, 1863; and that a writ of *habere facias possessionem* was issued forth of the Court, whereby it was ordered that plaintiff should be put into possession of the lands mentioned in ejectment; that the amount of rent ascertained by said judgment in ejectment was £287 10s., to the 1st

November, 1862, and the costs £19 4s. 5d., which sum, together with a further sum, up to 1st May, 1863, made in all a sum of £364 4s. 5d., and that same was endorsed on the *habere* in this cause; that the full amount of £287 10s., and the costs as aforesaid, was tendered on the 13th of May, 1863, and that the *habere* was executed on the 15th May, 1863, under a warrant from the sheriff of Roscommon; and that on the 5th of November, 1862, said sum of £364 4s. 5d. being as aforesaid the rent due up to the 1st May, 1863, was lodged in court, which sum plaintiff declined to accept, on the ground that same was insufficient, and that there should have been an additional half year's rent added, viz., a sum of £57 10s., up to the 1st November, 1863.

Wm. Roper for the motion.—The Court will have to decide two questions.—1. Whether the amount lodged is sufficient. 2. Whether the amount tendered before the *habere* was executed was sufficient. But the latter is only with reference to the costs of the present motion.

The applicant here is a mortgagee of the tenant's interest, and the money lodged is sufficient. The Court will, therefore, allow a writ of restitution to issue, and refer it to the Master of the Court to take an account between the parties. The amount lodged is the same amount as that indorsed on the *habere*, which, under the true construction of ss. 65, 70, & 71, of the 23 & 24 Vict., c. 154, is all that need be lodged, and the present applicant need not have lodged the half-year's rent which became due on 1st November last. This Court has, under the 71st section, the power to give the same relief as a Court of Equity might have done, and the old practice in redemption suits was, not to lodge more than the rent and arrears ascertained, by affidavit or by verdict, as the case might be, to be due at the time of the service of the ejectment, together with full costs; but the tenant was only restored to the possession on payment of such further sum as should have accrued due after giving credit for so much as the landlord, without wilful neglect, had made of the premises from the time of executing the *habere*.—*Gillespie v. Blackwood* (2 How. L. Exch., 73); 2 Furlong, 1159; Burroughs & Gresson, 141. Besides, it might be impossible for a stranger to ascertain the exact amount of rent and arrears due if the landlord desired to work a forfeiture, and therefore it is that the Legislature have enacted that in case the *habere* is executed, the amount claimed must be indorsed on it. A third party can then, by looking at the *habere*, see how much is claimed, and this is the true guide as to the amount which should be lodged. That this is reasonable, is fully proved by the affidavits here, which show that if an account be taken up to the last gale day, the landlord will be a debtor to the lands in over £130, and it would be inequitable in such a state of things to make the party redeeming bring in all the rent and arrears claimed up to the last gale. The amount tendered in May before the *habere* was executed was sufficient. The 64th section is distinct on that point; it enacts that the amount to be paid, lodged, or tendered before the writ of *habere* shall have been executed, shall be the amount of all rent and arrears due at the time of the service of the ejectment, together

with a sum sufficient to cover the costs. This was done, and the amount refused, because the half-year's rent due on the 1st May was not added. Such additional rent was clearly not necessary. The landlord should, therefore, pay the costs of this motion, which has been rendered necessary by his own act.

M'Mahon in support of the proposition that the amount lodged in Court should be the amount due at the time of the lodgment by the 64th section of the Act, It shall be lawful at any time before execution of the *habere*, to pay all the rent and arrears of rent due at the time of the service of the ejectment, or to tender the same, and in case of refusal to lodge the amount in Court, and thereupon to stay execution of the *habere*. The 70th section provides for the mode of redemption after the execution of the *habere*, and it provides that no restitution can be obtained without paying the rent and arrears, but it does not say the rent and arrears at the time of the service of the ejectment.

The Court made the following order:—It appearing to the Court that the said John Irwin has lodged in Court, pursuant to the statute in that behalf, the rent and arrears of rent due out of the said lands and premises up to and for the 1st day of May, 1863, and also the costs of the said judgment in ejectment, it is ordered by the Court that the writ of restitution do forthwith issue to restore the said John Irwin to the possession of the lands and premises taken possession of by the plaintiff under the said writ of *habere*, the said John Irwin hereby undertaking to pay the rents of the said lands and premises due on the 1st of November inst. And it is further ordered that it be referred to the Master of this Court to take an account of what is due to the plaintiff for rent and arrears of rent of the said lands and premises up to the 1st of November inst., together with the costs of the said ejectment suit; and also to take an account of what the plaintiff made, or what, without fraud, deceit, or wilful neglect might have been made of the said lands and premises from the 15th May, 1863, being the time of plaintiff's entering into possession thereof under the said *habere* up to the making of said report, to be set off by the Master against whatever sums should be found due to the plaintiff for rent and arrears of rents and costs; and that the Master do strike a balance between the parties and the consideration of the costs; and further orders are hereby reserved until the return of the Master's report.

ALLEN v. M'COOMBE.—Nov. 10.

Pleading—Count in malicious prosecution—Non-avowment of termination of prosecution before action brought—Useless averments.

Where the first and second counts of the summons and plaint complained of an assault and false imprisonment, and the third count complained "that the defendant falsely and maliciously, and without any reasonable or probable cause, charged the plaintiff with having committed a certain offence punishable by law, to wit, having feloniously stolen, &c., and upon said last-mentioned charge,

the defendant falsely and maliciously, and without any reasonable and probable cause, caused and procured the plaintiff to be arrested and taken into custody by a certain police constable, and to be brought along certain streets in the town of C., and to be imprisoned, to the plaintiff's damage," &c., it was Held, that the third count was bad as a count for malicious prosecution, in not averring that the process had terminated before action brought, and that the averments of malice and absence of reasonable and probable cause, were unnecessary and embarrassing.

THIS was a motion by the defendant to set aside the third count of the summons and plaint, on the ground that same was for malicious prosecution, and yet did not state before whom the charge alleged was made, nor that the criminal proceeding had terminated before this suit; and also that the said third count was useless for the purpose of presenting a complaint of an arrest and false imprisonment, inasmuch as the first and second counts would admit of the plaintiff proving at the trial any of such trespasses, and further that this form of pleading appears to have been resorted to for the purpose of presenting the subject-matter of the sixth count (which is slander published to a policeman) in the shape of a count in malicious prosecution, in order to prevent the defendant relying on a defence of privileged communication, which would be inapplicable to a count in malicious prosecution. The first count of the plaintiff was as follows:—For that the defendant assaulted the plaintiff, and gave him into custody of a policeman, and caused him to be imprisoned for a long space of time, to wit, &c. Second count—For that the defendant assaulted the plaintiff, and imprisoned him, and kept him a long time, to wit, &c., whereby the plaintiff was exposed and injured in his credit and circumstances to the damage, &c. Third count—And also for that the defendant falsely and maliciously, and without any reasonable or probable cause, charged the plaintiff with having committed a certain offence punishable by law, to wit, having feloniously stolen ten sacks of corn, and upon the said last-mentioned charge the defendant falsely and maliciously, and without any reasonable and probable cause, caused and procured the plaintiff to be arrested and taken into custody by a certain police constable, and to be brought by the said constable along certain public streets in the town of Carlow and Graigue, and to be imprisoned, to the plaintiff's damage, &c. The sixth count complained that the defendant spoke and published the words following, that is to say, "Go and take Allen (meaning the plaintiff) into custody; he (meaning the plaintiff) has robbed me of ten sacks of corn," to the plaintiff's damage of £100.

Byrne now moved to set aside the third count, and cited the following cases—to show that a termination of the process should have been alleged.—*Munce v. Black* (7 Ir. C. L., Ex., 475); *Bayle v. Hammond* (3 Ir. C. L., 579); and as an instance of how in England the Courts have dealt with pleadings containing unnecessary and embarrassing averments, he cited *The Great Ship Company v. Russell* (3 Foster & F., 94), where, in a declaration on a breach of contract, it was averred that the defendant fraudulently omitted to deliver true accounts. The declara-

tions was ordered to be amended by omitting the word "fraudulent," same being embarrassing.

The objectionable count could not have been demurred to, inasmuch as it contained a complaint of a substantive trespass, and yet it was embarrassing, as containing averments which savoured of malicious prosecution, and as a count for a malicious arrest it was bad. Absence of probable cause and malice were unnecessary and embarrassing, and therefore this count should be amended by expunging from it those averments.

O'Driscoll submitted that under the Procedure Act the count was good in substance. The count is for malicious arrest, and, therefore, the termination of the process need not have been averred, which he admitted, had the action been for malicious prosecution, should.

THE COURT were of opinion that the count was bad in malicious prosecution, in not averring that the process had terminated before action brought, and that the averments of malice and of absence of reasonable and probable cause should be expunged as superfluous in a count for trespass.

Consolidated Chamber.

[BEFORE FITZGERALD, J.]

M'GUCKIN v. DOBBIN.—May 12, 1863.

Pleading—Excessive distress.

On a motion to set aside a paragraph of summons and plaint alleging that defendant distrained for certain "pretended arrears" of rent goods of plaintiff of greater value than "the actual arrears"—Held, that the form was good.

THIS was a motion on behalf of the defendant to set aside and amend the second paragraph of the summons and plaint. The first paragraph alleged "that before and at the time of the committing of the grievances hereinafter mentioned, the plaintiff held and occupied a certain messuage and premises as tenant thereof to the defendant under a certain rent payable, therefore, to the defendant, and the defendant, falsely and maliciously pretending that a large sum of money, to wit, the sum of £15 11s. 2d., was due and in arrear for the said rent of the said premises, wrongfully and unjustly distrained the plaintiff's goods, to wit, &c., of great value, to wit, of the value, &c., of much greater value than the amount of the said pretended arrears of rent, then upon the said premises, whereas a part only, to wit, £13 15s., of the said rent so pretended to be in arrear and unpaid, was then due and owing for rent of the said premises, and wrongfully and unjustly detained and remained in possession of the goods and chattels under cover of the said distress, and deprived the plaintiff of the use and possession of the same, until the plaintiff afterwards was obliged to, and did, pay to the defendant the said pretended arrears of rent, to wit, the sum of £15 11s. 2d., and a further sum, to wit, &c., for the costs and charges of the said distress, in order to regain possession of the said goods and chattels, whereas at

the time of the making of the said distress, and at the time of the payment of the said sums of money, and during all the time aforesaid, a part only, to wit, the sum of £13 15s., of the said rent so pretended to be in arrear and unpaid, was due and owing for rent of the said premises to the defendant, and by means of the committing of the premises by the defendant, the plaintiff hath sustained grievous inconvenience, &c., by being obliged to pay down a sum of money, to wit, the sum of £1 16s. 2d. over and above the rent actually due and in arrear, and also by means of the premises, the plaintiff hath been, and is, greatly injured, &c., to the plaintiff's damage, &c. The second paragraph alleged the tenancy, &c., as in the first paragraph, and the defendant wrongfully distrained for certain pretended arrears, to wit, the sum of £15 11s. 2d., of the said rent, certain goods of the plaintiff, to wit, &c., then upon the said premises, of much greater value than the amount of the actual arrears of said rent, and of the charges of a distress for the same, and of the appraisement and sale thereof, although part of the said goods was then of sufficient value to have satisfied the said actual arrears and charges, and might then have been distrained for the same, and the defendant thereby made an excessive and unreasonable distress for the said arrears contrary to the statute in such case made and provided, to the plaintiff's damage, &c. There were also counts for trespass and money counts.

A. M. Porter for the motion.—The second paragraph is embarrassing, from the words: "certain pretended arrears" being followed subsequently by the words, "the amount of the actual arrears." Though the count professes to proceed under the statute of Marlbridge, it is uncertain whether it is equivalent to the first, namely, seizing for a larger sum than was actually due, without any allegation of special damage, or whether it is a count for seizing goods of greater value than the amount of the arrears. This count differs from all the ordinary forms (Bullen & Leake's Precedents, 188; Chitty, jun., 537). In all these the action is for seizing goods of greater value than the rent claimed. This is the gist of the action.—*Starch v. Clarke and others* (4 Barnwell & Adol., 113); *Lead v. Caldecott* (4 Q. B., 123). So it is laid down in a recent work of authority, when the goods distrained are excessive, and not in proportion to the sum distrained for, according to the statute of Marlbridge, an action on the case may be maintained by the tenant for such excessive distress.—Woodfall's Landlord and Tenant, 748). The plaintiff could not traverse this count without danger.

J. L. Whittle, contra.—The form is good; it is to be found in Woodfall, p. 1015, last edition. The precedent there given is a new one, framed to suit particular circumstances, which are just the circumstances of this case. The gist of the action, under the statute of Marlbridge, is excess over the sum actually due. The amount of arrears claimed is nothing.—*Crowder v. Sals* (2 M. & R., 290); *Crowther v. Ramsbottom* (7 T. R., 658); *Granville v. College of Physicians* (12 Mod., 386). The forms already referred to will do where the amount of rent is not disputed. The form given in Messrs. Bullen and Leake's book is distrained for certain arrears of said rent (i.e.,

the arrears alleged in the warrant of distress), goods of the plaintiff of much greater value than the amount of the said arrears, the said arrears, of course, being the certain arrears previously mentioned, thus precluding the plaintiff from proving that the goods distrained were of more value than the amount of rent actually due; but this is the real point at issue. Baron Watson says, it was contended that, under the common count for an excessive distress under the statute of Marlbridge, the plaintiff might show that the defendant had distrained for more rent than was due, in order to show that the distress was excessive—though that may be, we do not feel ourselves called upon to pronounce an opinion.—*Lucas v. Tarleton* (3 H. & N., 116). On the question raised in that case this form was framed, and it is thus referred to in the text—"It is not clear whether, under the usual count for an excessive distress, the plaintiff can show that the amount of rent due was less than that distrained for."—p. 753. There can be no difficulty in traversing this count, as the only issue could be, whether the distress was excessive for the actual arrears.

Porter in reply.

FITZGERALD, J.—Though there is no decision in direct support of this form, I think it a good one, and adapted to the circumstances of the case.

Motion refused with costs measured to £3.

Attorney for plaintiff—H. N. Smith.

Attorneys for defendant—Bowman & Campbell.

Court of Probate

[Reported by W. R. Miller, Esq., LL.D., Barrister-at-Law.]

REDMOND & REDMOND v. BARBER & BARBER.—Nov. 4.

Costs—Attorney-General—Motions.

The Attorney-General having been served with notice of a motion for administration in goods in which the Crown had not any interest, and as to which the Crown made no case, and where other persons unsuccessfully impeached the legitimacy of the deceased, is not entitled to the costs of appearing on the motion.

THIS was a motion of the plaintiffs, as some of the next of kin of the deceased, John Doherty, for administration of his goods, without giving security. The defendants claimed to be creditors, and had impeached the kindred of the plaintiffs, alleging, by their affidavits, that the deceased had died without any known relations. The plaintiffs, by affidavits in reply, made out their kindred satisfactorily, and that part of the case was arranged by the Court giving the grant to the plaintiffs without giving security, on certain terms, however, as to proceeding in Chancery to administer the real and personal estate.

George Waters for the Attorney-General, asked for his costs on the motion.—He was served with the notice of motion, accompanied by an affidavit of John Redmond, which alleged that the deceased died a bachelor, without any lawful issue, and that he left two sisters, widows, his sole next of kin, who were

the legitimate issue of A. B., &c. That affidavit and notice were submitted to counsel, and there was in it nothing whatever to show why the Attorney-General had got notice. At that time no other affidavits had been filed, and the only suggestion which could occur to counsel why the Attorney-General had been served was, either, first, that the deceased might have been illegitimate, and that the sisters were so called only in the popular sense of the term, or, secondly, he may have been convicted of felony, when his goods would be forfeited to the Crown, or, thirdly, he may have been an alien, when all his chattels real would vest in the Crown. A case somewhat similar arises in the Law Courts under the clauses in the Procedure Act, as to the attachment of debts. A creditor of A. applies there to attach a debt due by B. to A. He gets a conditional order, which is served both on the judgment debtor and on the garnishee. If the latter, in fact, owes the debt, and chooses to appear on the motion to make absolute the conditional order, he gets no costs. But if, on the contrary, he does not owe the debt, or disputes the amount, and appears, he gets his costs. [*Keatinge, J.*—So you might have come in and disputed, and displaced the case made of legitimacy.]

Berkley, Q. C., contra, for the plaintiffs.—It was quite right to give the Crown notice of the motion, and copies of all the affidavits had been served on the Attorney-General, but he did not dispute the facts, and, therefore, he had no right to appear.

KEATINGE, J.—The case stands thus.—On the death of the deceased, the Messrs. Barber, being creditors of his, thought that he was illegitimate, or had no known relations. Now, that assertion having been made, and two sisters, who alleged that they were his *legitimate* sisters, having turned up, it was quite right and proper to give notice to the Attorney-General, to give him an opportunity, if he pleased, to show that the allegation of their legitimacy was unfounded, and that, in fact, the deceased had died either illegitimate, or without any known relations; and in similar cases I have frequently directed that notice should be given to the Attorney-General. Suppose the case was, that immediately after the death of the deceased, some very remote relations alleged that they were nearest of kin to him, but it turned out that much nearer relations existed and came forward, is it to be said that the remote relations, though properly getting notice, should get their costs in all cases? There may be cases in which they ought to get costs, where there is something special; but here there is nothing special. The Attorney-General has made no case, and I cannot give him the costs of the motion.

No costs.

IN THE GOODS OF THOMAS SULLIVAN, DECEASED.

Administration—Justifying security—Domicil.

Where a party applying for administration with the will annexed would be beneficially entitled to the whole of the deceased's assets under his will, if valid, made in America, and proved there by the executors, who gave the applicant a power of attorney to take the

grant, and would, if the will were not valid, be entitled to a moiety, the Court required justifying security for only one moiety. The deceased had been originally domiciled in Ireland, but, it was alleged, had acquired an American domicil, and had returned and died here in itinere. Sed semble, he never lost his domicil of origin, and if he did, it was revived by the return to this country.

C. Palles, for Ellen Sullivan, the only surviving sister of the deceased, moved that letters of administration with his will annexed should be granted to her, without requiring justifying security. The matter had been already before one of the principal registrars of the Court, but he had declined to dispense with security. It appeared from the affidavit of the applicant, that the deceased had been originally resident and domiciled in Ireland, but had many years ago emigrated to America, and became resident in New Orleans, in the State of Louisiana, where he realised a considerable property. He also became naturalised in America, and it was alleged that he was in fact domiciled there. His relations, two sisters, had also followed him, one of whom was now dead, leaving children. In the month of June, 1862, the deceased, who was a bachelor, left America for the purpose of a tour through Europe, and came to Cork with his surviving sister, the present applicant, and several nephews and nieces, the children of the other sister, and he died there. The only assets in this country were the remains of the money which he had brought with him to meet the expenses of his trip, viz., about 1,000 lodged in a bank in Cork. He had made a holograph will in America, which was good by the law there, though not witnessed, leaving all his property to the applicant, and he appointed executors, who had proved the will in America. The executors had, by a power of attorney, authorised the applicant to take a grant in Ireland. There were no debts due by the deceased in the United Kingdom. Counsel contended that the applicant, in fact, represented all the assets, and having the authority of the executors, she ought to be in the same position as the executors would be, but for the accident that the deceased happened to die here, and not in America. His domicil was clearly American—he only died here *in itinere*.

KEATINGE, J.—I do not feel at liberty to dispense altogether in this case with the ordinary rule requiring justifying security. The case was peculiar. According to the American law, the will is a good one provided the deceased were domiciled there, as to which the facts stated to establish it are certainly strong, but they are all *ex parte*; and no person whose interest it is to dispute it, is represented here, but I confess that while as a juror I should have some difficulty in saying that he was at any time a domiciled American, yet even if he was, I think his coming over here in the way he did, looked very like coming over to settle here, and that his domicil of origin was thereby revived. No doubt, he left the bulk of his assets in America, but that is not inconsistent with his settling here, and I think the case wants any special circumstances to overrule the registrar's opinion, but as there are no debts, and the applicant is herself entitled in any event, whether of testacy or intestacy,

to at least one half, I may dispense with security for that much, and only require it for the remaining moiety.

Order accordingly.

FINN V. GORMAN.—Nov. 10.

Costs out of estate—Parties pleading fraud and undue influence and failing.

Where the estate is small, and fraud and undue influence have been pleaded in opposition to a will, which is established on the evidence of the party supporting it, though parts of the case were suspicious; the party failing was excused from paying costs, but did not get costs out of the estate.

Legatees in a former will, failing, are not so favourably considered as next of kin, as to costs.

Costs out of estate means only out of personal estate.

THE will of the deceased, which had been impeached by the defendant in this suit, was however established on the evidence of the plaintiff's witnesses, the defendant giving up all further opposition.

M. Morris, Q. C., and Dowse, Q. C., for the defendants, now asked for costs out of the estate.—The defendants, besides being legatees in a former will of 1857, were some of the next of kin. The case was pregnant with suspicion, on the evidence of some of the plaintiff's witnesses. It was a death-bed will, giving all the property to a grand-nephew in America, whereas, by a former will, the testator had given one-half to the Gormans, his nieces, and one-half to his relations in America. It appeared also that, at the time of the preparation of the will, the attorney, and a man named Dillon, had, by means of four cheques which they filled up, and the testator signed, drawn the whole of his ready money from the several banks he dealt with, partly on the day the will was made, and partly on the next day, the day on which he died. Besides, the relations were excluded, and an inventory refused, after the defendant died. Under those circumstances, the defendants were justified in pleading fraud and undue influence. The plaintiff is both devisee of the real estate, and legatee of the personal estate, and he can pay his costs out of the former.

KEATINGE, J.—I think that the peculiar circumstances of this case, even without the consent of the plaintiff, justify me in saying that I should not require the defendants to pay costs. Their real title is under a former will, though in form they appear as entitled in distribution, and legatees are not in this Court so favourably regarded as next of kin, as to costs. Now, according to the Probate Act, the decree of this Court is binding as regards both real and personal estate, but the Court of Appeal in Chancery has held in *Newton v. Newton* (7 Ir. Jur., N. S., 129), that when the costs are given out of the estate, they are not chargeable on the real estate. That decision binds me in this Court, and I cannot, by giving costs out of the personal estate to the defendants, do indirectly, what I cannot do directly. No doubt, the conduct of the attorney who drew the will, and of Dillon respecting the cheques, is so very extraordinary, that but for the very strong evidence as to capacity,

and of testamentary intention, the pleas might have been sustained in evidence. But the defendants have failed, and the question is, am I justified, in the state of the property in this case, which is very inconsiderable, not only of excusing the defendant from the payment of costs, but in giving him his costs out of the personal estate? I think they may be excused from paying, but not allowed to get costs. I do not say that the same rule would apply to the case of a large estate, but the property here is very trifling.

RORKE V. FLINN.—Nov. 17.

Practice—Citing heir-at-law.

Where an heir-at-law and devisees are cited by the leave of the Court, in a cause where pleadings have been filed, a notice should be given with the citation, stating that proceedings in the cause would be suspended for ten days, so as to allow the parties cited to intervene.

Dr. Ball, Q. C., for the plaintiff, applied for liberty to cite the heir-at-law of the deceased, and also the devisees, under an earlier will than that which the plaintiff had alleged.

Hamill for the defendant.

KEATINGE, J.—The citation in use here, as well as in England, does not limit any time for the parties intervening, as perhaps it should. But without further consideration I do not like altering the form. However, with the citation, serve a notice stating that further proceedings in the cause will be suspended for ten days, so that if they desire it, the parties may intervene.

IN THE GOODS OF CHARLES SLOANE, SUPPOSED DECEASED.
Nov. 17.

Administration on presumption of death.

It is not necessary, in a case of administration on presumption of death, in the affidavit for administration, to negative the existence of the persons who would, if alive, have prior interests to the applicant at the time of the death of the deceased, if the applicant is unable to do so. It is enough to negative their existence at the time of swearing. A grant in this case was made under the 78th section of the Probate Act.

THE deceased in this motion, it appeared, had in 1832 emigrated with his wife and infant child to the United States of America, being about 38 years old, and had been employed as a warder in a prison in New York; but for thirty years no account had been received in this country of him. A sum of £97 18s. 1d. was transferred to his separate credit in the Court of Chancery, by an order of June, 1838, and was his share of a sum of £600 left by his grandfather: and several members of the deceased's family, who knew of that sum having been so transferred, had also emigrated to America, and the deceased and his wife knew before their departure that he was entitled to such a sum, and the same constituted his only assets

here. Advertisements were inserted in the New York papers without any result, and an order was made on the 4th of July, 1862, allowing George Sloane, a brother of the deceased, to state in his affidavit for administration, the death of the deceased to the best of his information and belief. Accordingly, on the 24th April, 1863, an affidavit was filed, stating, to the best of the party's knowledge, information, and belief, the death of the deceased, but the exact date he was not able to state; and that to the best of his knowledge, information, and belief, there is not now living the wife, father, mother, or any child, grandchild, or other more remote issue of the said deceased, and that the party applying was the brother and one of the next of kin, &c. But the registrar required that the affidavit should negative the existence of the several parties aforesaid at the time of the death of the deceased.

Dr. Townsend now moved that administration might be granted to the brother on the affidavit already sworn.—We had a positive affidavit of the death of the father of the deceased in 1809, and the mother had died in October, 1855, and the applicant had obtained administration to her. It is quite impossible for my client to do what the officer requires, as he does not know when the deceased, or his wife, or child died.

KEATINGE, J.—I will make the order, but it will be pursuant to the 78th section of the Probate Act, and on giving justifying security. His Lordship referred to the *Goods of Peck* (2 S. & T., 506), and *Goods of Smith* (ib., 508).

Landed Estates Court.

[Reported by C. J. Manning, Esq.]

ESTATE OF HENRY F. GYLES, AN OWNER OF LAND.

May 12.

Will—Construction.

J. G. devised to H. F. "everything I may die possessed of, except the household furniture"—Held, that "such a devise passed real estate.

THE petition in this case by Henry Ffolliott Gyles filed March, 1862, prayed for a sale of the lands of Buoylart, in the barony of Kilcoursey and King's County, held under lease for lives renewable for ever, dated 8th December, 1789, made between Mary Foyle to Joseph Dickenson. By settlement dated 28th April, 1813, on the marriage of Joseph Dickenson and Anne Gibbons, the said lands, and Dickenson's interest therein, were conveyed to trustees to pay jointure to Anne in case she survived Joseph Dickenson, and after the decease of Joseph to hand over the said lands to such children as he should appoint. Joseph Dickenson died in April, 1849, intestate, without having made any appointment, leaving Anne Dickenson and one daughter surviving. There was issue of the marriage only this one daughter (Jane), who married Walter Gyles. Jane Gyles became entitled as heiress-at-law of Joseph Dickenson. Jane Gyles died 14th May, 1849, having bequeathed by

will the said lands to the petitioner. The will (written on half a sheet of note paper) was as follows:—

"10th May, 1829.

"This is my last will and testament. I give and bequeath, by the express directions of my late beloved husband to my dearly beloved brother-in-law, Henry F. Gyles, *everything* I may die possessed of, with the exception of the household furniture, and I hereby appoint him my sole executor and residuary legatee.

"JANE GYLES.

"J. T. GYLES.

"R. GYLES.

"N. S. GYLES."

Anne Dickenson, after the death of Joseph, entered into receipt of the rents till her death in March, 1860. After the death of Anne, one Catherine Dickenson, claiming to be heiress-at-law of Jane Gyles, entered into receipt of the rents; but the petitioner obtained the possession of the lands on 25th March, 1862, by ejectment, and was in possession at the filing of the petition. A conditional order for sale in the Landed Estates Court was made on the 21st April, 1862, upon service of Catherine Dickenson. The absolute order for sale bore date 17th June, 1862; and in April, 1863, a motion was made on behalf of Isaac Price and Catherine Price, otherwise Dickenson, his wife, heiress-at-law of Jane Gyles, deceased, to set aside the absolute order for sale of the 17th June, inasmuch as the lands did not pass to Henry Ffolliott Gyles under the above will of Jane, but were vested in Catherine as heiress-at-law.

Warren, Q.C., and *Flood*, appeared for Isaac Price and wife, and contended that there must be express words of gift to pass real estate; that there was no clear intention shown to deal with or dispose of the realty; that the residuary bequest coupled with the expression, "everything I may die possessed of," was not sufficient. Cited cases in 1 Ball. & Beatty, 533; 3 Dow., 248; 10 Ir. Eq., 134; and in 6 De Gex M. & G., 549; *Monk v. Mandslay* (1 Sim., 286); *Cooke v. Oakley* (1 P. Wms., 302); *Davenport v. Coltman* (9 M. & W., 481).

Hemphill (with *Roper*) contra, raised a preliminary objection that where a conditional order for sale had been made absolute after service on a particular party, that party could not come in and seek to set aside the order—see *Finlay's case* (4 Ir. Jur., N. S., 389). Catherine Price, otherwise Dickenson, was served with the conditional order, and did not show cause. [By the Court.—The point made is not one bearing on the merits; the order is made absolute before the Court investigates the title. This is a question of title.] Counsel, proceeding as to the construction of the will, cited *Alleyne v. Alleyne* (2 Jones & Lat., 544). The testatrix knew that the property was at her disposal, and that she had nothing else except furniture. If the expression in the will, "everything I may die possessed of," taken alone, did not pass the real estate, yet the inference from that expression, coupled with the residuary devise, is very strong to pass it.—See 1 Salkeld, 339. If "everything" referred to the personalty, *cui bono* the residuary clause. The rule is to give effect to every passage in a will as against an intestacy, and the two expressions,

"everything I die possessed of," and the residuary gift taken together, were sufficient. If the expression had been "everything I have," that would have passed real estate.—See Jarman. "All I have," and "all I am worth," pass real estate. See cases in 1 Salkeld, 239; 1 Brown, Ch. C., 137; 7 Taunton, p. 81; 15 Sim., 600; 12 Sim., 200; 4 Russell, 348.

May 12.—JUDGE HARGREAVE.—In this case I am called upon to construe a will which is very short, entirely free from what in other cases eminent judges have designated "nonsense," and yet raising a difficult question as to whether it passes the testatrix's real estate. The substance of the will is this one sentence, "I give and bequeath to Henry F. Giles everything I may die possessed of, except the household furniture," for I think that the ultimate appointment of the same person to be executor and residuary legatee does not of its own force pass real estate, and does not render any assistance in interpreting the previous sentence; for to use the language of the Vice-Chancellor in *Monk v. Maudsley*, there is no case in which words have been held to carry a fee simple merely, because they would otherwise be surplusage. The first point that strikes one's mind in reading this will is the extreme generality or, more properly, universality of the gift,—"everything I may die possessed of;" and the most satisfactory construction of such a phrase, in my opinion, is that which gives to it the most extensive signification which can possibly be given to it. It may be said that the word "thing" is not a proper one to describe real estate; but in the same ordinary or colloquial sense it would be an equally improper word to denote money in the funds, bonds, mortgages, or shares. What I have to interpret is not "thing" but "everything;" and however inappropriate it would be to call individual portions of a man's property so many things, it appears to me quite proper to designate the whole of it collectively by the phrase, "everything he has or is possessed of." Perhaps a will like the present ought not to be construed on technical principles; but undoubtedly in law the word "thing" is a technical term which includes real estate. Every subject that can be brought under legal consideration must be either a person or a thing. Law is divided into the law of persons and the law of things; and the first branch of the law of things is that which teaches us the law of real property. I cannot, therefore, say that either colloquially or scientifically the word "thing" is, when used in a universal sense, inappropriate as a description of (amongst others) real estate. In fact it is the word actually used when we wish to avoid further specification of particulars, and at the same time to leave no doubt as to the universality of the subject matter one is dealing with. Instances of this use of the term occur not unfrequently in the writings of eminent authors; and I have found at least one instance in which the word "thing" covers land as well as all other kinds of property. I have so far dealt with this case as if it were the first of the kind that had arisen for decision; and it is therefore necessary to consider how far the views above suggested ought to be qualified by the limited technical meaning of the words employed, or any other indications of what may have been in the testatrix's thoughts when she made the will. She uses the verb

bequeath, and not devise. I think this course unimportant, because she also uses the word "give," which is perfectly applicable to all kinds of property, and just as much to one kind as to another. She describes the subject of her gift as that of which she may die possessed, a term, undoubtedly, in a technical sense applicable to chattels real and some kinds of purely personal property, but not to freehold estates. We are not, however, to read the language of a will in the same way that judges have to consider the language of pleadings; and the ordinary meaning of the phrase seems to me to be simply whatever I shall have or whatever I shall possess, or, in shorter terms, "my possessions." [His Lordship read *Davenport v. Colman* (12 Sim.)] In *Monk v. Maudsley* (1 Sim. 286), Sir John Leach laid stress on the use of the phrase "shall die possessed of," and considered it as necessarily applicable to real estate, as a person could not then devise real estate which he might have at his death unless he was seized of it at the date of his will. Now, however, real property and personal property stand in the same position in this respect, and the argument derived from that consideration is no longer applicable. In *Wilkinson v. Wilke, demandant*, the phrase "everything" else I die possessed of" following a number of items of personal property was held to pass real estate, the will being prefaced by the old form of reference to all the testator's worldly estate. The case of *Warner v. Warner* (15 Jur. 141) appears to me to bear some resemblance to the present case. In that case the words of gift which were in question were placed in a parenthesis. They were "everything I possess I leave to her." The words were so placed as to appear to be merely a parenthetical re-statement of what he had previously given, which was confined to personal estate; but it was there held that the real estate passed by the effect of those words. The learned Judge Knight Bruce, then Vice Chancellor, said, "These words are large enough to include the real estate unless there is a correcting context. Here there is no correcting context. I am disposed to follow the principles of that case. I have examined several other cases more or less bearing upon the present, but having some points of distinction which prevents them from being much relied upon. In the conflict of authority I think it best to adhere to the sound rule which gives to words of a comprehensive import their full extent of operation unless some very distinct ground can be collected from the context for considering them as used in a restricted sense. It has been contended in this case that the exception of the furniture shows that the testatrix had personal property only in her thoughts. That is so, no doubt, but it must be confined to the exception and not extended to the gift. An exception of particular chattels furnishes no indication whatever in reference to the extent of the gift from what is excepted. On the whole I arrive at the conclusion that this will passed real estate; but as the Court could not have sold this real estate without a discussion of this point I refuse the motion, but without costs.

Subsequently the unsuccessful party got costs out of the funds, the Court being of opinion that the point had been properly raised.

[BEFORE JUDGE HARGREAVE.]

EDMOND DOWELL AND W. B. KELLY, OWNERS; E. DOWELL, PETITIONER.—Nov. 5.

Settlement—Construction.

The discretion which trustees possess as to the time of sale, under an instrument directing a sale "with all convenient speed," can only be exercised in the reasonable hope of the property increasing in value.

THIS was a motion to make absolute the conditional order for sale, dated 18th June, 1863, notwithstanding the cause shown by Tobias J. Kelly, and Anna Maria Kelly, and Walter B. Kelly, one of the owners. It appeared that on 20th July, 1848, by a settlement on the marriage of Tobias J. Kelly with Anna Maria Dowell, the premises for sale in this matter, viz., Killeshandra, in the barony of Tullyhunco, Co. Cavan, were vested in trustees, upon trust, for Bernard Dowell, till marriage, then out of the rents to pay the head rents and the residue to Anna Maria Dowell, during the joint lives of her and Bartholomew Kelly, for separate use, with power of anticipation, and after the decease of Bartholomew to sell the interest, and apply the proceeds in discharge of so much of a charge of £2,500 under a deed of 1846, as should be due. If no part due, or not sufficient to absorb the proceeds, then to pay same in discharge of two sums of £2,000 and £1,500, thereby provided for younger children, and meantime to invest, Anna Maria Dowell to have the interest; but if no younger children, then to pay the same to Tobias Joseph Kelly, her husband. The marriage took place, and there was a son. Bartholomew Kelly died in 1862. Walter Burke Kelly was appointed a trustee in place of Walter Burke, one of the original trustees, and he declined to join in the petition. Cause was shown by Tobias Joseph Kelly and wife, and the co-trustee, who contended that the sale would be prejudicial to the interests of the tenants for life. One of the sub-leases of the property was for two old lives, and the rent only £113, which was paid by a solvent tenant, who, however, had threatened not to pay, and the premises were stated to be not worth it.

Chatterton, Q.C., and Sherlock, Q.C., for the petitioners contended that, under the terms of the settlement, and according to the construction of the direction therein, to sell "with all convenient speed," the Court was bound to sell, and had no discretion.

Serjt. Sullivan and Devitt, on the other side, urged that the words, "with all convenient speed," did not render an immediate sale imperative, but that the duty of trustees was, to sell under every possible advantage to the *cestui que trusts*, and in the present instance there were circumstances which rendered an increase of value in the property highly probable.

The following authorities were referred to—*Lewin on Trusts*, p. 694; *Buxton v. Buxton*, (1 My. & C. 80); *Garrett v. Noble* (6 Sim. 504); *Ord v. Noel* (5 Madd. 440).

JUDGE HARGREAVE.—I have read the settlement of 1848, and I find that the intention of the parties clearly was, that Mr. Tobias Kelly should receive the rents of the Killeshandra property during Bartholomew Kelly's lifetime; and that on his decease that property should be sold and the proceeds applied as far as they would extend in relieving the other settled property (which was vested under the previous settlement of 1846 on her husband Tobias for life, with remainder to his first son in tail) from the charge of £2,500 and certain other charges. The parties entitled to these charges have no interest on the question; the only persons interested on the produce of the sale being Mr. Tobias Kelly and his infant son. It is, no doubt, the duty of the trustees to act impartially between the tenant for life and the remainderman; but this duty must be performed in the manner prescribed in the settlement. It was clearly the object of the parties that Mrs. Kelly should have the rents in specie during her father-in-law's lifetime, and that with convenient speed after his decease the property should be turned into money for the purposes I have mentioned. The discretion which the trustees possess as to the time of sale can only be exercised in the reasonable hope of the property increasing in value. I think there is no reason for such an expectation in this case, except upon very speculative hypothesis indeed. Under ordinary circumstances the property will certainly diminish in value, for it is in a partly ruinous condition, and derives a portion of its value from the existence of the sub-lease. This value diminishes every year, as the tenant is not bound to renew; and however difficult it may be to get the rent from the tenant, the chance of obtaining it adds to the value of the property. I therefore think it best to follow the terms of the settlement and to sell the property.

Disallow cause; petitioner's costs costs in matter.

Court of Admiralty.

[Reported by William G. Chamney, Esq. Barrister-at-Law.]

THE PATRIOTTO.

Wages—Materials—Kettle money—Conduct money—New hiring—Costs.

Where seamen sign ship's articles for a specified service, and before the voyage has concluded, the captain agrees to give one or more of them increased wages, the Court will not bind the owners by such an agreement; and will only make its decree for the wages properly payable under the ship's articles.

The Court will award kettle money and costs to petitioners claiming for wages, and substantiating their claims; but will not give conduct money in the case of a British registered ship.

A decree for materials will be made on funds in Court realized by the sale of the ship, but the payment must be paise to the claims of the seamen for wages.

THIS was a suit for wages and materials. The petition claiming wages was filed by Guiseppe Giacomo, the master, Eugene Mattia, the mate, and nine seamen, the crew of the Maltese brigantine, "Patriotto,"

against her or the proceeds of her sale, £410, then in Court, to recover wages due to them for their services on board of her. Their joint claims amounted to a sum of £276 1s. 5d., besides conduct-money, kettle-money, and costs. By the ship's articles it appeared that this vessel, 215 tons burden, the property of Vincenzo Cabrisia, of Cospicua, in the island of Malta, had been bound on a voyage from Constantinople to any ports in the United Kingdom or Continent of Europe, calling at a port, if required, for orders; from thence to any port in the Mediterranean; voyage not to exceed ten months. She sailed with a cargo of corn on the 17th of September, arriving at Cork, which was subsequently arranged to be the port of discharge, on the 26th of March following—last March. During that voyage she had been obliged to raise money on bottomry at Constantinople, at Valetta and Cagliari. After discharging her cargo and waiting further orders at Cork, whilst lying there she had been arrested and sued by the holders of the last bottomry bond, who had in consequence obtained the decree of the Court against her for its amount, £270 19s. 4d., under which decree the vessel had been sold, the produce of that sale being then in the registry, and not yet applied. It was against that sum the master and crew now claimed payment of their wages, as having a lien antecedent to all other demands. Upon the part of the mate and three of the seamen there was a claim also for extra wages from the 2nd of November, the day the vessel left Malta. As it appeared from endorsements on the articles the mate had been re-engaged that day at a higher rate of wages, and the three seamen rated also at increased payments. The petition for materials was filed by John Christie, James Harris, and John Eccles, of the county and city of Cork, who had supplied stores of various kinds for the fitting out of the vessel, and meat and provisions for her crew when on board, during the months of April, May, and June. The case was, by consent, heard *viva voce*.

Doctor Elrington appeared for the master and seamen; and *Doctor Townsend* for the other petitioners. The owners did not appear by an advocate.

JUDGE KELLY.—The petition of the material-men must be pronounced for, to the amount of £32 17s. 8d., but all further directions as to its payment must for the present be deferred, until the exact amount of the funds, subject to the disposal of the Court, be ascertained, and the prior charges also satisfied. The petition for wages, which stands on a different footing, as being a lien antecedent to all others, is now to be considered. The Court is satisfied that the hiring and services of the master and crew of this vessel have been well proved, and no evidence has been offered in disproof. Had the petition merely prayed for payment, in accordance with the stipulated hiring, the decree of the Court should go as of course. That is not the case, however, as the mate and three of the petitioners claim beyond that stipulated hiring. The allegation on their part is, that when the vessel was during the course of her voyage, lying in Malta Harbour on the 31st of October last, the mate was re-engaged for the remainder of the voyage at a rate of wages much higher than that for which he had

hired at the beginning of it, and that the master had consented to increase the wages of Sagelari, Esposito, and Possich, the other three claimants under this petition. Now, a claim of this nature, being in derogation of the original contract, requires to be examined into with scrupulous attention, as the circumstances of it must indeed be very exceptional to take it out of what has been and is the declared law, both of the Court of Admiralty and the Common Law Courts. The ship's articles have an endorsement signed by the assistant-superintendent of the port, at Malta, that *Mattia*, the mate, had been discharged, and afterwards engaged upon the terms mentioned in the articles; but the Court in looking at these terms, finds them identical with those of the original hiring. That endorsement then does not support his claim. The master's evidence is next appealed to, and that evidence is, that the mate was not discharged, but reinstated at a salary of £4 4s. per month, instead of £3 12s., the original hiring. Upon this admitted fact, namely—that the mate was not discharged before the fresh contract—the Court will guide itself by the settled law. In *Harris v. Carter*, (3 Ell. & Bl. 559), where a plaintiff under such circumstances was non-suited, Lord Campbell, C.J., was of opinion “that the non-suit was proper, and ought not to be disturbed. Had the plaintiff (he said) been relieved from the obligation which he had contracted towards the shipowners, he might have entered into a fresh contract, and under some circumstances the captain might have had authority to bind the owners by entering into a fresh agreement on their behalf with him. Had there, for instance, been an entire change of the voyage, it might have been so, but here there were no circumstances of that kind. The voyage remained the same for which the men had shipped. There was no consideration for a promise to the plaintiff, and the captain had no authority to bind the owners.” He then concluded with saying—“It would be most mischievous to commerce if it were supposed that captains had power under such circumstances to bind their owners by a promise to pay more than was agreed for.” Crompton, J., adds—“I should be very sorry to let it be supposed that there was the least doubt in this case.” The mate's claim for additional wages must therefore fail. The evidence as to the claim of the three seamen calls for a decision upon a different principle. The endorsement on the articles states that the increase of wages to them was by consent of the master; but the master's testimony is, “that they would not sail otherwise—that they were imprisoned at first for refusing to go, and that then they consented when put on the increased rate.” Now all the reasoning in the case just cited applies to this claim also; moreover, there is here strong evidence that what is called in the endorsement on the articles “a consent” was a consent under compulsion—the master thinking it a wiser choice of evils to comply with the demand of these men for higher wages than to hire others at a higher rate or to sail away short-handed. In *The Aramula*, (18th Jur. 793) the learned judge of the Court of Admiralty of England, when similar circumstances were under his consideration, said, “I strongly incline to the opinion that if there were a contract for any award beyond the wages stipulated for in the mari-

ner's contract, it would not matter whether the contract were compulsory or voluntarily, it would in either case be illegal, and such was the effect of all the cases." Upon all these authorities, then, the Court considers the contracts, upon which the claim for extra wages are founded, to be illegal, and pronounces against them. The wages due, and to be allowed by the Court, must be calculated in accordance with the several rates stipulated for in the ship's articles. For the several sums when so computed, together with kettle-money and costs, the petitioners shall have their decrees; but the Court refuses conduct-money, this being the case of a British registered ship. The decree was accordingly entered for £250 19s. 6d.

Proctor for the owners—Mr. Taylor.

Proctor for the seamen—Mr. Doran.

Proctor for the Interveniants—Mr. Hamerton, Q.P.

THE SEMAPHORE.

Collision—Lights and Look out—The Merchant Shipping Act, (17 & 18 Vict., c. 104, s. 296)—Costs.

In a suit of collision, where the impugnants plead that it was caused by want of proper lights on board the promovent vessel, and this plea is positively denied, the Court will carefully examine the entire of the evidence, and decide the question upon the general accuracy and trust-worthiness of the respective witnesses.

Where there is the risk of a collision, if two vessels continue on their respective courses when first seen, both vessels are bound to port helm under the provisions of "The Merchant Shipping Act," (17 & 18 Vict., c. 104, s. 296), and if one of them ports in proper time, and the other neglects to do so, and a collision takes place, she will be held liable to make good all the damages caused by her default, and pay the costs of the suit.

The absence of a good look out in hazy weather on board the impugnant vessel will go far to induce the Court to hold her liable in a suit of collision.

THIS was a suit of collision instituted by the registered owners, the master and crew of the brig *Nereid*, of Belfast, 149 tons burthen, Joseph Ferry, master, against the registered owners of the screw steamer *Semaphore*, of Belfast, 380 tons burthen, John Campbell, master, to recover compensation for injuries it was alleged they had severally sustained in a collision which took place between those two vessels, on the 4th of October last, in the Irish Channel, whereby the brig was sunk, and totally lost, owing, as the petitioners alleged, to the gross negligence and want of nautical skill of the captain and crew of the steamship. The damages sought to be recovered amounted to a sum of about £2,060, which included the full value of both ship and cargo, and the personal effects of the master and crew. The Court was assisted by Capt. Somerville, R.N., and Lieutenant Crosby, R.N.R., as nautical assessors, and the case was, by consent, heard *via voce*. The facts appear fully in the judgment of the Court.

Doctors Todd, Townsend, and Elrington, for the petitioners.—The case was one of total loss, and as the respondents were the sole cause of the collision, by their gross negligence in not having a proper lookout, the petitioners were entitled to be awarded the full value of their respective losses. They cited *The Cleopatra* (Swaby's Reports, 135); *The Mangerton* (Swaby's Reports, 120); *The Anne and Jerome* (5 Ir. Jur. N.S. 360); *The Telegraph* (8 Moo. Priv. Council Case, 167); and *The Vivid* (Swaby's Reports, 91).

Doctors Gibbon, Lloyd, Q.C., and Chatterton, Q.C., for the impugnants.—The petitioners were not entitled to any relief, as they had been the cause of the collision in not exhibiting lights, as required by the statute, and the *Semaphore*, under the circumstances, was justified in starboarding. They cited *The Commerce* (3 Wm. Rob., 287); *The Joseph Somes* (Swaby's Rep., 185); *The Clyde* (Swaby's Rep., 23); and *The James* (10 Moore's P. C. Cases, 162).

JUDGE KELLY (addressing the assessors) said—It is now my duty, after due consideration of the evidence, to present to you the several circumstances of the case, which, upon a careful review, appear to have been established, in order that you may be better enabled to assist me with your nautical skill and experience respecting certain issues upon which my judgment must mainly rest; and as you have had the advantage of being present during the entire progress of the trial, I trust that you will have little difficulty in following me as I proceed. About five o'clock—one hour before sunrise—on the morning of the 4th of October, a collision occurred in the Irish Sea, about eight miles north of the Calf of Man, between the *Nereid*, from Belfast, a brig of 149 tons burthen and seven hands, bound for Cardiff with a cargo of iron ore, and the *Semaphore*, of Liverpool, an iron screw steamer, of 380 tons and 29 hands, bound for Belfast with passengers and cargo. The effects of that collision were damaging to both these vessels. They came together nearly head on, the bowsprit of the *Nereid* being broken off about one-third, and her foretopmast carried right across her bows.—The *Semaphore's* starboard bow carrying away the *Nereid's* stanchions, nightheads, and bulwarks past the luff of her starboard bow and her starboard bow anchor. The water rushed in very fast on both sides of the *Nereid's* stem after the collision, and a hole was made in her starboard bow about one foot from the stem, and about one foot wide. The *Semaphore*, on the other hand, although her bowsprit and all her forerigging were perfect and nothing forward hurt, had received a fracture about one foot square over her topgallant forecassle, twelve or fourteen feet from the stem to the starboard bow, and was also stove in nearly twenty feet in the full of her starboard side, about fourteen or fifteen feet from her stem. She, however, succeeded in making her port of destination. The *Nereid*, within half an hour after the collision, filled and sunk to the bottom, and, with her cargo and effects, became a total loss. For some time, and immediately previous to the collision, the courses of the two vessels had been—that of the *Nereid* S.S.W., and that of the *Semaphore* N. by E., consequently they were upon opposite directions, and one point only between them. Upon this there is no contra-

very. The wind at the time was S.E. and fresh, as proved by the masters of two sailing ships, and afterwards conceded by the defendants; and the Nereid was going close-hauled on her port tack about three-and-a-half knots an hour. That is also admitted. On the other hand, the Semaphore, being a steamer was going free about eleven knots an hour, and, according to the evidence of Captain Finlay, a most competent witness, was steering admirably. It is to be borne in mind, that at the hour named it was the master's watch in both vessels, and that the masters of both vessels were then on deck. The evidence of the master of the Nereid is as follows:—About half past four in the morning he descried at once, upon the report of his look-out, a bright light about four or five miles off, one point on his port or weather bow. That light proved to be subsequently the bright or masthead light of the steamer. Holding on his course he, in about eight or ten minutes, made out the green light, the same bearing as the light on his port bow. He still kept his course, waiting for the red light, as, until he saw it, he could not know the steamer's course in order to shape his own. After five or seven minutes he opened that red light broad four or five points on his port bow, and about one quarter of a mile off, and upon that at once gave orders to the man at the helm, beside whom he was then standing, to keep the Nereid off, and to give her a good full. These orders were at once obeyed, and the Nereid, under the influence of her port helm, was kept off half a point, being at the moment quarter of a mile distant from the Semaphore. He had, however, taken scarcely two or three steps along the deck when he saw the green light open again, and the Semaphore coming right down on him. Seeing that a collision was then inevitable, he ordered his helm down to ease its effect, but as that was scarcely a second before the Semaphore was close upon him, the Nereid did not alter her head at all. He ran forward to catch the Semaphore to save himself, but before he got to the windlass end of the deck he fell under the shock of the collision. The evidence of the man at the helm corroborates this statement, as does also that of the other witnesses of the plaintiff, and they are not contradicted. On the opposite side, the evidence of the master of the Semaphore is this—He saw the Nereid when reported by his look-out, one-fourth or one-third of a mile off, from one to two points on his starboard bow. She was sharp by the wind and seemed close-hauled, and her yards seemed to be at an angle. She was approaching them. He knew at once she was on his starboard bow one or two points, and made her out by his naked eye, and saw that she was approaching him across his bows. He did not port when he saw her, and was of opinion had he then ported he must have killed every one on board her. He saw her one minute and a half before the collision; he was going at eleven knots, and the Nereid three and a half. He put his helm hard a starboard and stopped the engines; his vessel would fall off one or two points in a minute, and had time to fall off; the Nereid ported before he put hard a starboard. His second mate, agreeing in the rest of this evidence, says that the Semaphore starboarded before the Nereid ported; but Thompson, the look-out man,

who had the best opportunity of the three for observation, says—Agreeing with the master that when he reported her she was porting, going off to starboard, and when the signals were given she was going more off to starboard, and was porting. He further adds, that the Semaphore had paid off under her starboard helm. The man at the wheel corroborates this last fact; and it should be here observed, that in the 9th article of the defensive plea of the Semaphore, it was under the circumstances thus sworn to by each, that, in order to avoid a collision when both vessels saw what was likely to occur, the master of the Nereid ported and the master of the Semaphore put hard a starboard. It is rather a singular fact that neither party challenges the truth of the other as to these circumstances. Your assistance will be, therefore, most necessary to determine where the error lay. Considering the evidence of the master of the Semaphore, that he first saw the Nereid about one-fourth or one-third of a mile off, approaching across his bows on his starboard bow one or two points, that seems to be the very moment of time when the master of the Nereid, according to his evidence, first saw the red light about a quarter of a mile off; and thus the evidence on both sides would agree in this, namely, that about one minute and a half occurred between that sighting and the collision, and that the two vessels were then one quarter of a mile asunder. There is established, then, by the evidence, this state of facts, that these two vessels, approaching each other from opposite directions, with but a point between them, and both conscious that they incurred the risk of collision, should they continue in those directions, that, with common consent, they determined to do something to avoid that risk; and, accordingly, the one and the other starboarded. The Nereid ported after she had the Semaphore's red light broad four or five points on her port bow. The Semaphore starboarded after she had seen the Nereid port. I need scarcely mention to you that the law never did leave cases of this kind without some fixed rule to regulate them by. The Merchant Shipping Act has laid down the rule that in such cases both vessels should port so as to pass on the port side of each other, except circumstances existed to justify a departure from that rule; and that such circumstances did exist in this case is the defence, and, if proved, the justification of the Semaphore. The plea first put forward with that object by her, is that the Nereid did not port in time, and a very sufficient plea for that object, provided it be established by the evidence, and you should so advise me. Now, in examining that evidence, it is to be remembered that the Nereid was sailing from North, on a course S.S.W., and the Semaphore from the South, on a course N. by E. Referring again to the evidence of the master of the Semaphore—that he saw the Nereid about one-half or one-third of a mile off on his starboard bow—that she was approaching him—that in a few seconds she was approaching him across his bows—that he would fall off one or two points in a minute, and had time to fall off—that she ported before she starboarded; and to the evidence of the look-out—that when sighting the Nereid at first she was giving more port-helm and porting as she neared him, the Court cannot discover how such

a plea as that she ported too late can be maintained. Here it may be observed that the duty of all shipmasters is, under all circumstances, to do what is right, each on his own part, properly and fairly presuming that the other will do the same on his part. But how strongly contrasts with this plea the evidence of the master of the Nereid, in which he states his reason for not porting until the time he did, namely, that until he had opened the red light of the Semaphore he could not know her course, or decide upon his own, and that as soon as he had opened it he did so at once, and that sailing as he had been under the influence of port-helm, half a point more was quite sufficient to keep away. But again, it is not clear how this alleged delay could have prejudiced the Semaphore, as both the master and mate appear to have determined all through that they would not, under any circumstances, have ported the Semaphore, their evidence being, that if both ships had ported when first sighted there would have been a collision. These matters I will, however, submit to your nautical judgment. Another and a very substantial ground of defence, has been pleaded on the part of the Semaphore; that is, that the Nereid had not exhibited lights according to the statute, whereby the collision was occasioned, and she was disentitled on that account to sue in that or any Court whatever. In regard of the fact here alleged, the presumption that a party upon whom a duty under a penalty was imposed, had properly fulfilled that duty was urged on the part of the Nereid, but such a presumption cannot be urged if strong or sufficient evidence exist to rebut it. There exists however a strong probability against it, as it is scarcely likely that the master of the Nereid, looking as he was for at least fifteen minutes upon the Semaphore's lights as she approached, and knowing their vast importance, to enable him to ascertain her course, and decide upon his own, it is unlikely that, at the same time, he should have forgotten or neglected to exhibit his own. Passing by altogether, without further observations, these mere preliminaries, I must assume the duty of examining the evidence itself which has been given in support and denial of this plea, perfectly conscious that with regard to that evidence I must act upon my own sole responsibility, performing, with regard to it, the duties of a juror. In support of it no fewer than eleven witnesses have been examined, five of whom were the master, second mate, and three seamen of the Semaphore, and six were passengers on board of her. (Of these latter two only saw the Nereid, for the first time, one minute or immediately before the collision; the other four not until after it. Now, the state of the Semaphore at and after the collision is described by the second mate to have been one of great confusion, between the fears of the passengers—some of whom were females—and the dangerous appearance of the Semaphore herself, as she had filled in her fore-compartment, and sunk down by the head above her hawse holes. At such a moment of time a steady or accurate examination of the Nereid's lights was neither likely, or to be expected; the Nereid herself, after passing off to leeward, momentarily filling and going down, and being herself a lower vessel in the water than the Semaphore. Accordingly, the evi-

dence of these six witnesses, with one exception, is very general—the answer from each and all of them being the same—"they did not see the lights," and "if there were any they must have seen them;" the exception, however, is a remarkable one—Captain Finlay, the master of an East Indiaman, then a passenger in the Semaphore. This gentleman admitted that "the red light of the Nereid might have been burning without his seeing it." Now it is to be remembered that that was the light of the Nereid's portside. The master and crew of the Semaphore have given their evidence in precisely the same terms—they saw no lights—had there been lights they must have seen them. One of them, the second mate, refused to say that the Nereid had not lights. Of these witnesses, moreover, three only saw the Nereid before the collision—viz., the captain, the second mate, and the look-out; and for that reason their evidence, although like all the other testimony on this point of a negative character only, required minute examination; but such examination must be with reference to the accuracy and consistency of their evidence on other points of material importance; and if by such a test, the only one in my power, they are found to be little worthy of dependence for accuracy of observation or of statement, the Court can scarcely be called upon to rely altogether upon their observation or statements with regard to this question of the lights. And first, with regard to their evidence as to the telegraph signals, the captain swore that he gave both these signals; the second mate swore that he himself, and not the captain, gave them; and the look-out swore that the captain gave the one and the mate the other. Next, with regard to their evidence as to the captain being on the bridge before and at the time the Nereid was sighted—the captain swore that he was, the second mate that he was not, and the look-out contradicted the mate; and again, with regard to the look out man, the captain swore that he knew at the time who was the man, and the mate swore that the captain asked him afterwards who the man was. These discrepancies tend to shake the credence which the Court might otherwise be induced to give to the testimony of these men, and compelled it, in the exercise of a proper caution, to require corroborating evidence. Such, however, was not to be had; but, on the contrary, there is evidence on the part of the Nereid, full, positive, and circumstantial, that she was provided with proper lights; that they were burning brightly and well previous to, and after the collision; that they had been set up the night before at seven o'clock; that they had been burning at four o'clock the morning of the collision, and just about one hour before it. The master of the Nereid described their places on the ship's sides with great particularity, and the lighting of the signal lantern and the green light, when they were pulling off in their boat, before the Nereid went down. Laidlaw, the mate, swore he was the man who lighted the signal lantern at that light; Parke, the steward, swore that he cleaned and trimmed it that morning one hour before the collision, and Boyle, a passenger on board the Semaphore, deposed that he saw the red light on the Nereid. Here, then, were witnesses swearing to the same, as well as different particulars of a fact within their own knowledge,

and who, upon other points of equal importance in the case, have sworn consistently with each other and without exaggeration, and corroborated, as already observed in the leading points of it, by the evidence on the part of the Semaphore. Mr. Taylor, in his book on Evidence, observes—"That the true question, in trials of fact, is not whether it is possible that testimony may be false, but whether there is sufficient probability of its truth—that is, whether the facts are proved by competent and satisfactory evidence," and he defines such evidence as being that amount of proof which generally satisfies an unprejudiced mind beyond reasonable doubt, so to convince it that it would act upon that conviction in matters of important personal interest. In applying such principles to the evidence just adduced on the part of the Nereid, as compared with that on the part of the Semaphore, I cannot come to any other conclusion than that I have been satisfied by the former, beyond reasonable doubt, that the lights of the Nereid were exhibited by them before the occurrence of the collision in question. I consider, therefore, that the defendants have failed in their proof in support of this ground of defence. There remains now but one matter more for the consideration of the Court—that alleged by the petitioners in their 22nd article, that a sufficient look-out had not been kept on board the Semaphore. According to the evidence of the captain of the Semaphore the place for the look-out on board that vessel was on the fore-castle when in rivers, and on the bridge when on the open sea—giving as the reason that when at sea the vessel shipped water forward. Now, the captain's watch in this vessel was set at half-past two o'clock a.m., and the look-out in that watch was placed at first on the fore-castle, and at about half-past four o'clock, after passing the Calf of Man, was called up to the bridge by the second mate, and stood on the forward part of it about midships. The morning at that time, and up to the time of the collision, was described as dark and hazy, the evidence of the look-out being that a vessel without lights could be seen one quarter of a mile off, and with lights two miles. The bridge was a more elevated position than the fore-castle. The look-out admitted that the haze had lifted but little and lay mostly on the water, and that he could see objects on the water better when he looked under than over that haze; and that for such purpose the fore-castle, which was a lower place to look out from, was a better place for him than the bridge, to which the mate had called him up. The captain states that he was on the bridge at the same time with the look-out and the second mate; but the latter officer, as more than once observed, swore that the captain was not there, and had not been there from the time the look-out was called up until the collision, which was full twenty minutes after. The mate admitted that he himself was not forward with the look-out, but abaft on the bridge, and did not descry the Nereid until the look-out reported. The amount of this evidence, then, was, that the duty of the look-out had been at that very critical time entrusted to one man only. Here the evidence of Boy e, the passenger on board the Semaphore, because of importance. This witness had gone upon deck about one hour before the collision. He stated that at that time there was no one on the fore-castle, and no one

on the bridge. The credit of this witness was set up by the corroboration given by the second mate to his evidence on another point, namely, that some time after the collision the captain called out to know who was on the bridge at the time of it. Leaving these details simply before you, I shall now ask your opinion upon the following points:—

First—Considering the respective courses upon which the Nereid and the Semaphore were sailing on the morning of the 4th of October, the half-hour immediately before the collision, was there risk of collision had they continued in those courses, and if risk, what was their common duty in order to avoid it?

Secondly—Was the Nereid justified in delaying to port helm until she had opened the red light of the Semaphore, or did that delay in any way contribute to or cause the collision?

Thirdly—Was the Nereid, when she saw the Semaphore coming down upon her with a starboard helm, justified in starboarding her own helm, or did she, by so doing, in any way contribute to, or cause the collision?

Fourthly—Was there a sufficient look-out kept on board the Semaphore previous to and after the collision?

Fifthly—Whether, within the time and distance the Nereid was reported to the Semaphore, the latter had room and time sufficient to avoid the collision had she adopted proper measures?

Sixthly—Was starboarding the Semaphore the proper measure to adopt under the circumstances, or what ought to have been done by her? and

Seventhly—Do you attribute the collision to the fault of both vessels, or of one only, and if so, of which, stating your reasons?

HIS LORDSHIP having retired with his assessors after an absence of an hour and a half returned into Court, and announced that they had given the following answers to the questions proposed:—

To first—We consider that there would have been a risk of collision had both vessels continued on their respective courses as first seen, and under this belief we are convinced that both vessels should have ported.

To second—The Nereid was perfectly justified, and the delay of not porting could not, under the circumstances, contribute to or cause in any way the collision.

To third—We consider the Nereid was fully justified to save herself as far as she could, in putting her helm to starboard, at that time the collision being inevitable.

To fourth—We are not satisfied that there was a vigilant or active look-out kept previous to, and up to the time of the collision.

To fifth—We consider that there was sufficient room and time to avoid the collision had the steamer instantly ported on seeing the brig under the influence of her port helm.

To sixth—We consider that starboarding at the time of seeing the brig was erroneous, and we are convinced that it was the steamer's duty, for every reason, to have ported.

To seventh—We consider the Semaphore solely and wholly to blame for the collision, for the reasons assigned in all the foregoing answers.

JUDGE KELLY.—I fully acquiesce in the answers I have just read, and, adopting them, decree for the petitioners, with costs.

Proctor for petitioner—Mr. Richardson.

Proctor for impugnant—Mr. Hamerton, Q.P.

Court of Queen's Bench.

[Reported by William Woodcock, Esq., Barrister-at-law.]

CROWN SIDE.

RE WILLIAM CONNOR.—June 4, 27.

Right of father to custody of male infant—Habeas Corpus—Age of discretion.

The age of discretion at which a male infant may choose his place of abode is fourteen, not sixteen, and, therefore, where a male infant had passed the former, but had not attained the latter age, the court refused to deliver him against his will into the custody of his father. (Dissentiente, O'Brien, J.)

THIS case came before the Court on the return to a writ of *habeas corpus ad subjiciendum*, directed to the managers of the institution called "The Bird's Nest," at Kingstown, directing them to bring up the body of one William Connor, a child in the institution. The writ had been obtained by Thomas Connor, the father of the child. It appeared from the affidavits in the case, that Thomas Connor had given, or allowed to be given, his son, into the charge of the institution in question, that he was now anxious to remove him from it, and had accordingly applied to its managers, who had refused to deliver the boy up to him: that the boy was unwilling to return to his father, and also that he was over the age of fourteen, and under that of sixteen. The body of the boy was now brought into Court, and the father claimed that his son should be forthwith delivered over to his custody.

J. A. Curran and J. A. Curran, jun., for the prosecutor.—We contend that the age at which a child may choose his own abode for himself is sixteen, not fourteen. The Act 14 & 15 Car. II., c. 19, s. 6 (Irish), enables the father to appoint a testamentary guardian, whose authority shall extend until the child reaches twenty-one. It is absurd to imagine that the father should have power to delegate an authority which he does not possess himself. The question is, what is the age of discretion? In most of the cases which have occurred, the child was under fourteen, but there is nothing to shew that the authority does not extend beyond that age. *Wellesley v. Wellesley* (2 Bligh, N. S., 124); *The King v. Greenhill* (4 Ad. & El., 624). In the *Queen v. Howes* (30 L. J., N. S., M. C., 47; s. c., 7 Ir. Jur., N. S., 22), the Court, in the case of a girl, refused to allow her to choose her own abode against the will of her father, though she had passed the age of fourteen. The language used by the judges in that case shews that they intended to establish a rule applicable to boys as well as to girls. In the *Queen v. Clarke* (7 Ell. & Bl., 156), Lord Campbell, in his judgment, quotes with approval an opinion given by Patteson, J., at the request

of Sir Erskine Perry, Chief Justice of Bombay, in which he states that the father was entitled to the custody of his child even after the age of fourteen. The Irish Poor Law Act, st. 1 & 2 Vict., c. 56, s. 53, makes the father liable to maintain every child under the age of fifteen. Would it not be a hardship, if, this being the case, the child could yet set his father at defiance, and refuse to live with him? *In re Shanahan* (5 Ir. Jur., 58) will be cited on the other side, but the question was not raised there. They also cited *The Queen v. Thorpe* (Carth., 384).

Hemphill, Q.C., and *Acheson Henderson*, for the managers of the institution. We say that we have the boy in Court, and that he should be discharged and allowed to go where he chooses. In all cases of male infants, the age of discretion is fixed by analogy to that at which guardianship for nurture terminates; that is, the age of fourteen.—Co. Litt., 78, b, and 88, b, note 13 in Hargreave's edition. The same is the case in the criminal law, fourteen being the age at which an infant is *capax doli*, and responsible for his actions.—1st Hale, P. C., 25. *Re Shanahan* (5 Ir. Jur., 58) is a distinct authority on the subject. *The Queen v. Howes* is an authority only in the case of girls, and is founded on the analogy of the st. 4 & 5 Ph. & Mar., c. 8, as to the abduction of females under sixteen against the will of their parents. The note to *In re Daly* (2 Fost. & Fin., 256,) shews that *The Queen v. Howes* is considered by the profession in England only to refer to the case of girls. The opinion of Patteson, J., referred to by Lord Campbell in *The Queen v. Clarke*, is not an authority; it is entirely extrajudicial, and has not even the weight of a *dictum* in a case. They also referred to *In re Moore* (11 Ir. C. L. R., 1); *The King v. Greenhill* (ubi supra); *Ex parte Barford* (8 Cox, C. C., 405); *The Queen v. Timmins* (8 Cox, C. C., 401); *Hyde v. Hyde* (29 L. J., N. S., Prob. & Matr., 150).

FITZGERALD, J.—This case of William Connor came before the Court on the 4th of June, on the return to a writ of *habeas corpus*. That writ had been sued out by the father of the boy, and was directed to the principals of an orphanage known as The Bird's Nest, at Kingstown. A question arose upon the return to that writ, which is rather voluminous, and contains a good deal of irrelevant matter; but it was arranged on the occasion of the argument that the return should be taken as one of *habeo* simply; and according to the course of the Court, it is called upon in the first instance to see that the boy is relieved from illegal restraint, if he is so confined, and given to freedom. So far there is no difficulty. But this application is made by the father to us to deliver the boy into his custody; and it appears and was a fact conceded, that the boy is over fourteen years of age. He attained the age of fourteen years in April last, and was consequently over fourteen years old at the time when this writ was sued out; and the question now before us is, whether at the instance of the boy's father we should make an order that the boy, who is now more than fourteen years old, should be delivered up to his father? The rule in cases in which infants are brought before the Court by *habeas corpus* is to a certain extent settled by the case of *The King v. Greenhill* (4

Ad. & Ell. 624), by Lord Denman, C. J., to which I refer, because it contains not alone a very lucid judgment, but because all the earliest cases of any importance are cited in it. Lord Denman, C. J., says,—"When an infant is brought before the Court by *habeas corpus*, if he be of an age to exercise a choice, the Court leaves him to elect where he will go." But this question remains for us to determine whether this boy has attained the age of discretion? that is to say, what is the age at which the Court will assume that the boy is capable of exercising a choice as to his place of abode? As a general rule this question must be answered without reference to the maturity of intellect or to the precocity of the infant, and without regard to consequences. We must act on general rules applicable to all cases without regard in any particular case to the consequences which will result from it. The prior cases are all collected and commented upon in that case of *The King v. Greenhill*; and it is somewhat remarkable that, though cases are of very frequent occurrence in which infants have been brought up by *habeas corpus*, yet there is no case in which a decision as to the paternal right as to the custody of sons who are over fourteen years of age, has been made. With regard to male infants under that age the decisions are numerous; but there is no decision upon the point when the boy had attained the age of fourteen years. In the course of the discussion of the present case it appeared that the real question was, whether in the case of an application made by the father the boy is to be assumed to have attained discretion at the age of fourteen years, so as to have power to determine for himself what shall be his place of abode? or whether that assumption is to be postponed until he reaches the age of sixteen years? From a recent decision it appears that sixteen years is the age at which the assumption will be made in the case of a female infant. But the question here is to be determined as between a father and his son. The prosecutor relies very strongly in his argument on the 14 & 15 Charles II., c. 19, s. 6; that is the statute which abolishes the Court of Wards and Liveries in Ireland, and tenures in *capite*, and by knight's service, and reduces all tenures to socage tenure. By the 6th section it enables the father to appoint a guardian of his infant child within the age of twenty-one; and it was argued before us that, inasmuch as the father had a right to appoint a guardian for his son until twenty-one, *a fortiori* the father who could make a testamentary appointment of that nature was also entitled to the custody of his child until twenty-one. However, it is not necessary for us now to pronounce any opinion as to the limits of the father's rights to the guardianship of the child; that is not the question before us. The question before us is not the extent of the guardian's right or the paternal right, but whether on the writ of *habeas corpus* we are to make an order to give the child, this boy, to the custody of his father. The prosecutor also relied on a portion of the judgment in the case of the *Queen v. Clarke* (7 El. & Bl., 186). No decision was made there upon this point; the case related to the custody of a daughter, not of a son, and of a daughter under the age of fourteen, but in the course of Lord Campbell's judgment he refers to Mr. Justice Patteson's opinion

given under the following circumstances. Sir Erskine Perry had to enforce the writ of *habeas corpus* in Bombay, in the cases of Parsee fathers seeking to recover the custody of their children: for his guidance he wrote a letter to Mr. Justice Patteson asking his opinion on the subject, and in a volume of his own Indian reports he printed the opinion which he had obtained. That is not the opinion, properly speaking, of a judge at all, but of a very eminent person who had ceased to hold a position on the Bench. He says in the letter, "I cannot doubt that you were quite right in holding that the father was entitled to the custody of his child, and enforcing it by writ of *habeas corpus*. The general law is clearly so, and even after the age of fourteen; whereas this boy (*Shripad*) was only twelve." The weight to be given to this opinion is, that it is quoted by Lord Campbell without disapproval; but of course whatever value it may have as a private opinion, it cannot be considered as having the weight of a decision. In addition to referring to that passage, which could not be controverted in the case in which it was cited, the prosecutor also relied strongly on the case of *The Queen v. Howes*. In that case the question arose also as to the right of a father to the custody of his daughter, who was over fourteen, but under sixteen: and it was there held that she had not attained the age of discretion, and that the father was entitled to a peremptory order for her custody; but on looking to the decision of the Court of Queen's Bench in that case, it will be found that it is based entirely on the statute 4 & 5 Ph. & Mar., c. 8, re-enacted by the 9 Geo. 4, c. 31, s. 20, one of the Acts known as Peel's Acts. Both make the abduction of a female under sixteen a misdemeanour, and, guided by the analogy of the Act of 4 & 5 Ph. & Mar., the Court of Queen's Bench held that the effect of the Act was in substance to take away from the girl all discretion as to her place of abode till she was sixteen, and to give absolutely to parents and guardians the right to fix her place of abode, and, acting by analogy, they held that the girl had not, so far as related to choosing her place of residence, attained the age of discretion, and that her father could fix it for her. It was urged on us that though that case relates only to the instance of a daughter, there was language in it shewing that the Court was anxious to lay down a general rule, and unquestionably there is general language from which one might be led to infer that the Court of Queen's Bench in England, in its judgment intended to go beyond the case of a daughter, and to establish a general rule. I think it matter of regret that the judgment is couched in such ambiguous language that it should be open to that comment. If the judges had come to the conclusion that it was proper to establish a general rule applicable to boys as well as girls, and to fix sixteen as the period at which in both cases the age of discretion should be arrived at as to residence, I think it would be very mischievous for us to come to a different rule. I regret that there is ambiguous language in the judgment. I think there is a difference in the three reports of the case; but on looking to the report in *The Jurist* especially, I can only come to the conclusion that it is a decision on the parental right to the cus-

tody of a daughter only, and that the right is extended to the age of sixteen by analogy to the statute, and I can understand why such a rule should be applicable to the case of girls, and how fraught it would be with mischief if a person was allowed to decoy a girl away under that age, probably with intent to work out her ruin. The statute of Philip and Mary, which is followed by that of Geo. 4, is intended to remedy that, and the effect of both is to deprive girls under sixteen of a discretion as to their place of residence. Both statutes are founded on wise rules, and both are enacted to remedy a great and crying evil. But they are only applicable to girls, and I cannot consider *The Queen v. Howes* as a decision in any case but that of girls. I have now adverted to the authorities which were mainly relied on by the prosecutor to this writ, and to the fact that we have no decision whatever as between father and son, fixing definitively the period at which a son's age of discretion shall be assumed to have arisen; and, therefore, though to a certain extent it is a matter of discretion in us, yet that discretion is a judicial discretion, to be regulated by the current of opinion, and of legal analogies. Now, let us take the case at common law, and see what was the position of a boy there? There were three species of guardianships: there was in the first instance a common law guardianship by nature; but that was one which I have not to deal with, as it applied only to the case of the eldest son, but extended until that son became of age. It had particular characteristics, and was founded on particular reasons. The second was guardianship for nurture, and that extended only to the age of fourteen, where it ended. The last was socage guardianship, which was given to the next of kin, to whom the inheritance could not descend, and that also ended at fourteen. Again, we find that at fourteen, by the common law of the land, a boy was assumed to have attained the age of discretion for certain purposes. Up to seven he was assumed to be incapable of committing crimes. Between seven and fourteen it was a matter of inquiry depending on the state of his mind. Certain crimes he was incapable of, amongst others rape, or assault with intent to commit it; but after fourteen he was responsible for his acts. In addition we find that at fourteen a boy was considered competent to make a will, so that so far as we can be guided by this analogy, it is plain that the common law assumed that at fourteen a boy had attained the age of discretion. I have now to advert to statutable analogies as guiding and regulating our judicial discretion on the subject. First, the statute of 10th Car. 1, c. 17. The first section is that which in substance is a re-enactment of the provisions of the 4th Ph. & Mar. in England, and which makes the abduction of girls under sixteen, even with their own consent, a crime. The second section is a more remarkable one. After the statute has thus made it a crime to take a girl under the age of sixteen out of her father's custody, that section goes on—"And be it further enacted by the authority aforesaid that if any person or persons above the age of fourteen years, shall from and after the first day of May next ensuing after the end of this present session of Parliament, unlawfully take or convey, or cause to be taken or conveyed, any maid

or woman-child unmarried, being within the age of sixteen years, out of or from the possession, and against the will of the father or mother of such child, or out of or from the possession against the will of such person or persons as shall then happen to have, by any lawful ways or means, the order, keeping, education, or governance of any such maid or woman-child; that then every such person or persons so offending, being thereof lawfully attainted or convicted by the order and due course of the laws of this realm, other than such of whom such person taken away shall hold any lands or tenements by knight's service, shall have and suffer imprisonment of his and their bodies, by the space of two whole years without bail or mainprise, or else shall pay such fine for his or their said offence as shall be assessed by the council of the King's highness, his heirs or successors, in the Court of Castle Chamber." Thus this section takes the distinction between males and females, and makes the abduction of a girl under sixteen a crime, and makes a boy who is engaged in it punishable if he has reached the age of fourteen. Again by the 10th Geo. 4 in this country, c. 34, s. 24, we find also it is again re-enacted that the abduction of an unmarried girl under sixteen is an offence punishable by fine and imprisonment, and I rather think that abduction under that statute is independent of the consent of the girl. We pass on to the 24 & 25 Vict., c. 100, ss. 55 & 56. By section 55, whoever shall unlawfully take, or cause to be taken, any unmarried girl being under the age of sixteen, out of the possession and against the will of her father or mother, or of any other person having the lawful care or charge of her, shall be guilty of a misdemeanour, and liable to imprisonment not exceeding two years, with or without hard labour. Again, I have to observe on this section that while the offence must be against the will of the father or mother, it does not depend on the consent of the girl at all. By the 56th section of the same Act, an alteration of the previous law takes place. The heading is "child-stealing:" and how is it defined? The section says, "Whosoever shall unlawfully, either by force or fraud, lead or take away, or decoy or entice away, or detain, any child under the age of fourteen years." There could be no kidnapping of a boy over fourteen. Such are the analogies which I think necessary to refer to, both at common law and under the several statutes, and the inference I deduce is, that both by the common law and the statute law, and in the absence of express decision, these are the guides we have to take; by both a boy is taken at fourteen to have attained his age of discretion. It might have been wisely decided, and I would have been prepared to have acceded to it if such had been decided, that the age of sixteen was the age; but we have no decision to that effect, and I must now advert to the ground of received opinion amongst the profession. Up to the time I heard this case argued, I had been of opinion that it was the received opinion of the profession that fourteen was, with a boy, the age of discretion, and that the Court would then allow him to say would he go to his father, or stay where he was. In reference to the case of *The Queen v. Howes*, we are referred to that case in a note in 2 F. & F., 263. It is very true that those are reports of *Nisi Prius* deci

sions, but they are remarkable for the care with which they are brought out, and also in many instances for the learning of the notes. The note at p. 263 there, so far as has a bearing here, is as follows—a note which is valuable as shewing how *The Queen v. Howes* was understood by the profession: “The Court of Queen’s Bench, in Michaelmas Term, 1860, decided with reference to the statute of Philip and Mary, as to the abduction of girls under sixteen, that sixteen, and not fourteen, as in the case of boys, was the age at which a girl had a right to choose her residence. This question could not have arisen in this case even had the writ been contested, for the girl was under fourteen, and under that age, as established in *re Race* (26 L. J., Q. B., 169), a boy or girl is not *sui juris*, even as regards personal liberty, and is not entitled to choose a residence.” I take it that is a statement of the professional understanding of *The Queen v. Howes*. Upon these grounds, I am of opinion that, in the due exercise of a judicial discretion, we must come to the conclusion that fourteen, and not sixteen, is the age at which a boy is allowed to choose his place of residence. It appears that in this case the boy was examined. He appears to be a boy of remarkable intelligence, and that he has expressed a wish not to return to his father, but to the institution, and therefore I am of opinion we should say no rule.

HAYES, J., said the Court was called on to decide how long that authority of a father continues which entitles him to the possession of his son. Until very lately the general opinion of the profession had been that the right ceased when the child, whether male or female, attained the age of fourteen; and in accordance with that this Court, in *Shanahan’s case*, decided that a boy who had attained that age was not to be delivered up to his father against his will, but was of an age of discretion to choose his residence. The Court should here consider for a little the nature of the father’s authority—the *patria potestas*, as it was called in the Roman law. Heinneccius told us that a father had the same authority over his children that a master had over his slaves; and he proceeded to give several instances of the authority. He told us first that the father had the authority of life and death over his child; that he could sell him into slavery; and that though he was twice manumitted, still he returned to the father’s authority and could be again sold; and that what the child acquired was for the father. It was needless to remark that no such absolute authority was claimed in the English law. The child, as soon as he was born, was entitled to the protection of the law equally with all others; and it was only that he might acquire the education and training which should enable him to discharge the duties which he owed to the community and to himself that he was placed by law under guardianship during the earlier period of his life. As admitted by Lord Eldon in *Wellesley v. The Duke of Beaufort*, it belonged to the king to provide for those who could not take care of themselves; and this was founded on the necessity of placing that authority somewhere. So again, Lord Redesdale, in 2nd Bligh, N. S., 124, “What is the ground on which the opposition is made to this order? The opposition is founded on the right of the father to

have the care and custody of his children. That right is not disputed by the order; but the question is, whether the father having that right is to be at liberty to abuse that right. That is the real question. Why is the parent entrusted with the care of his children. Because it is generally supposed he will best execute the trust reposed in him; for that it is a trust of all trusts the most sacred, none of your lordships can doubt. . . . I apprehend it is impossible to say that the father has that absolute right which is contended for at the bar. What are the grounds on which the custody of the children is given to the father? First protection, then care and education. Is it not clear that if the father does not give that protection, does not maintain the child, that the law interferes for the purpose of compelling the maintenance of that child? Is it not clear that if the father cruelly treats the child in any manner, that a court of criminal jurisdiction will interfere for the purpose of preventing that treatment? Is it to be said, then, there is no jurisdiction whatever in this country that can control the conduct of the father in the education of his children?” Here, then, we had it established that the father’s authority was derived from the Crown; that the father held it as a delegated trust; and that like other trustees, he was liable to correction if he neglected his duty. If a parent was intrusted with the care and education of his child, and made responsible for his duty, it was plain he must be endued with the authority and power requisite for the discharge of his duties, and such must be continued so long and no longer than the necessity for it existed. After that time the control of a father over his child was regulated by different rules. His authority must then rest rather on moral than on legal grounds. On the one hand the father owed care and protection to his son; on the other hand the son owed to the parent a love which was testified by a ready obedience to the wishes and commands of a parent. But what was the time at which the legal rights and duties of a parent should cease, and when the infant should be deemed to have attained to such years of discretion as that he should be allowed by law to reject the parental abode.” The earliest authority on the subject was the Year Book, 8th Edward 4, Mich. fol. 7 B, pl. 2. There we might observe that the duty of guardian for nurture was stated to be for the care and education of the child; that it was to be confided only to the father or mother, and was to continue till fourteen, that being called the age of discretion. It was also to be observed that the grounds were the same as lie at the root of all delegated authority as stated by Lord Redesdale. His lordship referred also to Brooke, Comyn’s Digest, Guardian, 1 B., and *Alicia Race’s case*. From the whole tenor of the judgment in that case, and notwithstanding the passage from Sir Erskine Perry’s letter cited in it, he thought that the Court contemplated that the parent’s right as guardian for nurture was to cease at fourteen; but as the child there was under that age, the question did not arise whether the authority continued after that. The question arose in *The Queen v. Howes*, in the case of a female. Was that decision to be confined to females, or did it extend equally to males and females. There was no doubt a series of enactments was passed by the Legislatures both in England and

in Ireland in its care for females. The fact that so many statutes were passed showed that the case of females was considered a special one; so that whatever light was derived from it as to females, not a ray is cast on the law as to males. In the *The Queen v. Howes* (30 L. J., M. C. 47), the Court dwells on this, that the statute made it a misdemeanor to take away an unmarried female under sixteen, even with her own consent; and thence the Court deduced the inference that the statute has pointed out the age of sixteen as that up to which a female child shall be subject to her father and cannot act for herself. Assuming this to be so, how stood the law in Ireland? By the 10th G. 4, c. 34, the English enactment was made law in Ireland. Sec. 24 provided a penalty against the abduction of an unmarried girl under the age of sixteen. Bearing in mind the decision in *The Queen v. Yore* (1 Ir. L. Rep. 301), might we not come to the conclusion that sixteen was the age if she had property, whereas if she had no property the age was sixteen? The question in his lordship's mind assumed a different complexion now in 1863 when the case was that of a male infant, when the Act of G. 4 had been repealed, and the Act of 24 & 25 Vic. c. 100 had been put in its stead. The 53rd section of that statute enacted that whoever should fraudulently allure, take away, or detain a woman having any interest in property as stated in the early part of the section, being under the age of twenty-one years, out of the possession and against the will of her father or mother, or of any other person having the lawful care or charge of her, with intent to marry or carnally know her, or to cause her to be married or carnally known by any other person, should be guilty of felony; and being convicted thereof, should be liable at the discretion of the Court to be kept in penal servitude for any term not exceeding fourteen years and not less than three years, or to be imprisoned for any term not exceeding two years, with or without hard labour. So the 55th section: "Whoever shall unlawfully take or cause to be taken any unmarried girl, being under the age of sixteen years, out of the possession and against the will of her father or mother, or of any other person having the lawful care or charge of her, shall be guilty of a misdemeanor, and being convicted thereof shall be liable at the discretion of the Court, to be imprisoned for any term not exceeding two years, with or without hard labour." Both these sections would seem to declare that, one at the age of sixteen and the other at twenty-one, the care of a female was in the father, but not that the parental authority extended beyond that age. Sec. 56 enacted that whosoever shall unlawfully, either by force or fraud, lead or take away, or entice, or detain any child under the age of fourteen years with intent to deprive any parent, guardian, or other person having the lawful care or charge of such child of the possession of such child, or with intent to steal any article upon or about the person of such child to whomsoever such article may belong; and whosoever shall, with any such intent, receive or harbour any such child, knowing the same to have been by force or fraud led, taken, decoyed, enticed away or detained, as in this section before-mentioned, shall be guilty of felony. In the corresponding enactment of 10th G. 4, c. 34, the age of the child was

fixed at ten; but here, and apparently with the design of making them conformable with the age of termination of guardianship for nurture, it was fixed at fourteen. And might we not, approving the principle of *The Queen v. Howes*, say that the Legislature had thrown a light on the subject, and that it was impliedly stated that till the age of fourteen, and not after that period, a party should be deemed incapable of choosing his domicile. Upon the whole of this case, and confining his observations to the case of a male child, it appeared to him that no reason had been shown for fixing a later age than fourteen as that of discretion so as to authorise a child to make choice whether he would or not return to the parental home. He came to this conclusion the more readily, because the Court was not called on to interfere with *The Queen v. Howes*. Accordingly he concurred with his brother Fitzgerald.

O'BRIEN, J.—The question before us is one of considerable importance. The principle involved in it is one of general application; and there is no doubt that the decision of it may produce results seriously affecting parental authority and the relations of families by defining the period after which the father is deprived of the right to the custody of his son on an application to a court of law, and, in my opinion, can no longer control the education or pursuits of that son. It is admitted that among the many cases in the books there are very few which bear directly on the question before us, which is, whether the father's right to recover his son on a writ of *habeas corpus* is absolutely taken away by the mere circumstance of the boy having attained the age of fourteen. The counsel for the institution here have cited the case of *In re Shanahan*, and also that of *Hyde v. Hyde*. The decisions in those cases, do not, in my opinion, govern the case before us. On the other hand the counsel for the father has relied on *The Queen v. Howes*, in which it was held that the right of the father with respect to his daughter continued until sixteen. I find also that in the old case of *The King v. Delaval* (3 Bur. 1434), which was not cited, the Court refused to deliver a daughter to her father, and allowed her to go where she pleased. In that case the girl was eighteen; and Lord Mansfield rests his decision not on the ground that the girl had every right to go where she liked even then, but that she had received ill usage. It would have been unnecessary for Lord Mansfield to have relied on that ground if he had considered the law to be, that after the age of fourteen she was free to go where she chose. I may add that Lord Campbell, in referring to that decision in *Alicia Race's case*, also takes this view of the decision; but in all the other cases I have been able to find, the question arose on the custody of children under fourteen. In several the father had died without appointing a guardian, and the claim was made by the mother as guardian for nurture, which guardianship wholly determines when the child reaches the age of fourteen. I may add the case of *In re Moore*. But the rights of the mother are clearly settled by *Alicia Race's case*, where Lord Campbell, in his very clear and full judgment, lays down as a general principle that the mother, becoming guardian for nurture, is entitled to the custody of the child up to fourteen. But when the

child attains that age, the mother's guardianship for nurture determines, and her right to the custody of the child without reference to the wishes of the child, is gone also. The contention here is, that the right of the father as to guardianship are far more extensive than those of the mother; that they do not determine when those of the mother determine; that he is guardian by nature, and that that continues till twenty-one. Several authorities will be found in Macpherson on Infancy, pp. 61, 62, and 63. I shall refer to a passage from Blackstone quoted by him. It is, that the father "may lawfully correct his child being under age, in a reasonable manner: for this is for the benefit of his education. The consent or concurrence of the parent to the marriage of his child under age was also directed by our ancient law to be obtained; but now it is absolutely necessary, for without it the contract is void. And this also is another means which the law has put into the parent's hands in order the better to discharge his duty; first, of protecting his children from the snares of artful and designing persons; and next of settling them properly in life, by preventing the ill consequences of too early and precipitate marriages. The legal power of a father (for a mother, *as such*, is entitled to no power, but only to reverence and respect,)—the power of a father, I say, over the persons of his children ceases at the age of twenty-one; for they are then enfranchised by arriving at years of discretion, or that point which the law has established (as some must necessarily be established) when the empire of the father or other guardian gives place to the empire of reason. Yet, till that age arrives, this empire of the father continues even after his death; for he may by deed or will appoint a guardian to his children. He may also delegate part of his parental authority during his life to the tutor or schoolmaster of his child, who is then *in loco parentis*, and has such a portion of the power of the parent committed to his charge, viz., that of restraint and correction, as may be necessary to answer the purposes for which he is employed." Well, that strong declaration by Sir William Blackstone of the rights of the father is confirmed by the English and Irish Acts on guardianship. The Irish Act is the 14 & 15 Car. II., and these Acts empower any father who has any child or children under twenty one at his death, to dispose by deed or will of the guardianship of them until twenty-one. Well, it is almost unnecessary for me to add, after reading that statute, that by enabling the father to confer on others such extensive powers, it implies that the father himself, if living, would have similar powers. It has been suggested that at Common Law, and according to some of the authorities, this right of guardianship by nature was not very clearly defined; that what was called guardianship by nature applied only to the eldest son, but that distinction, it is manifest from the passage in Blackstone's Commentaries which I have read, has long since ceased, and it is plain from the same work that it continues over all the children until twenty-one. I may remark that the mother has no such power of appointing a guardian as is given to the father. Even if she survived the father, her appointment of a guardian is absolutely void. She may of course delegate her authority during her

life, but after her death that power ceases, and an appointment by her is absolutely void. Such being the general nature of the father's rights to the custody of his child, the next question is, what are the limits within which those rights are to be enforced by virtue of the writ of *habeas corpus*, and what is the age after which the Court will not interfere to enforce them by handing over the child against his will to the custody of his father. It is settled that the Courts will not interfere if the child has attained the age of discretion, entitling the child to exercise its own free will, and select its place of abode. The judgment of Lord Campbell in *Alicia Race's case*, and the authorities he refers to, show that the question is, what is the age of discretion? Lord Campbell lays down the rule that during the guardianship by nurture the child has no such discretion, and that the mother has that guardianship. But, as I have said, those decisions as to the mother's rights expiring when the child reaches the age of fourteen, do not apply to the case of the father. His guardianship continues beyond the age of fourteen: that appears from the statutes. With respect to the several reported cases of applications by the father, it appears that in all, except *Re Shanahan*, the children were under fourteen. Under that age it was not necessary to consider whether the rights extended beyond fourteen. But in none of those cases, whatever may be said as to the current of opinion among the profession, do I find any expression coming from any judge of the Court, intimating that the father would lose his right to the interference of the Court on the boy attaining the age of fourteen. I have mentioned the case of *Re Shanahan*, in which the Court declined to deliver the custody of the child to the father. The counsel for the institution in that case argued that at the age of fourteen the boy had the right to choose his own place of abode, but it appears in the report of the case that that the boy had attained the age of sixteen. I have looked at the affidavits in that case, and I find there that the father stated that the boy was under fourteen, but it appeared by documents, and was sworn to by the officers of the institution that the boy was at the time over sixteen. It is not, therefore, a decision on the subject, and I do not find any opinion expressed that at the age of fourteen the boy would have attained the age of exercising the discretion of choosing his residence. In this state of the authorities, there being nothing to shew that the father's rights terminate on his son reaching fourteen, it appears to me that the principle of *The Queen v. Howes* may well and properly applied to the case before us. The circumstances of that case have been mentioned. The girl was fifteen, and the circumstances were such as would make the Court anxious to grant the father's application; but the decision of the Court did not rest on that ground. They dealt with the question as one of law, involving the general question as to all females irrespective of that particular case, and they clearly intended to lay down a rule applicable to all cases of females at least. But it is said that this rule is not applicable to the case of boys, because the decision of the Court turned on the provisions of the statute 9 Geo. 4; and the contention is this, that inasmuch as there is no such statutable provision as to

boys, that decision does not bind in this case. It appears to me, however, from the observations of the judges, and the terms in which their judgment is pronounced, that they profess to pronounce a rule applicable to males as well as to females, and I may add that even if the expression of opinion was not clear, or, if clear, extrajudicial, it appears to me that the principles on which the decision was made are applicable to the case of boys. Chief Justice Cockburn states it in language applicable to children in general. The two reports of the case in the *Jurist* and in the *Law Journal* both agree substantially in the following statement of Cockburn, C. J. He states the question, and then adds—"The cases which have been decided on the subject shew that although a father is entitled to have the custody of his children up to their attaining the age of twenty-one years, the Courts of Law will not interfere by *habeas corpus* to withdraw a child from the custody of persons with whom it may be, and hand it over to the custody of its father, if it has attained the age of discretion, and is capable of understanding the position in which it is placed. The whole question is, at what age a child can be said to arrive at the age of discretion. We are bound to see that we act upon some general rule as to the age at which a person, though a minor, may be left to the freedom of choice which the law recognizes." Having thus, according to the reports in these two places, stated the nature of the question and the nature of the rule set out, as I have observed, in terms applicable to children generally, he goes on—"The Legislature have thrown light upon the subject which may safely guide us: the age of sixteen years is pointed out as the age as to which a child ought to remain under parental control." The *Jurist* in its report says "a female especially." He then deals with the statute of 9 G. IV. as proceeding on the supposition that until a girl had attained the age of sixteen, she had not attained the age of discretion; and the Court appears to have regarded the statute as a legislative declaration to that effect. Well, having stated that they should act on some general rule as to the age at which a young person may be left to freedom of choice, he appears to have considered that though the statute provided only for female children, the inference should be acted upon in the case of males, and that the age of all should be sixteen. I shall presently state why independently of the statute it would be inconsistent to hold that the age should be later in girls than in boys. I shall however now refer to the opinion of Patteson, J. That opinion was given at all events under circumstances of gravity. It was given at the instance of Sir Erskine Perry for the future guidance of the Court over which Sir Erskine Perry presided. "I cannot doubt" says Patteson, J. "that you were quite right in holding that the father was entitled to the custody of his child, and enforcing it by writ of *habeas corpus*. The general law is clearly so, and even after the age of fourteen." This clearly shews that in the opinion of Patteson, J. the right of the father continued even after the son had attained the age of fourteen. It is certainly not a decision to that effect, but in the absence of any decision to the contrary, the opinion of that eminent person given upon a subject with which he was most familiar, and

deliberately given by him on the application of Sir Erskine Perry, is entitled to considerable weight. I should say, with every deference to what may be the received opinion on a question which has never arisen, it is entitled to more weight than any opinion that has been generally entertained by the profession. The question certainly before Lord Campbell in *Alicia Race's case* did not relate to a child who had passed the age of fourteen, but he quotes the whole of Patteson, J.'s opinion and expresses no dissent from the passage relating to the age of fourteen; and we find that in the case of the *Queen v. Howes*, Cockburn, C. J. referred to the opinion and to Lord Campbell's observations on it, and the very circumstance of his referring to this would rather lead us to conclude that he considered the question before the Court as depending on a general principle applicable to boys as well as girls. In the report in 7th *Jurist*, Cockburn, C. J. says, after stating the opinion and shewing that the right of a father extends beyond the age of nurture "it extends to the age of discretion." Does not that shew that the age when guardianship by nurture expires, is not necessarily the age of discretion; and that the Court of Queen's Bench thought the rule extended to boys as well as girls? We have the opinion therefore quoted by Lord Campbell, and by Cockburn, C. J. I have said however that it appears to me that if the judgment of the Court is not to be considered as being to that effect, or to be considered as extrajudicial, and not binding in the case of a boy, the principles are applicable to the case of a boy. It was at all events settled in that case with the concurrence of the judges of other Courts, that until a girl reached the age of sixteen she did not reach the age of discretion. If so, why should we hold that boys attain that age at an earlier period? So far as the age of discretion may be considered as depending on the mental capacity, it will be found to be a principle of law that the intellectual faculties of girls are considered to be more quickly developed than those of boys. This was recognised by law in many cases. I shall only refer to the case of wills, which in the case of personalty might be made by boys at fourteen, and by girls at twelve. This distinction is abolished by the Statute of Wills, but the previous instances of that distinction shew that at all events a boy was not considered as arriving at the age of discretion before a girl. But if we are to refer, and I admit it should not be passed over, to another circumstance which may be supposed as influencing the Court, namely, that a girl from the dangers to which she is exposed requires the protection and authority of a father longer than a boy, I will ask whether, though boys are not exposed to dangers of the same kind, it can be said that they are exposed to none; or that their prospects in life would not be imperilled by their being left at fourteen free to abandon their father's house, and emancipate themselves? We are called on to lay down a rule applicable to infants of every rank. The age of sixteen is about that period when the school-education of a boy terminates, generally speaking, and it is necessary for him to enter upon professional studies. Until then even school education is in many instances not complete, and the entire period up to sixteen is a most important one for him, not merely as to the acquirement of knowledge and the improvement of his facul-

ties, but also as to the development of his moral nature and the acquirement of principles. Is it to be desired that a boy of fourteen should be allowed to abandon all control, to give up as irksome and distasteful the studies he was placed at, and leave the school he was in? It will not be said as a rule that boys of fourteen are possessed of sufficient intelligence to be left to their own guidance. Besides we must remember, it is the right of a father to direct the studies of his son. Such is the law of nature. It is also recognised by the statute of Charles II. Can it be said that the tuition of a boy is complete at fourteen, or that the father can complete that tuition, if the boy in despite of his father's will can go live somewhere else than in the place which the father has assigned to him? I will refer to Lord Campbell's judgment which forcibly illustrates the mischiefs that may arise. At p. 94 he says the consequences which would follow from allowing such a choice would be most alarming. "How could *nurture*" he says, "be carried on with such a doctrine, which if established would apply to every father of a family in the kingdom in respect of all his children, male and female, above the age of seven years. If a father wishes to take his son when ten years old from a private school where flogging is not practised, and send him to *Eton*, and the boy refuses to come home, and is brought up by *habeas corpus*, is he to be permitted to say that on consideration, he is of opinion that the private school is preferable to any public school where flogging is permitted, and therefore he makes his choice to return to the private school, the master being willing to receive him?" These observations apply to the case of a child under fourteen, but are they not in common sense applicable to a boy at the period of his life between fourteen and sixteen. It must be considered if we refuse to interfere to enforce the father's rights that we deprive him of his power to enforce the obedience of his son, and we do so at a period of life when it is so essential that a father's control should exist. The testamentary guardian after the father's death may apply to the Court of Chancery: that Court will act only where there is property. During life it is to be said that the father is left without remedy? We have been referred to some authorities as shewing that a boy at fourteen has attained the age of discretion; but those are cases where the boy had in fact no legal guardian, where the father had died without appointing a guardian, and where there being no person entitled to interfere, the boy was allowed to choose. It was never suggested that he could exercise the right during his father's life. I have mentioned *Hyde v. Hyde*, but in that case the mother had obtained judgment for a judicial separation. The father lived with his mistress and kept the boy with him. This circumstance alone would be considered in Courts of common law such a circumstance of misconduct as would disentitle the father to relief. Besides, that decision was under a section of the Divorce Act. The order made by Sir Cresswell Cresswell was that the boy should reside with his mother. The father by his immorality and misconduct had forfeited his right, and all that the Court decided was that beyond the age of fourteen the residence of a boy with his mother should not be compulsory. It appears to me that this does not bear on the general question. We have

been referred to the provisions of the Poor Law Act, which I do not think have reference to the case; but the Reformatory Act of 1857, (21 & 22 Vict., c. 103) I think furnishes an instance in point. By section 7 of that Act any boy under the age of sixteen may be ordered, on conviction for any offence, to be sent to a reformatory school. And by section 15, the parent of the offender may be made to contribute to his support during his detention. This legislation proceeds on the principle of making the father responsible for any crime which the son might commit under the age of sixteen. The consequences may continue long after, but I think it may be a sound principle to make the father responsible for the conduct of the child during the period the father has control over its conduct; but is it not inconsistent that though the father is responsible until the child reaches sixteen, he should be deprived at fourteen of all control, and be prevented from saving the boy by the proper exercise of parental authority from the evil effects of bad associates? I think the Legislature contemplated that up to sixteen the father had such right and such power over the child as would have enabled him by a proper exercise of that right and that power to keep the child safe. We have been referred to the 9th G. 4, and the 10th G. 4, and the Criminal Law Consolidation Act of 1860, which it may be said affects the application of the decision in *The Queen v. Howes*. First, I may remark that as to the statute of G. 4, it appears to me to proceed in analogy rather with another provision, that under the age of fourteen a boy should not be considered capable of the crime of violation, but the statute of 1860, section 56, is relied on because that section makes the forcible abduction of a child a felony punishable with penal servitude, and it is suggested that the distinction indicates an intention on the part of the Legislature that the right of the parent should cease at fourteen; but we must consider that section 56 was merely a re-enactment of the provision in the 9th & 10 G. 4, with this exception that the former law applied only to the case of children under ten, but the late Act made the abduction punishable in the same manner. But before the statute of G. 4 was passed, it never was suggested that because ten was the age at which the fraudulent abduction of a boy should cease to be a crime, that therefore the boy had at that period reached the age of discretion. It shews that the father's authority is not to be considered as limited by the age for the commission of the offence. From the great importance of the case and the circumstance of my differing from the other members of the Court, my observations have extended to great length. It appears to me on the whole of the case that the father ought to succeed. It is settled that he should succeed if the boy was under fourteen, and that the mother's right as guardian for nurture extends up to fourteen. It also, I think, is clear that the guardianship of the father continues over the children till they attain twenty-one, and in no case has it been decided that when any child attains fourteen, the father loses his right to have the child delivered to him. According to the principles on which the Court acts they will not hand over the child against his will after he has attained the age of discretion, and in the words of Cockburn,

C. J., the question is, what is the age of discretion? We have on this the deliberate opinion of Patteson, J., that by the general law the father is entitled even after fourteen. This involves the position that at that age the boy does not attain the age of discretion. The question we have to consider is at what intermediate period between fourteen and twenty-one a boy is to be considered as attaining the age of discretion, and it is on this question that *The Queen v. Howes* gives a clear ground on which to proceed. Even supposing that the Court did not profess to lay down a rule as to all children, the principle on which they proceed is applicable to both sexes, and it is only in conformity with the old law to hold that a boy does not attain the age of discretion at fourteen. Many mischievous consequences may follow from holding that he attains that age at that period. It may be even that they would follow from holding that he attains it at sixteen; but it is clear that at that age the probability of their doing so would be much diminished. I do not, however, rest on that ground. I grant that we should not assume a jurisdiction if we have it not, but it appears to me that the decision of the Court of Queen's Bench in England in *The Queen v. Howes*, the opinion of Patteson, J., and the statutes, shew that in the present case we would not exceed our jurisdiction by complying with the father's motion. We have to lay down a general rule. By fixing sixteen as the age of discretion, the circumstance that even after that age boys might be injured by their own discretion is not a reason. While adopting for boys the same age as there is authority for adopting for girls, we do at all events what is reasonable, and I can see no reason either in policy or in law why a boy should be considered as attaining the age at an earlier period than girls. I am of opinion that the rule should be granted.

LEFFROY, C.J.—If we sat here not to administer the law, but to make law according to what might appear to be more convenient, more desirable on general principles, than the limit which the law, as long as we can trace it back, has fixed as the age of discretion, and which, in the male sex, the party is considered to have arrived at that age, which invests him with all the legal incidents which, so far back as we can trace, have been considered to be conferred on the male at that age, namely, the age of fourteen, I should shrink also from the difficulty of determining if once we departed from what the law has settled, I should be perplexed by the difficulty of finding an intermediate period between fourteen and twenty-one, and therefore in this case if I had no other reason for acting on the principle *stare decisis*, I should say that for that reason we should not depart from all the decisions which have been already so fully and correctly referred to by my brothers who have preceded me. Indeed on both sides all the decisions have been adverted to; but the great ground upon which Mr. Curran, who argued this case, insisted that in the present instance where the boy has passed the age of fourteen, we should depart from the established rule, and fix a new period, namely, the age of sixteen, was the fact that it was decided by the judges of the Queen's Bench in England, that a female at that age is considered to arrive at the age which would entitle her

to the same privileges at which the boy arrives at the age of fourteen; but I should still ask, as I did when Mr. Curran put the argument derived from that authority, why did the judges, in that case, have recourse to the statute of Philip and Mary, and the later statutes adopting it; why did they find it necessary to refer to this statute in justifying them in holding that the age of sixteen was the age at which a female would be entitled to this privilege of deliverance from the authority of her father? Why, if the law had settled that sixteen was the age for both males and females, why should the Court of Queen's Bench have thought it necessary in the case of *The Queen v. Howes*, to have recourse to the statute to authorise their decision? On the face of it, therefore, I cannot help continuing to feel that the very decision which was referred to for our acting on the age of sixteen, would perfectly testify against the argument. Now, the age of fourteen was the age settled by the law as long as we can trace back the history of the law for either male or female previous to that statute which changed the law in respect to females. In tracing back the law, which one of my learned brothers traced back to the Year Books, I will take it up at an intermediate period—namely, Littleton, s. 123. He informs us of the age of discretion, and says that “when the heir cometh to the age of 14 years complete, he may enter, and oust the guardians in socage, and occupy the land himself if he will.” Now, if the law allowed that fourteen was the age that enabled the heir in the wardship, when he was entitled to land, to oust the guardian, and enter upon the land, I desire to know what more perfect test can be found than that as to the age of fourteen being in contemplation of law, the age of discretion, at which the law, whether wisely or not, held that the infant was discharged from guardianship when he was considered to have arrived at the age of discretion, which would enable him to occupy his property, and become the master of it; and are we to say that we are to alter the rule when it must be admitted that there is not a single authority from that to the present time that has decided that the age of fourteen is not the age of discretion for a male—not one single authority; for I have observed the case of *The Queen v. Howes* is not an authority for that proposition, but implies by having recourse to the statute law, that there is no authority whatever in respect to the common law. It is merely by analogy derived from that statute as regarded females that that case was decided—an analogy derived from the statute which has surrounded them with a protection which it was not necessary to surround the other sex with, the Legislature having made it a criminal offence to take away females of sixteen from their parents or guardians; but that statute was founded on the peculiar circumstances of those for whom it was made a provision of security—a security which it was much more important to provide for than for the enjoyment of property, which the Legislature still left to the person at the age of fourteen. We see, therefore, why, in the case of males, the age of fourteen was fixed on as the age for discharging from the guardianship for nurture. When he was entitled to land in socage, the rule was as I have stated. If he had no land the law provided a

guardianship for nurture or by nature. The guardianship for nurture adopted the age of fourteen for the termination by analogy to the termination of the guardianship in socage; and if fourteen was the age at which he might be entrusted with the management of property, at the same age he might properly be discharged from the guardianship for nurture. Mr. Hargreave, in the note at p. 88 b. of Coke upon Littleton, has enumerated the various guardianships that the law recognizes. He observes that there has been such a vague use of the term guardian by nature, that for the instruction of the profession he has collected all the law into this note respecting all the various guardianships, and what he says on the guardianship for nurture is—"Though what our law calls guardianship by nature is thus confined to the *heir apparent*, yet we must not from them conclude that parents have not a right to the custody of their other children, for our law gives the custody of them to their parents till the age of fourteen by the guardianship of nurture." The law gives to their parents the guardianship by nurture till the age of fourteen. We are told that the law is liable to be impugned as an absurdity for allowing a child to be the master of himself at that age. It may be so, and it may be true that if we were now for the first time to fix the termination of the guardianship by nurture, we would fix it otherwise than as it has been for centuries; therefore the answer to what Sir William Blackstone says, is, that we cannot depart from the law as we find it, and I will not take up the public time by going through the authorities; I may rest on the statement which has been made of them so clearly. Here we have to decide the point when the guardianship by nurture terminates. I have already read the passage which furnishes the analogy. The Courts have held that in every case the guardianship for nurture ends at the age which the Courts have hitherto held. It is said that the *Queen v. Howes* has settled the contrary. No doubt, the Chief Justice occasionally uses the word "child," referring most clearly, as I think, to the child that was the subject of the case and of the decision; and it appears to be a matter of perfect demonstration that they did not mean to decide anything with respect to a male child, else why should they refer to the statute of Philip and Mary? Is not the referring to that statute decisive to satisfy us that they did not mean any but a female child, and that we should not be doing them justice if we supposed they went out of their way to decide anything but the subject-matter of the decision? It was argued also by Mr. Curran, why should the Legislature have given power to appoint a guardian by statute if the parent had not the power before? Can we suppose the Legislature would enable the parent to give a power which he had not himself? The very interference of the Legislature to give the power would seem to me to show that it was a power the father had not before. The guardian appointed by will is not bound up by the age of fourteen, because he is not guardian by nurture but by the statute. The authority may be exercised by a person under the age of twenty-one; but the Legislature has given power which must be regulated by what follows, but which cannot by possi-

bility regulate us in the exercise of the duty we are now called on to exercise. We have now to consider the case of a child who has been rescued from illegal custody and brought before the Court. The father calls on us to deliver to him the child, who is aged more than fourteen. Fourteen is the age of discretion; but it is more than satisfactory to us to find that in the carrying out of the law we are carrying out not merely a legal discretion but that it is a case in which, on the circumstances of the case, we would be warranted in trusting to the child the exercise of that discretion which the law gives him. All the authorities have been already so fully cited that it would be a waste of time for me to refer to them again; but the result is, that there is not a single case in which after the termination of the period of guardianship for nurture the father has been held entitled to enforce the residence of his son. There may be a dictum of a judge in the case of making out the law in the East. That was his own view. It does not happen always that the view of even the most eminent person is right; but it is, at all events, no authority. The dictum of Mr. Justice Patterson is against the whole current of decision. I do not say that the question was ever raised formally, but in every case it was taken for granted that the age of discretion was fourteen. Lord Kenyon has said that the current of authority makes the law as much as any decision. Here we have a strong current of authority to support the rule which we are about to make. There are several cases where the Court has refused to set children under fourteen free from the guardian by nurture, none where it has enforced the authority after that age, and therefore I consider we must do in this case what we have done in other cases, and that the child may exercise the discretion with which the law invests him at the age at which he has arrived.

The Clerk of the Crown then declared to the boy that he was free to go where he pleased, and the boy returned to the institution.

Court of Common Pleas.

[Reported by J. Field Johnston, Esq., Barrister-at-Law.]

HALLORAN AND WIFE v. THOMPSON.—May 1.

Libel—Demurrer—Privileged occasion—Averment of want of malice—Alleged excess—Construction of plea upon general demurrer.

In an action for libel the first count of the summons and plaint alleged that the plaintiff, having employed an attorney to recover a sum of £33 due to him by one Henderson, the defendant, maliciously contriving and intending to injure the character of the plaintiff's wife, and to deter the plaintiff from prosecuting his suit, and to cause it to be believed that the conduct of the plaintiff's wife was of so atrocious a nature that her life would be sacrificed by the persons in the neighbourhood if she remained, addressed a letter to the attorney employed to recover the £33. The second count, commencing with, "the said defendant, contriving, and intending, as in

the preceding paragraph particularly set forth," proceeded to set out the letter, which was a history of the plaintiff's supposed cause of action against Henderson, and contained this sentence, "This Mrs. Halloran has been very troublesome for some time past, and has brought the neighbourhood in which she lives into a turmoil by the most reprehensible conduct, so much so that it is as much as her life is worth to remain here." The defendant pleaded to the second count of the summons and plaint that the plaintiffs were the tenants of P. H. T.; that the defendant was the agent of P. H. T.; that the said Henderson was in the employment of the defendant as bailiff on the estate of P. H. T.; that in pursuance of an agreement between all the parties, the said Henderson, by the defendant's directions, sold the good-will of the plaintiffs in the lands held by them for £33; that the plaintiffs afterwards refused to comply with the agreement as to the application of the said sum, and employed the said attorney to sue the said Henderson for the same, and that the defendant did write and publish the said letter, believing the matter therein stated to be true, and to protect his said servant, the said Henderson, from vexatious litigation. Held, that the letter was a privileged communication. Held, also, that as malice was impliedly rebutted by the plea, the absence of the words, "bona fide and without malice," would not make it bad on demurrer.

Held, also, that if the occasion was exceeded, the alleged excess was a question for the jury.

The rule in Buckley v. Kiernan (7 Ir. C. L. R., 75), regarding the treatment of a plea upon general demurrer, repeated.

THE first count of the summons and plaint complained that the plaintiff, Mary Halloran, was a just, faithful, and honest person, and as such had always behaved and conducted herself, and until the committing of the grievances by the defendant, as herein-after mentioned, was always reputed to be, and esteemed as a person of good name, fame, and credit; and that before the committing of the grievances by the said defendant as herein-after mentioned, one William Henderson was justly and truly indebted to the plaintiff, Timothy Halloran, in a certain sum of money, to wit, the sum of thirty-three pounds, and for the recovery thereof the said plaintiff, Timothy, had employed an attorney of this honorable Court to sue and implead the said William Henderson for the said debt so justly due as aforesaid, yet the defendant, well knowing the premises, but maliciously contriving and intending to injure the character of the plaintiff, Mary Halloran then being the wife of Timothy Halloran, and to deter the plaintiff, Timothy Halloran, from prosecuting his said suit against the said Henderson, and to cause it to be believed that the plaintiff, Mary Halloran, was a violent and dangerous person, and a disturber of the peace in the neighbourhood in which she lived, and that her conduct in the said neighbourhood was of so atrocious a nature that her life would be sacrificed by the persons dwelling in the said neighbourhood if she remained there, in the form of a letter addressed by the defendant to one Thomas

Lalor Cooke, then being the said attorney of the said plaintiff, Timothy Halloran, falsely and maliciously wrote, composed, and published of and concerning the said plaintiff, Mary Halloran, then and still being the wife of the plaintiff, Timothy Halloran, and of and concerning her character and conduct in the neighbourhood, the false, scandalous, malicious, and defamatory and libellous matter following, that is to say, &c. The second count complained that the said defendant, contriving and intending, as in the preceding paragraph particularly set forth, in the form of a letter addressed by the defendant to one Thomas Lalor Cooke, falsely and maliciously wrote, composed, and published of and concerning the said plaintiff, Mary, then and still being the wife of the plaintiff, Timothy, the false, scandalous, malicious, and defamatory and libellous matter following, that is to say—

"Shannon Harbour, 8th Oct., 1862.

"Sir,—I have just been shown a note from you to Mr. Wm. Henderson, on the subject of instructions you received from Mrs. Halloran of Clonoughbeg on the subject of a sum of £33, which Henderson holds for her and received from Mr. Quade. I think it right that you should be put in possession of the whole case relative to Mrs. Halloran, and the money above mentioned. This Mrs. Halloran has been very troublesome for some time past, and has brought the neighbourhood in which she lives into a turmoil by the most reprehensible conduct, so much so that it is as much as her life is worth to remain here. Consequently, she has been permitted to dispose of her holding and crop, a proceeding which was sanctioned by Mr. Thompson, her landlord, in order to enable her to get off at once—of course this was on the written understanding that her lawful debts and all rent due should be paid out of the amount received. I came here this day to have the matter settled. The whole sum obtained for her "good-will" of her farm was £33. She owed a bill to a shopkeeper in this village of 16 12s. 11d., the accuracy of which I myself tested by an examination of his book. This I deducted, along with a further sum of £1 5s., which she was lent in cash and does not dispute, and one year's rent up to May last, £2 6s. 6d. These several sums being subtracted, left a balance of £12 15s. 7d., which I tendered to her in gold and silver this day in presence of the sergeant of police, Mr. Thompson, and several others. She, however, refused to receive it; consequently Mr. Thompson holds himself perfectly free to retract his permission to dispose of his farm at all if he should so determine. You will observe as aforesaid that it was a favour to allow this woman to sell her good will, and that she has no title whatever to look for any further indulgence. I have thought it right to inform you of this in order to prevent you proceeding against Henderson, and thus involving Mrs. Halloran in costs which are sure to fall on her.

"I have, &c.,

"THOMAS H. THOMPSON."

By means of which premises the plaintiffs have been much injured in their character and circumstances. To the second paragraph of the summons and plaint the defendant pleaded that before the writing and publish-

ing of the letter in the said paragraph complained of, the said plaintiffs had been the tenants of Peter Hamlet Thompson, Esquire, on the lands of Clonougheg in the King's County, and the said defendant was the agent of the said Peter Hamlet Thompson over the said lands, and the said William Henderson in the said letter mentioned was in the employment of the said defendant as bailiff on the said estate; that before the writing and publishing of the said letter, and while the said plaintiffs were such tenants as aforesaid, the said Mary Halloran did, by prosecuting her neighbours for petty trespasses, and bringing, or causing to be brought, false charges against them, and by endeavouring to cause it to be believed that some of them had assaulted her daughter, and that they had posted a threatening notice on her house, disturb the harmony and good feeling that theretofore prevailed among the said tenantry, and created so much bad feeling among the said tenantry against herself, that it was necessary for the police, by stopping in her house, and other measures, to give her special protection; that a memorial signed by a great number of said tenants was presented to the said Peter Hamlet Thompson, dated the 16th day of September, 1862, complaining of the said Mary Halloran and her son and daughter, and of their concocting prosecutions against them, and that in consequence of the said memorial, and of the bad feeling existing among the said tenants against the said Mary Halloran as aforesaid, and in order to restore harmony and good feeling among his said tenants by removing the said Mary Halloran and her family from among them, the said Peter Hamlet Thompson allowed the said plaintiffs as a favour to sell and dispose of their good-will in the lands held by them as such tenants, but upon this express agreement that out of the proceeds thereof, and of the crops on the said lands, the debts of the said plaintiffs in the neighbourhood, and the arrears of rent due to the said Peter Hamlet Thompson should be paid; that in pursuance of said agreement and permission, the said William Henderson, by the directions of the said defendant as such agent as aforesaid, did sell the good-will of the said plaintiffs in said lands, and the crops thereon, for the sum of thirty-three pounds, and which sum the said defendant, as such agent as aforesaid, duly applied in accordance with the terms of the said agreement in the manner in the said letter specified; that the said plaintiffs afterwards refused to comply with said agreement as to the application of the said sum of money, and employed the said Thomas Lalor Cooke, an attorney, to sue the said William Henderson for the said sum of thirty-three pounds, and that under the circumstances aforesaid the defendant did write and publish the said letter in the second paragraph of the summons and plaint complained of, believing the matter therein stated to be true, and to protect his said servant, the said William Henderson, from vexatious litigation, as he lawfully might for the cause aforesaid. The plaintiffs, by leave of the Court, said that the said defence to the said second paragraph did not disclose any answer good in substance to the said second paragraph, because whilst the said defence purported to show that the letter in the second paragraph complained of was written on a privileged occasion, the

said defence did not, nor does any part thereof, state or show any matter or thing constituting same a privileged communication in law, and also because the said defence did not, by any of the alleged circumstances therein stated, show any matter or thing to rebut the inference of malice, or any averment that the defendant in writing the said letter was not actuated by malice.

POINTS OF DEMURRER.

That the defence to the second paragraph is not either a traverse and denial, or a confession and avoidance of the several matters, or any of them, complained of in the said second paragraph. That if the said defence be intended as a plea of justification, it does not sufficiently or at all justify any of the matters complained of in the said second paragraph. That if the said defence be intended as a plea of privileged communication, it is insufficient in that behalf, and discloses nothing to show any privileged occasion in fact or circumstance to sustain such a defence, and also is wholly insufficient in law on other grounds.

Heron, Q.C., and *O'Driscoll* in support of the demurrer.—It cannot be said whether this is a plea in justification or a plea of privileged communication. It cannot be both.—*Dunne v. O'Grady* (5 Ir. C. L. R., 450). As a plea of justification it falls short; it should have stated what were the trespasses for which Mary Halloran prosecuted her neighbour. It does not say if they were tried; it does not say what were the false charges, or how they were false. It does say that she endeavoured to cause it to be believed that some of the neighbours had assaulted her daughter, and posted a threatening notice, and that might be true. The plea must justify up to the mark.—*Halsam v. Blackwood* (11 C. B., 111). As a plea of privileged communication it does not disclose a privileged occasion, and it does not disclose *bona fides*. [*Christian, J.*—It does state that it was to protect the defendant's servant from vexatious litigation the letter was written. *Ball, J.*—I presume the defendant means to rely on that as a privileged communication. *Monahan, C.J.*—We have taken the form in use from what has been laid down in the decisions on the general issue.] There must be such a relation between the parties as renders it the duty or interest of the party to make the statement, and there must be a correlative interest in the party spoken to.—*Beatson v. Skene* (5 H. & N., 838); *Owens v. Roberts* (4 Ir. C. L. R., 386); *Harrison v. Bush* (5 El. & Bl. 344). There was no relation between the parties here to warrant the writing of this letter. Again, if there was a necessity, the letter transcended the necessity. The defendant might have said, "This woman owed so much money, and agreed that I should dispose of it in such and such a manner, and she will have to pay costs if she goes on," but he begins by representing her as a firebrand, so much hated by the neighbours that they would have taken her life. As regards the police being in her house, in this country circumstances sometimes render that necessary with people who are quite peaceable, and this fact will not justify what the defendant wrote. Where is the privilege that entitles a party to write a private remonstrance to the attorney of another party?—*Huntley v. Ward* (6 C. B., N. S., 514). [*Chris-*

tion, *J.*—If a master put his servant into the position that he will be sued, is there not a duty in him to put the attorney in possession of the real facts of the case, and a corresponding right in the attorney? *Monahan, C. J.*—If *Huntley v. Ward* had laid down the principle that a communication could not be made to the attorney of the opposite party it would rule this case, but it went upon another point.]—*Martin v. Strong* (1 Neville & Perry, 29) *Præger v. Shaw* (4 Ir. C. L. R., 660); *Cooks v. Wildes* (5 El. & Bl., 328); *Wenman v. Ash* (13 C. B., 886); *Ede v. Scott* (7 Ir. C. L. Rep., 607). The intention averred in the first paragraph is imported into the second. What is alleged upon the record? That there was a just debt due by Henderson to the plaintiff, Timethy; that for the recovery of that debt an attorney had been employed; that the defendant knew that the debt was due, but, contriving to injure the plaintiff, and to deter him from prosecuting his suit, falsely and maliciously wrote the letter. Therefore, if ever malice in fact was alleged, it is upon this record. A plea of privilege consists of two distinct matters of fact, both of which must be found by the jury, but one of which being found by the jury, it is for the Court to decide if the occasion be privileged. The alleged debt is no more excuse for what the defendant wrote than the quarrel between the plaintiff and defendant in *White v. Tyrrell* was an excuse for the latter to say what he did of the father of the former. If it be true that the reprehensible conduct of the plaintiff be a fair history of the circumstances, why allude to the debt? *Huntley v. Ward* goes upon the principle that when the plaintiff's attorney writes a letter demanding a debt, the defendant has a right to answer that letter refusing to pay the demand and showing the reasons for refusing. [*Christian, J.*—If the defendant here has put another person into the position of being the defendant, has he not the same privilege as if he was the defendant? *Monahan, C. J.*—Does there not devolve an obligation upon Thompson to indemnify Henderson, and so if there were a verdict against Henderson, would not Thompson be the virtual defendant?] That is a matter of opinion for the Court, and there is probably no authority that will assist upon that question. There is no averment in the plea that the libel was published *bona fide* and without malice. This averment is material. *Carr v. Duckett* (5 H. & N., 783) is distinguishable from the present case, because the words "and not otherwise" were added in the plea. There is no other instance where the averment of *bona fides* was omitted. The finding in *Huntley v. Ward* shows from which side that averment ought to come. It is not enough that the occasion be privileged: the jury must find *bona fides* and could it be said that it lies on the plaintiff to put in a replication stating that the libel was not published *bona fide*? [*Christian, J.*—The plea shows first, that the occasion was privileged, and then that the letter was within the occasion, was written for a purpose within the occasion: is this not sufficient to rebut the presumption of malice?] The jury have to find both the facts which make the privilege and that the defendant availed himself of the privilege. [*Christian, J.*—Suppose the issue to be whether the plea was true in substance and fact, and that it was proved

on the trial that to protect the servant was one object of the letter being written, but that there was evidence of malice in a portion of it, would not the judge leave it to the jury? *Monahan, C. J.*—You can get rid of the difficulty by replying that the letter was written for a malicious purpose and no other.] Was that ever done before? [*Monahan, C. J.*—It is very likely that we should not give you leave to reply, but make the defendant amend his plea.] In *Carr v. Duckett* the words "and not otherwise" were held to supply the want of the words "*bona fide* and without malice." *Christian, J.*—Would the judgment have been otherwise if those words had not been there?] Chief Baron Pollock puts it upon those words. There is no traverse of the averment of malice upon the record. There is no introductory statement in the plea denying the introductory statement of the plaintiff. Malice in fact is not denied. The ancient and well known form of pleading is not adopted.

Chatterton, Q. C. and *Todd*, contra.—That this defence is capable of being construed both as a plea of justification and a plea of privileged communication, will not make it bad on demurrer. It is a good plea in justification. The only passage in the letter capable of a libellous construction is the one, "this Mrs. H. has been very troublesome for some time past, and has brought the neighbourhood in which she lives into a turmoil by the most reprehensible conduct, so much so that it is as much as her life is worth to remain here," and the justification of this is that by reprehensible conduct, by false charges and falsely reporting that her daughter had been assaulted, she did bring the neighbourhood into trouble. It is reprehensible to falsely charge that an assault had been made and a whiteboy offence committed by posting a threatening notice. It is sufficient to justify the sting of the libel. In *Morrison v. Harmer* (3 Bingham's N. C., 759) it was objected that the words "scamps and rascals" were not justified in the plea, and the Chief Justice held that these words could not be considered to mean more than had been indicated in the other part of the libel. The statement that it was as much as her life was worth, is a figurative way of putting it; it does not mean that the plaintiff was literally in danger of being murdered by her fellow-tenants. In *Tighe v. Cooper* (7 El. & Bl. 639), the words made use of were, "There is nothing too base for him to be guilty of," and Erie, J. says, "the words mean that nothing in this particular line of transaction is too base." This defence is substantially sufficient. [*Monahan, C. J.*—On one or two occasions where we were embarrassed as to the true meaning of an allegation in a plea, we thought we were not bound to give judgment at all, but to set aside the demurrer, and let the parties abide their own costs. We did not wish that a case should go to a Court of Error or the House of Lords where there was not a point of law.] As a plea of privileged communication it is sufficient. It is urged, 1st, that we have not shown a sufficient interest; 2nd, that there was not an occasion to justify the communication; 3rd, that there is no averment of *bona fides*. Henderson was a mere servant of Thompson, and by his directions held this money, not for his own benefit,

but for that of the person who employed him. Can it then be said that Thompson had not a sufficient interest? What is the difference between the action being brought against Henderson and against Thompson? Henderson had a right to be borne harmless. To protect his own pecuniary interest, and not merely to benefit Henderson, Thompson wrote this letter. It pointed out that the proper person to sue was Mr. Thompson, and not his servant. Take your action against me who am solvent; your client is not; that is the meaning of it. The letter is a mere history of the circumstances under which the money got into Henderson's hands. The conduct of this woman was relevant to the subject of the action. The only expression where even excess might be relied on is where it is said she had brought the neighbourhood into a turmoil. There was no relation between the parties between whom the communication was made in *Buckle v. Kiernan* (7 Ir. C.L.R., 75), further than that they were both attorneys in the same action, and yet it was held privileged. We honestly believe in the present case that the attorney is misinformed as to the real nature of the transactions, and we write to him, and come within what is said in *Buckle v. Kiernan*. It was not the letter but some of the statements in it which were held to be unwarranted in *Huntley v. Ward*; but this letter is entirely confined to the subject-matter of the action. It shows how this debt originated, and if we have used words which are not within the privilege, that is not ground of demurrer, but for the jury to say whether it is evidence of malice. There is no malice, in fact, averred in the plaint. The frame of the plaint is an averment by way of inducement. By the old rule of pleading which is still in force, matters of inducement are not traversable, therefore not to be taken as admitted upon demurrer. If malice is alleged in this plaint, it is denied by the plea because the plea states the real facts of the case. It would not do to ask the defendant in the witness box whether he wrote the words without malice; until express malice be proved, the inference is that they were published without malice—*Somerville v. Hawkins* (10 O.B. 583). The demurrer admits that the letter was written for the object alleged, and no other. The absence of the words, "*bona fide*, and without malice," would only be ground of special demurrer; nothing is gained by adding them. [*Monahan, C.J.*—Supposing you merely pleaded you used the words on a privileged occasion, and believing them to be true, would it be competent to the plaintiff to show at the trial there was malice in fact, he not having pleaded it by an averment?] It would. [*Christian, J.*—Suppose specific issues on these pleadings; suppose you prove *prima facie* you did write and publish, desiring to protect your servant, can the plaintiff, admitting that, go on to give evidence that you did it also for another purpose?] He can. Under the old system of pleading, if the facts set out were sufficient, the formal negative *absque hoc*, &c., was not matter of special demurrer. In *Buckle v. Kiernan*, this Court says, "We are of opinion, in order to give effect to the present system of pleading, that if a party, instead of applying to the Court, will demur, that the Court ought to give to the pleading demurred to the

meaning that will support the pleading." The words "without malice" were not in the plea in *Carr v. Duckett* (5 H. & N. 783); and it was held that the plaintiff should have applied to set it aside or amend it, but that upon demurrer it was a good plea. It stated that "the defendant published the said words for the purpose of warning all persons from purchasing the said goods so unlawfully detained by the plaintiff, and not otherwise." [*Christian, J.*—The words "and not otherwise" are not in your plea. [*Ball, J.*—It is consistent with this,—that you published for the purpose you allege and for other purposes.] That is for the jury. [*Christian, J.*—Is there any averment here that you wrote the letter for the one purpose and no other?] There is. The averment may mean that the defendant did it solely for that reason or for that and some other, but the fair construction is the first. In common English and according to grammatical construction, to say "I did a thing from such a motive" means "I did it from that motive and no other." [*Christian, J.*—There may be a difference in saying you did it for a purpose and you did it from a motive. The latter would mean the whole purpose.] In *Dixon v. Franks* (7 Ir. Jur. 239), the defendant pleaded that the words were spoken without malice, and the plea was set aside, Baron Greene saying that the word "maliciously" in the plaint meant malice in law; and that if the defendant relied on there being no malice in fact, he should state the matters from which the jury might draw that inference. [*Monahan, C.J.*—We wish the parties to consider whether the plea should not be amended by inserting a denial of malice and the words *bona fide*, and whether the parties should not abide their own costs. *Christian, J.*—It might also be worth considering whether if this plea be amended it ought not also to be amended by separating it into its component parts of a plea of justification and a plea of privilege.]

Cur. adv. vult.

May 31.—*MONAHAN, C. J.*—The parties in this case have called for a judgment, and we shall gratify them, though I had some doubt whether we might not have refused to do so. We had hoped that some arrangement would have been made. The action is one of libel. The plaint states—as the plaint always does state in such cases—that the plaintiff was a person of the most unexceptionable demeanour in the community. The count upon which the question arises begins with the words "the defendant contriving and intending as in the preceding paragraph particularly set forth, and therefore we may import the words in the first count into the second. [His Lordship read the libel and the plea.] Extrajudicially we may say, it would be very difficult to make this plea a plea of justification; but it is not necessary to consider that according to the view we take. The substance of the plea, looking at it merely as a plea of privilege, is this: that the defendant, believing the matter in it to be true, wrote the letter complained of to protect his servant, Henderson, from vexatious litigation, as he lawfully might. The question is, was that a justifiable occasion? Two objections have been taken to the plea. First, that the occasion disclosed is not privileged, because no proceedings were taken against Mr. Thompson, but

against Henderson. "The attorney," says the plaintiff, "never wrote to you. You are an intruder. You had no business to interfere." It is, as in these cases generally, very difficult to find an authority exactly in point, but the general rule is so well known that I shall not refer to a single case to show what it is, that rule being that a person who has an interest in a subject-matter has a right to write to another person also interested for the purpose of protecting his interest therein. The case of *Huntly v. Ward* (6 C. B., N. S., 514) was referred to, I believe, in order to show that this was not a privileged occasion; but for whatever purpose, the report clearly shows that the opinion of the judges was that the occasion was privileged, but that the defendant outstripped the privilege. The facts were, that the plaintiff had employed an attorney to sue for a debt due to him. The defendant stated in reply to a communication to him what had no connection with the debt. It was decided not that the occasion was not privileged, but the defendant had no right to write on what had no connection with the supposed ground of action. Are we at liberty to apply the doctrine of that case to this? Doubtless there the person was himself sued, and not as here; but the facts here are, that Henderson, though sued, is a mere agent of the defendant, who received the money and applied it by his direction in a different way. By the direction of Thompson he receives £33, and by the direction of Thompson he applies a portion of it in such and such a way. It is plain that if Halloran could recover this money from Henderson, Thompson would be bound to reimburse it to him. Therefore we think that Thompson had a right to protect his own interest when he believed there was a just and legal defence. It is said, secondly, that admitting the occasion to be privileged, and that a good plea might be framed, still it is necessary to state not merely that the defendant wrote the letter to protect his servant, but that he wrote it *bona fide* and without malice. To render this plea a good one it must expressly or impliedly contain that statement. It is bad unless expressly or by fair and necessary intendment it contains that statement. We do not yield to what was said about a replication. We do not go upon that. Does then the other statement about protecting the servant imply this? There is an authority though it does not precisely bear on the question—the case of *Carr v. Duckett* (5 H. & N. 783). Carr was the proprietor of building materials which he advertised for sale. Duckett published a counter-advertisement cautioning the public from purchasing them, as they were his property. An action was brought by Carr. In England, as we are all aware, the plea to raise the question of privileged occasion is the general issue. The jury must find whether the defendant acted *bona fide* and without malice. So the defendant, Duckett, pleaded "that before and at the time of the committing of the grievances complained of by the said first count, the plaintiff did unlawfully detain from the defendant certain timber, &c. the property of the defendant; and that the defendant was informed and believed that the plaintiff did intend to dispose of the same (among other things) at the advertised sale by auction in the declaration mentioned; and thereupon the defendant printed and published the said words

for the purpose of warning all persons from purchasing the said goods and chattels so unlawfully detained by the plaintiff as aforesaid." If the plea stopped there it would be identical with the plea in this case, but it goes on to add "and not otherwise." It was argued that that was a bad plea unless it amounted to the general issue. It was alleged there as here that the plea did not negative malice; but the Chief Baron says—"It is plain that it is nothing more than the general issue. The defendant says that he published the alleged libel for a certain lawful purpose and not otherwise; therefore he in fact negatives the charge that he published it maliciously. If an application had been made to a judge at chambers he would perhaps have struck out the plea or ordered it to be amended, but upon demurrer I think it is good." Baron Bramwell says (and this is material here) "I also think that the plea is good on the ground already stated, that it amounts to the general issue; for it would not be proved unless under the allegation that the defendant published the alleged libel for the purpose of warning all persons from purchasing the goods, it was shown that it was done *bona fide* and without malice." Applying this, which is the only authority, to the case before us, when the allegation is that the letter was written to protect Henderson, we say the plea would not be true unless it was written *bona fide* and without malice. The proper course in the present instance would have been to apply to set aside the plea as embarrassing. I do not like to refer to a case on privilege decided by myself, but I believe my brother Christian was not upon the bench when *Ruckley v. Kiernan* was decided. The question was, if a letter had been written on a privileged occasion. It was doubtful upon the plea whether the party adopted the meaning put upon the libel by the innendo. We were referred to cases which determine that the libel must be justified in the sense imputed by the pleader. The observations shortly made by me were these:—"We are of opinion, in order to give effect to the present system of pleading, in which special demurrers are abolished, and in lieu of them a party may apply to the Court to set aside any pleading calculated to embarrass that if a party, instead of so applying to the Court, will demur, that the Court ought to give to the pleading demurred to the meaning that will support the pleading, if the words used will fairly bear such a meaning, rather than the meaning which will not support the pleading, though, perhaps, under the old system, such pleading would be objectionable for uncertainty on special demurrer. Nor do we at all think that the opposite party can be in any way prejudiced by such a rule as in tendering or settling issues he may insist on such construction; and it will clearly be the duty of the judge in settling the issues to adopt such construction." We think it right to abide by this rule, which is a different one from the old one on pleading. We are clearly of opinion that if such an application had been made here it should have been complied with. We have regard to this, that malice is impliedly rebutted by this plea, and that the parties would be entitled to a special issue on it. The only remaining thing to be noticed is, that it is said this libel goes a little further than the libel in *Carr v. Duckett*, by giving the previous history of the plaintiff having

brought the neighbourhood into a turmoil. I shall not refer to *Ruckley v. Kiernan* on this otherwise than to refer to a case which was followed in that case (the case of *Cooke v. Wilde*) in which it was held that the alleged excess being in relation to the same subject-matter, it was for the jury to say whether the defendant had acted maliciously under the circumstances. That is not inconsistent with *Carr v. Duckett*. If, therefore, there was excess here, the jury and not the Court would be the proper tribunal to adjudicate upon it. All that was said in this letter was connected with what gave rise to the libel. We therefore reluctantly overrule this demurrer, because we do not like giving a judgment from which other courts may differ, not upon any principle, but upon a question of how this plea is to be taken.

CHRISTIAN, J.—As the Chief Justice has observed I was not a member of the Court when *Ruckley v. Kiernan* was decided. I beg to say that it is upon the passage just read from the judgment in that case by the Chief Justice, that I have arrived at my conclusion in this case; and that being so, I need say no more than that, I entirely concur in the decision pronounced.

Demurrer overruled.

Court of Probate.

[Reported by W. R. Miller, Esq., LL.D., Barrister-at-Law.]

GUMLEY v. GUMLEY.—25th Nov.

Practice—Filing declaration—Several defendants.

Where the plaintiff in a suit to establish a will cites devisees under a former will to see proceedings, he is bound by the 33rd rule of 1858 to file his declaration within a month from the appearance, otherwise the defendant may move to limit a time for filing it. The 17th and 19th rules of 1861 only apply to the case of a principal defendant or defendants.

Boston, for the defendant, moved that the plaintiff be ordered to file his affidavit of scripts, and to declare, within a certain time to be fixed by the Court: the month from the appearance had long since expired, and no affidavit of scripts had been filed by the plaintiff, though the defendant's affidavit had been filed long since.

S. C. Armstrong, for the plaintiff, relied on the 17th and 19th rules of April, 1861. Here two other persons had been cited and made defendants as devisees under a former will; they had not yet appeared; and the 19th rule said that the plaintiff shall not be compelled to file his declaration or to deliver a copy thereof to the defendant until the expiration of eight days after the defendant has filed his affidavit of scripts.

KEATINGE, J.—That only applies to the case of a principal defendant. These parties were only cited to see proceedings and may never appear. There has been very great delay in this case by the plaintiff. Let the affidavit of scripts and declaration be filed before the first of December, and the plaintiff must pay the costs of this motion.

BERNARD CONNOR v. THE MOST REV. DANIEL M'GILLIGAN, D.D., R. C. BISHOP OF RAPHAEL.—Nov. 26.

Lost will—Pleading—Record.

It is necessary in a suit to establish the contents of a lost will to set out the contents in an affidavit or a copy lodged in the registry, and to refer to it in the declaration; and a record which had been made up in the ordinary form applicable to an existing will was at the hearing ordered to be amended accordingly.

THIS was a suit by citation requiring the defendant as the sole executor named in the will of Maria Macklin, deceased, to propound and prove her will, otherwise to show cause why it should not be condemned. The deceased it appeared had made her will, giving various legacies to Roman Catholic charities or other charitable or religious purposes, and had named the defendant as her executor. She sent her will to the defendant to keep but he had lost it, however a copy was forthcoming. The defendant had in his declaration propounded the will in the ordinary form as an existing will, having previously in his affidavit of scripts detailed the circumstances of the loss and the contents of the will. The plaintiff pleaded only undue execution. The record was made up, stating the pleadings as they were on the file. The case was about being stated to the jury—[Keatinge, J.—Is not this case one of a lost will? The record is quite irregular and must be amended, making it applicable to the case.]

Norman, Q.C. (J. Hamilton with him), contended that the record was correct.—The declaration pleads that the testatrix made her will of such a date and appointed the defendant her executor; and it is only matter of evidence to supply the contents. In a case before Sir C. Creswell in England, he held that it was not necessary to do more than state the date and the character of the party who propounds the will—*Glen v. Burgess* (32 L. J. Pr., 157). In that case, as here, the affidavit of scripts stated the loss and the contents of the will. In *The goods of Emily Coghlan* (6 Ir. J., N.S., 271) your lordship required the contents of a lost will to be set out in *hæc verba* in an affidavit to entitle a party to probate in common form.

KEATINGE, J.—That case was quite right, and was very peculiar. Several persons made affidavits as to the accuracy of drafts or copies, but I required the person who had taken the instructions for the will to detail in his affidavit the very words which the deceased told him as well as he could recollect. As to the other case I do not intend to follow it. I consider that there must be two issues for the jury to try. 1stly,—Whether the deceased made her last will in writing, bearing date, &c.; and 2ndly,—whether the contents of the same were as appearing and set forth in a copy lodged in the Registry, and marked with a particular letter; and how can those issues be raised on this record? Let the record be amended by alleging in the declaration the loss of the will, and that the contents are detailed in the copy now lodged in the Registry, and marked with the letter C, and stating the proper issues to which I have referred. The record was amended accordingly, and on the evidence

the jury found both issues affirmatively, and a decree was made establishing the will.

Landed Estates Court.

[Reported by C. J. Manning, Esq.]

[BEFORE JUDGE HARGREAVE.]

ESTATE OF OLIVER TIBEANDO, OWNER; JOHN JULIAN, PETITIONER.—Nov. 25, 1863.

Where the Court sells under the condition that a purchaser will be bound to execute, at the tenant's expense, a fee-farm grant of the premises to the tenants, or trustees for them, the sum paid into Court tenants for renewal fines is not apportionable.

Semble—Where lands are held under a lease for lives renewable for ever, and for a long period of years, there has been no renewal, the representatives of parties who have not renewed have no claim for fines against the person who subsequently grants the renewal.

THIS was an application to vary an order made on the 17th July last, so far as the order decided that no part of the fund in Court to the credit of the matter represented the life estate of Oliver Tibeando, the Court declaring that the fund was not liable to duty in respect of the succession of Oliver Tibeando, and that an order be made declaring that a sum of £800 having been paid into Court by the tenant of the lands of Kilcappagh for renewal and septennial fines and interest thereon, in respect of a lease for lives renewable for ever, dated 2nd January, 1699, which sum of £800 formed part of the funds in Court to the credit of this matter, the said Oliver Tibeando was as tenant for life under the will of his father, Richard William Tibeando, entitled to a portion of the said sum of £800 in respect of the fines which fell due while he was tenant for life, and interest thereon, and in respect of the interest upon renewal and septennial fines due prior to the death of the said Richard William Tibeando; and that an account be taken of the amount to which the said Oliver was so entitled in respect of renewal and septennial fines and interest; and that Mrs. Sophia Tibeando, as administratrix of the said Oliver, be declared justly entitled thereto; and that the said amount be paid to the said Mrs. Sophia Tibeando out of the funds still in Court to the credit of these matters, first deducting thereout any sum that shall have been properly paid for succession duty, payable by the said Oliver Tibeando. It appeared that in 1855, R. W. Tibeando, of Portnahinch, in the Queen's County, by his will, devised the estate to Oliver Tibeando for his life, with remainder to his issue tail male, remainder to his second son Joseph for life, and his issue in tail male. Richard Wm. Tibeando died on 1st January, 1856, when, Oliver being then under age, the trustees of Richard William's will entered into possession for Oliver up to the time he attained age in September, 1857. Oliver died on 3rd January, 1860, intestate, and without issue. Sophia obtained administration. On the death of Oliver, Joseph be-

came entitled under the will to an estate for life. The tenant of the lands of Kilcappagh having been returned upon the notice to tenants as tenant from year to year, filed an objection, claiming to hold under lease for lives renewable for ever, dated 1st and 2nd January, 1699, subject to the yearly rent then paid for said lands, and a renewal fine of £10 on the fall of each life. It was stated that said lease had been renewed, but no particulars of any such renewal were given, nor was it pretended that the original lease or any renewal was forthcoming, or that any lives were in being, and, in fact, the sole evidence of the existence at any time of such lease, rested upon recitals in certain documents, executed by the tenants or their predecessors *inter se*, and in no way binding on the owners in this matter. The said objection was accordingly resisted on the part of Joseph Tibeando, the then owner of the lands, and came on to be heard on the 18th of July, 1862, when the owners and petitioners denying the right of the tenant to a renewal, it was ordered that said objection should stand to the November following, with liberty to the tenants to file a cause petition, in the meantime to establish the alleged right. On the same occasion the tenants offered to compromise by paying £600 in lieu of renewal fines, provided the alleged lease were admitted; and it being stated in Court that £800 would be accepted, the order provided that the tenant might offer £800, and if accepted, might lodge that sum in Court before November. The tenant having agreed to pay said sum of £800, upon the purchaser in this court being bound to execute a fee-farm grant on the terms of the alleged lease, the offer was accepted, and the amount subsequently transferred to the credit of this matter, in Government stock, equivalent to 800*l*. Subsequent to the lodgment of the money, and pending the settlement of the schedule and allocation of the fund, no claim was put forward by any party to any separate interest in the £800, although all parties, including the personal representatives of Oliver Tibeando and Richard William Tibeando, had notice of, and attended the proceedings, but said sum was always treated as part of the owner's estate. The question for the Court now was, whether the widow and executrix of Oliver Tibeando, who had been tenant in possession for three years, was entitled to any and what portion of said sum of £800.

Oves, for Mrs. Sophia Tibeando, contended, in support of the motion, that she was entitled to a portion of the £800, which was the estimated amount of renewal, septennial fines, and interest in respect of the three years. Oliver, as tenant for life under the will of R. William, was entitled to any fines that *ought to have been paid*, while his life estate lasted. It was settled by authority that where a party has died who would have received fines had they been tendered at times when they ought to have been paid, his representatives are entitled. Richard William, by his will, settled the *corpus* of fines accumulated up to his death as an incident to or accessory of the estate settled—*accessorium sequitur meum principale*—and Oliver was entitled to whatever interest the *corpus* of fines yielded during his period of possession. Counsel cited *Freeman v. Boyle* (2 Ridgway's Parl. Cases);

brought the neighbourhood into a turmoil. I shall not refer to *Ruckley v. Kiernan* on this otherwise than to refer to a case which was followed in that case (the case of *Cooke v. Wilde*) in which it was held that the alleged excess being in relation to the same subject-matter, it was for the jury to say whether the defendant had acted maliciously under the circumstances. That is not inconsistent with *Carr v. Duckett*. If, therefore, there was excess here, the jury and not the Court would be the proper tribunal to adjudicate upon it. All that was said in this letter was connected with what gave rise to the libel. We therefore reluctantly overrule this demurrer, because we do not like giving a judgment from which other courts may differ, not upon any principle, but upon a question of how this plea is to be taken.

CHRISTIAN, J.—As the Chief Justice has observed I was not a member of the Court when *Ruckley v. Kiernan* was decided. I beg to say that it is upon the passage just read from the judgment in that case by the Chief Justice, that I have arrived at my conclusion in this case; and that being so, I need say no more than that, I entirely concur in the decision pronounced.

Demurrer overruled.

Court of Probate.

[Reported by W. R. Miller, Esq., LL.D., Barrister-at-Law.]

GUMLEY v. GUMLEY.—25th Nov.

Practice—Filing declaration—Several defendants.

Where the plaintiff in a suit to establish a will cites devisees under a former will to see proceedings, he is bound by the 33rd rule of 1858 to file his declaration within a month from the appearance, otherwise the defendant may move to limit a time for filing it. The 17th and 19th rules of 1861 only apply to the case of a principal defendant or defendants.

Boston, for the defendant, moved that the plaintiff be ordered to file his affidavit of scripts, and to declare, within a certain time to be fixed by the Court: the month from the appearance had long since expired, and no affidavit of scripts had been filed by the plaintiff, though the defendant's affidavit had been filed long since.

S. C. Armstrong, for the plaintiff, relied on the 17th and 19th rules of April, 1861. Here two other persons had been cited and made defendants as devisees under a former will; they had not yet appeared; and the 19th rule said that the plaintiff shall not be compelled to file his declaration or to deliver a copy thereof to the defendant until the expiration of eight days after the defendant has filed his affidavit of scripts.

KEATINGE, J.—That only applies to the case of a principal defendant. These parties were only cited to see proceedings and may never appear. There has been very great delay in this case by the plaintiff. Let the affidavit of scripts and declaration be filed before the first of December, and the plaintiff must pay the costs of this motion.

BERNARD CONNOR v. THE MOST REV. DANIEL M'GETTIGAN, D.D., R. C. BISHOP OF RAPHAEL.—Nov. 26.

Lost will—Pleading—Record.

It is necessary in a suit to establish the contents of a lost will to set out the contents in an affidavit or a copy lodged in the registry, and to refer to it in the declaration; and a record which had been made up in the ordinary form applicable to an existing will was at the hearing ordered to be amended accordingly.

THIS was a suit by citation requiring the defendant as the sole executor named in the will of Maria Macklin, deceased, to propound and prove her will, otherwise to show cause why it should not be condemned. The deceased it appeared had made her will, giving various legacies to Roman Catholic charities or other charitable or religious purposes, and had named the defendant as her executor. She sent her will to the defendant to keep but he had lost it, however a copy was forthcoming. The defendant had in his declaration propounded the will in the ordinary form as an existing will, having previously in his affidavit of scripts detailed the circumstances of the loss and the contents of the will. The plaintiff pleaded only undue execution. The record was made up, stating the pleadings as they were on the file. The case was about being stated to the jury—[Keatinge, J.—Is not this case one of a lost will? The record is quite irregular and must be amended, making it applicable to the case.]

Norman, Q.C. (*J. Hamilton* with him), contended that the record was correct.—The declaration pleads that the testatrix made her will of such a date and appointed the defendant her executor; and it is only matter of evidence to supply the contents. In a case before Sir C. Creswell in England, he held that it was not necessary to do more than state the date and the character of the party who propounds the will—*Glen v. Burgess* (32 L.J. Pr., 157). In that case, as here, the affidavit of scripts stated the loss and the contents of the will. In *The goods of Emily Coghlan* (6 Ir. J., N.S., 271) your lordship required the contents of a lost will to be set out *in hæc verba* in an affidavit to entitle a party to probate in common form.

KEATINGE, J.—That case was quite right, and was very peculiar. Several persons made affidavits as to the accuracy of drafts or copies, but I required the person who had taken the instructions for the will to detail in his affidavit the very words which the deceased told him as well as he could recollect. As to the other case I do not intend to follow it. I consider that there must be two issues for the jury to try. 1stly,—Whether the deceased made her last will in writing, bearing date, &c.; and 2ndly,—whether the contents of the same were as appearing and set forth in a copy lodged in the Registry, and marked with a particular letter; and how can those issues be raised on this record? Let the record be amended by alleging in the declaration the loss of the will, and that the contents are detailed in the copy now lodged in the Registry, and marked with the letter C., and stating the proper issues to which I have referred. The record was amended accordingly, and on the evidence

the jury found both issues affirmatively, and a decree was made establishing the will.

Landed Estates Court.

[Reported by C. J. Manning, Esq.]

[BEFORE JUDGE HARGREAVE.]

ESTATE OF OLIVER TIBEANDO, OWNER; JOHN JULIAN, PETITIONER.—Nov. 25, 1863.

Where the Court sells under the condition that a purchaser will be bound to execute, at the tenant's expense, a fee-farm grant of the premises to the tenants, or trustees for them, the sum paid into Court tenants for renewal fines is not apportionable.

Semble—Where lands are held under a lease for lives renewable for ever, and for a long period of years, there has been no renewal, the representatives of parties who have not renewed have no claim for fines against the person who subsequently grants the renewal.

THIS was an application to vary an order made on the 17th July last, so far as the order decided that no part of the fund in Court to the credit of the matter represented the life estate of Oliver Tibeando, the Court declaring that the fund was not liable to duty in respect of the succession of Oliver Tibeando, and that an order be made declaring that a sum of £800 having been paid into Court by the tenant of the lands of Kilcappagh for renewal and septennial fines and interest thereon, in respect of a lease for lives renewable for ever, dated 2nd January, 1699, which sum of £800 formed part of the funds in Court to the credit of this matter, the said Oliver Tibeando was as tenant for life under the will of his father, Richard William Tibeando, entitled to a portion of the said sum of £800 in respect of the fines which fell due while he was tenant for life, and interest thereon, and in respect of the interest upon renewal and septennial fines due prior to the death of the said Richard William Tibeando; and that an account be taken of the amount to which the said Oliver was so entitled in respect of renewal and septennial fines and interest; and that Mrs. Sophia Tibeando, as administratrix of the said Oliver, be declared justly entitled thereto; and that the said amount be paid to the said Mrs. Sophia Tibeando out of the funds still in Court to the credit of these matters, first deducting thereout any sum that shall have been properly paid for succession duty, payable by the said Oliver Tibeando. It appeared that in 1855, R. W. Tibeando, of Portnahinch, in the Queen's County, by his will, devised the estate to Oliver Tibeando for his life, with remainder to his issue tail male, remainder to his second son Joseph for life, and his issue in tail male. Richard Wm. Tibeando died on 1st January, 1856, when, Oliver being then under age, the trustees of Richard William's will entered into possession for Oliver up to the time he attained age in September, 1857. Oliver died on 3rd January, 1860, intestate, and without issue. Sophia obtained administration. On the death of Oliver, Joseph be-

came entitled under the will to an estate for life. The tenant of the lands of Kilcappagh having been returned upon the notice to tenants as tenant from year to year, filed an objection, claiming to hold under lease for lives renewable for ever, dated 1st and 2nd January, 1699, subject to the yearly rent then paid for said lands, and a renewal fine of £10 on the fall of each life. It was stated that said lease had been renewed, but no particulars of any such renewal were given, nor was it pretended that the original lease or any renewal was forthcoming, or that any lives were in being, and, in fact, the sole evidence of the existence at any time of such lease, rested upon recitals in certain documents, executed by the tenants or their predecessors *inter se*, and in no way binding on the owners in this matter. The said objection was accordingly resisted on the part of Joseph Tibeando, the then owner of the lands, and came on to be heard on the 18th of July, 1862, when the owners and petitioners denying the right of the tenant to a renewal, it was ordered that said objection should stand to the November following, with liberty to the tenants to file a cause petition, in the meantime to establish the alleged right. On the same occasion the tenants offered to compromise by paying £600 in lieu of renewal fines, provided the alleged lease were admitted; and it being stated in Court that £800 would be accepted, the order provided that the tenant might offer £800, and if accepted, might lodge that sum in Court before November. The tenant having agreed to pay said sum of £800, upon the purchaser in this court being bound to execute a fee-farm grant on the terms of the alleged lease, the offer was accepted, and the amount subsequently transferred to the credit of this matter, in Government stock, equivalent to 800*l*. Subsequent to the lodgment of the money, and pending the settlement of the schedule and allocation of the fund, no claim was put forward by any party to any separate interest in the £800, although all parties, including the personal representatives of Oliver Tibeando and Richard William Tibeando, had notice of, and attended the proceedings, but said sum was always treated as part of the owner's estate. The question for the Court now was, whether the widow and executrix of Oliver Tibeando, who had been tenant in possession for three years, was entitled to any and what portion of said sum of £800.

Ores, for Mrs. Sophia Tibeando, contended, in support of the motion, that she was entitled to a portion of the £800, which was the estimated amount of renewal, septennial fines, and interest in respect of the three years. Oliver, as tenant for life under the will of R. William, was entitled to any fines that *ought to have been paid*, while his life estate lasted. It was settled by authority that where a party has died who would have received fines had they been tendered at times when they ought to have been paid, his representatives are entitled. Richard William, by his will, settled the *corpus* of fines accumulated up to his death as an incident to or accessory of the estate settled—*accessorium sequitur meum principale*—and Oliver was entitled to whatever interest the *corpus* of fines yielded during his period of possession. Counsel cited *Freeman v. Boyle* (2 Ridgway's Parl. Cases);

Tutthill v. Adamson (3 Law R., N. S., 157); *Taylor v. Horde* (1 Burr., 121); *Merton v. Archbold* (4 L. E. Rep.); *Steele v. M'Cauley* (7 Ir. Ch. R. 122); *Lyne on Leases*, p. 209; *Furlong on Landlord and Tenant*, p. 284. [*By the Court*.—The administratrix of Oliver had no interest in the fines which would have been payable in the life of Richard William, if the tenants had elected to renew in his lifetime. The estate was devised by him for successive life estates, with the benefit of the arrears of fines to whomsoever should be required by the tenants to grant a renewal. Now Oliver might have secured this fund if he had served a notice on the tenants requiring them to take a renewal, but he did not do so.]

M'Mahon for Joseph Tibeando insisted that the executrix was not entitled to any portion of the fines which fell due during the three years. The £800, moreover, was paid by way of commutation, and there was no way of determining or apportioning the amount due to the executrix.

JUDGE HARGREAVE.—In this case of Tibeando's Estate the general question was discussed, whether an accumulation of several fines belongs to the person who grants the renewal or is divisible between him and the representatives of former owners of estates. The circumstances of this case seem to me, however, to exclude the question here. It appears that the property was brought into this court for sale in the lifetime of the late Oliver Tibeando; and when ordered to be sold it had the benefit of the fact that this lease had not been renewed for a very long time, if at all. Had the Court chosen to sell the property in that condition, it is obvious that the *corpus* of the estate would have got the full benefit of this circumstance; and what was done in this case substantially amounted to the same thing. The Court made it a condition of sale that the purchaser should renew, and it exacted from the lessees a sum of £800 as the price of this condition, that sum being fixed upon by consent as representing the probable amount of renewal fines which the purchaser would have got if no such condition had been inserted. The renewal was granted, not by any tenant for life, but as it were by the Court; and what the inheritance lost by the renewal is restored to it by giving it the £800 which was directed to be brought into Court and added to the *corpus* of the fund, and not to be paid to any tenant for life or representatives of deceased tenants for life. The general question therefore does not arise; but if it did I think it will be found to be substantially concluded by the legislation which has taken place in reference to renewals. No one reading the 21st section of the 5 & 6 Wm. IV., c. 17, could for a moment imagine that the representatives of parties who had not renewed could have any claims for fines upon a subsequent renewal. The section provides in case a renewal is made for a lunatic by the Master the fine is to go ultimately to his heir and not his executor, showing that if the lunatic had not renewed, his heir would have had the fine; whereas according to the view suggested on the part of the applicant it would belong to his executor, the fine having accrued (as it is called) in his lifetime.

Motion refused with costs, measured at £5, to be paid by Sophia to Joseph Tibeando. Petitioner's costs to be costs in the matter.

Circuit Cases.

[Reported by Constantine Molloy, Esq., Barrister-at-law.]

HOME CIRCUIT.

WESTMEATH SUMMER ASSIZES, 1863.

[BEFORE THE LORD CHIEF BARON.]

REGINA v. BODKIN.

Murder—Statement for the prosecution.

Counsel not to state in his address to jury statements made by prisoner after his arrest.

Battersby, Q.C., in his opening address for the prosecution, was about stating to the jury the particulars of certain statements which the prisoner had made to police constables and a magistrate after his arrest.

Curran and Molloy, for the prisoner objected, and said it had always been held not proper for counsel to state to the jury in his opening address admissions made by the prisoner, inasmuch as they are frequently afterwards rejected as inadmissible.

The CHIEF BARON said that in the course of his experience as Crown prosecutor he had never known such statements to be introduced into the addresses of counsel, opening the case for the Crown; and that even if it were necessary now to create a precedent, he would make one, and rule that they should not be stated.

REGINA v. BODKIN.

Answer by a prisoner, after his arrest, to a question asked by police constable inadmissible.

W. R., a police constable, arrested the prisoner, and having given the usual and proper caution, proceeded to search his house; having found the prisoner's coat, which was wet from washing, the constable asked prisoner why he had washed his coat.

Battersby, Q.C., for the prosecution, proposed to give in evidence the prisoner's answer to this question. *Curran and Molloy*, for the prisoner, objected.

The CHIEF BARON ruled the answer could not be given in evidence, and said that where a constable arrests a party he ought to abstain from asking questions; he ought to leave that duty to the magistrate, who alone has the power to reduce to writing what is said by the prisoner.

MARTBOROUGH SUMMER ASSIZES, 1863.

[BEFORE THE LORD CHIEF BARON.]

REGINA v. WILBAIN AND ELIZABETH RYAN.

Threatening letter—Comparison of handwriting—Police officers and constables not admissible as experts.

The prisoners were indicted for writing and sending a threatening letter.

Ball, Q.C., for the prosecution, proposed to examine sub-inspector M. B., who had compared the writing in the threatening letter with the writing in certain books found in the prisoner's house, and which the prisoner Elizabeth had admitted to be in her handwriting, as to whether or not they were all, in his opinion, written by the same person.

Curran, for the prisoner, objected to this evidence. *Ball, Q.C.* replied that M. B. had given similar evidence without objection on trials in different counties.

The CHIEF BARON refused to receive the evidence, and said that this class of evidence should be given by witnesses skilled in deciphering handwriting.

The prisoners were acquitted.

Rolls Court.

[Reported by John Munroe, Esq., Barrister-at-Law.]

WYTHE v. KNOX AND SWAN—Nov. 23, 1863.

Setting down petition—Want of prosecution—27th General Order.

Where an order was made by consent giving further time to file additional affidavits, Held that this did not extend the time for setting down the petition, but that the two terms ran from the filing of the answering affidavits.

THIS was a motion, on the part of the petitioner, that two side-bar orders entered by the respondents, ordering the petitioner to pay the costs, on the ground that the suit had been dismissed for want of prosecution, might be set aside for irregularity, or that the petition might be reinstated. The original petition, which was for setting aside a deed, had been filed on the 20th October, 1863. There was then an application on behalf of the respondent, that petitioner should give security for costs. And the order of the Master of the Rolls refusing such security was dated 16th January, 1863. The answering affidavits were filed on the 24th February, 1863. There was then an order made by consent of the parties allowing the petitioner one week to file affidavits in reply dated April 2nd, 1862, and three weeks after were granted to respondents to file their affidavits in reply. The side-bar rule declaring the petition dismissed bore date the 9th Nov. 1863.

C. H. O'Neill now moved the Court to set aside this order or to reinstate the petition. The rule had been made under the 27th General Order, 1851, which provides "That every cause petition which shall not have been set down for hearing for the space of two whole terms after the time at which it might have been so set down against any party, according to the regulations hereinafter made, shall thereupon, without any rule or order, stand dismissed." The rule further provides for the side-bar rule being entered for costs, and that the petition may be reinstated on such terms as the Court may deem just. He moved on two grounds; first, that the side-bar order was irregular, as two terms had not yet elapsed. The time in ordinary cases ran from the filing of the answering affidavit; but here, as the time for filing affidavits had been extended by consent, the time should begin to run from then. In the second place, even if the Court ruled against him on this point yet the petition should be reinstated to prevent substantial justice from being defeated. The petition was to set aside a deed executed under circumstances which, if proved—as they would be proved by five or six unprejudiced witnesses, contradicted indeed to some extent by those who had an interest in supporting the deed—would necessarily invalidate it. These facts were sufficient to justify the interference of a court of equity to reinstate the petition.

Brewster, Q.C. and S. Walker for respondent, Knox.—The Court could never sanction such a doctrine as that now submitted to it. The rule, they contended, was quite clear that the time should begin to run from the period

at which the cause might have been set down. The cause might have been set down as soon as the answering affidavits were filed. The fact that additional affidavits were filed by consent did not make any difference. The second ground of petitioner's application was equally bad. A very strong case should be shown before the Court would interfere—*Carey v. Brown* (4 Ir. Ch. 210). In this case there were several affidavits filed by the respondents contradicting those of the petitioner in the most material particulars. The Court would never go into the merits of the case on a simple motion.

Exham, Q.C., and Jellett for respondent Swan.

The MASTER OF THE ROLLS said that the present motion amounted almost to a contempt of court. It was an application by way of appeal from the Lord Chancellor, he having by his order declared that the petition stood dismissed. It was a monstrous doctrine to contend that the time for setting down a petition was extended by the filing of additional affidavits; that if affidavits, by way of rebutter or surrebutter, rejoinder or surrejoinder, were put in, two terms were still to be given from the filing of the last. The two terms must run from the filing of the answer, whether additional affidavits were filed by consent or not. With regard to the second ground put forward in support of the motion, he could not sanction it. He could not hear the entire case and come to a conclusion as to its merits on a mere motion. If such were the case briefs would have to be furnished to counsel as if the cause were at hearing; and probably the petitioner himself would be the first to object to this when the costs came to be taxed. The motion should therefore be refused, with costs.

Court of Queen's Bench.

[Reported by William Woodcock, Esq., Barrister-at-law.]

LORD ALDBOROUGH v. HAGARTY.—May 7, 8.

Pleading—Account stated—Omission of words, "Money found to be due by defendant to plaintiff."

A count in a summons and plaint complaining "that the defendant is indebted to the plaintiff in the sum of £63 14s., money payable by the defendant to the plaintiff on an account stated between them," held good on demurrer.

DEMURRER.—One of the paragraphs of the summons and plaint complained "that the defendant is indebted to the plaintiff in the sum of £63 14s., money payable by defendant to plaintiff on an account stated between them." To this paragraph the defendant demurred, on the ground that it stated no cause of action good in substance.

Coates, for the defendant, in support of the demurrer.—The paragraph is bad for want of the words "money found to be due." The words at the beginning of the summons and plaint "money payable by defendant to plaintiff," will not supply the omission. They have no definite meaning, and are mere words of form. We could not traverse the allegation of mo-

ney being payable—*Chambers v. Soden* (8 Ir. Jur., 79). An action of account cannot be brought without showing a certain sum to be due—*Egles v. Vale* (Cro. Car. 69, S. C. Finlayson's Leading Cases on Pleading, 1); *Homes v. Savill* (Cro. Car. 116). [*Fitzgerald, J.*—Does not the expression "payable" imply fairly the words "found to be due?" Could you not traverse that any money was found to be due?] That would be raising a traverse of matter not in the count itself. [*Hayes, J.*—What do you say to secs. 81 and 241 of the Common Law Procedure Act?] Those sections must be construed by the previous parts of the Act which show that matters need not be stated in technical language, but still that facts which amount to a cause of action must be stated.

Byrne, contra, was not called upon.

The Court held that the words "on an account stated" were to be connected with the words "money payable," and that a sufficient cause of action was stated.

Judgment for plaintiff.

[CROWN SIDE.]

IN RE REILLY.—June 1, 1863.

Habeas Corpus—Costs.

Where a writ of habeas corpus had been allowed to go and had been obeyed without argument, held that the Court had no authority to grant costs against the defendant.

In this case a writ of *habeas corpus* had issued directing the defendant to bring up the body of — Reilly, a child in defendant's custody. The writ had been allowed to go, and had been obeyed without any argument, and the child handed over to his mother, who had obtained the writ.

Purcell, for the prosecutor, applied for costs against the defendant.

J. A. Curran, jun. appeared for the defendant, and resisted the application for costs.

The following authorities were cited:—*In re Cobbett* (14 M. & W. 175); *Dodd's case* (2 De G. & J. 510, s. c. 4 Jur. N. S. 291); st. 56 G. III., c. 100, s. 3.

THE COURT held that they had no jurisdiction to grant costs under the circumstances.

21 Vic. c. 79, so as to admit of being proved by "the probate of the will or the letters of administration with the will annexed, or a copy thereof, stamped with any seal of the Court of Probate." *Semble*—That the notice directed to be served by said section need not specify the particular purpose for which the probate is intended to be used.

Semble—That one of two testamentary guardians can determine a tenancy from year to year.

Quære—Whether an infant may maintain an ejectment where there are testamentary guardians.

Quære—Whether, since the changes in the law of inheritance, a mother can be guardian in socage.

THIS was an ejectment on the title brought to recover a message or tenement in Fownes's-street, in the city of Dublin, in which the parties were described as Francis Robert Cope, an infant under 21 years of age, by Cecilia Philippa Cope, widow, his mother and next friend, and Sir Thomas Staples, Bart., plaintiffs; Lawrence Mooney, administrator, with the will annexed, of Michael Henry Connolly, deceased, defendant. The action was tried before Monahan, C. J., at the Hilary After Sittings. The plaintiff's attorney, William J. Cooper, deposed that said Michael Henry Connolly, deceased, had been in possession of the premises as tenant from year to year of one Arthur Cope, who died in the year 1843, leaving Robert Wright Cope him surviving, who died in April, 1858, leaving plaintiff, Francis Robert Cope, his only son and heir-at-law, and plaintiff, Cecilia Philippa Cope, his widow, and mother of the minor; that he, witness, received £30 a year rent for the premises from said Connolly, commencing 1st November, 1855, for said Robert Wright Cope and Francis Robert Cope, and accounted for same for the minor plaintiff; that since the death of Robert Wright Cope witness also received rent from the occupying tenant, M'Gauran, and from defendant; and on the 19th January, 1863, wrote to defendant a letter of that date demanding the rent for plaintiff to November, 1862, and received an answer thereto from defendant dated 24th January, 1863, referring him to his clerk, Mr. Lee, who would pay him; and that said Lee called at the office of witness and asked time and promised to pay. The plaintiffs next produced from the registry of the Court of Probate a document purporting to be the will of said Arthur Cope, dated 7th August, 1840, and to devise said premises to the use of Robert Wright Cope for life, remainder to his issue in tail male, and to be witnessed by Frederick J. Robert Grant, and James M. Weightman, 13 King's-road, Gray's Inn. One Robert Cooper, attorney, deposed that he had been an articulated clerk in the office of Messrs. Walker & Grant, solicitors, in London, and knew the said Weightman as a clerk in their office, and proved the handwriting of said Weightman. The said Wm. J. Cooper deposed that said Walker & Grant were his correspondents in London; that he believed he was acquainted with the handwriting of both said witnesses, and that he believed that said signatures were genuine, and that both the witnesses lived in London, out of the jurisdiction of this Court. The judge refused to receive the said will in evidence. The plaintiffs next proved service of a notice upon the 26th

Court of Common Pleas.

[Reported by J. Field Johnston, Esq., Barrister-at-Law.]

COPE v. MOONEY.—May 2, 5, 1863.

Evidence of appointment of testamentary guardian—20 & 21 Vic. c. 79, s. 68.

An appointment of a testamentary guardian is not "a devise or other testamentary disposition of or affecting real estate" within the 68th section of the 20 &

January, 1863, on defendant's attorney, that they would give in evidence at the trial the probate of the will of Robert Wright Cope; and they then tendered said probate, the reception of which was objected to on the grounds that the notice did not specify the particular devise which said probate was intended to prove; and that said notice was not in conformity with the statute 20 & 21 Vic. c. 79, s. 68, and that to prove the appointment of testamentary guardians a will must be proved *per testes*. The notice was as follows:—

26th Jan. 1863.

Notice that probate copies of wills of Arthur Cope and Robert A. C. Cope, Esqrs., will be given in evidence.

Sir, Take notice that at the trial of the issues in this cause the plaintiff proposes to give in evidence the probate copy or an attested copy of the last will and testament of Arthur Cope, Esq.,

deceased, bearing date the 7th day of August, 1840; and also the probate copy of the last will and testament of Robert Wright Cope, Esq., deceased, bearing date the 22nd day of June, 1854. And take notice that this notice will be used hereafter as occasion shall require.

The latter of these wills bore date 22nd June, 1854, and appointed said plaintiff, Cecilia Philippa Cope, the Earl of Gosford, and Francis Manley Shaw Taylor, Esq., guardians of said Francis Robert Cope. The said Wm. J. Cooper proved that said Taylor was dead; that the Earl of Gosford had acted in some things but not expressly in relation to the premises in question, and that said Cecilia Philippa lived in the family mansion with the minor and maintained and educated him, and expressly sanctioned this action; and he also proved a notice authorised by said Cecilia Philippa Cope, dated the 26th April, 1862, on behalf of Francis Robert Cope, requiring defendant to quit on the 1st November then next, signed "Cecilia P. Cope, testamentary guardian of said Francis Robert Cope, on behalf of said Francis Robert Cope." Service of this notice was admitted. The defendant offered no evidence, but called for a nonsuit on the following grounds: 1st,—Because there was no legal evidence of the appointment of Cecilia Philippa Cope as testamentary guardian. 2nd,—Because the notice to quit was signed by one only of two testamentary guardians. 3rd,—Because both testamentary guardians were not plaintiffs in the action. The plaintiffs insisted that the judge should tell the jury that if they believed the evidence they should find for them, or that he should leave the question to the jury, whether said Cecilia Philippa Cope, as guardian, acting with the sanction of her co-guardian, and also as natural or elected guardian and in receipt of the rent, had authority to determine the tenancy. The judge declined leaving any question to the jury, but non-suited the plaintiffs, reserving liberty for them to move to set aside said nonsuit and to enter a verdict for them if this Court should be of opinion that they were entitled thereto upon the facts above stated. The plaintiffs accordingly obtained a conditional order to set aside the non-suit and enter a verdict for them, or for a new trial, against which

John O'Hagan (with him Martin) showed cause—

1. There was no legal evidence of the appointment of

Cecilia Philippa Cope as guardian. 2. The notice to quit was not a legal notice, being signed by only C. P. Cope. 3. The plaintiffs cannot succeed, there being testamentary guardians. There are three things necessary to maintain an ejectment. First, a tenancy; secondly, a determination of the tenancy; thirdly, proper parties to bring the action. A notice to quit, signed by the mother of an infant as his guardian and next friend, without proof of appointment, is insufficient to support an ejectment—*Lessee Reads v. Kennedy* (12 Ir. L. Rep. 565). The notice of using the probate copy is in the most general terms and did not inform us how it was to be used. It simply states that the probate will be given in evidence on the trial of this cause. It does not follow the requirements of the section (20 & 21 Vic. c. 79, s. 68). It should have stated that the probate would be used instead of the original will. [Ball, J.—The plaintiffs could not intend to volunteer both the probate and the original.] The terms of the section are strong. This objection was made in *Irwin v. Callwell* (12 Ir. C. L. Rep. 144). [Christian, J.—Probate is not primary evidence of title to real estate; and therefore, *prima facie*, serving the notice was an intimation that it was to be used as secondary evidence.] The probate is not evidence to prove the appointment of a testamentary guardian. Prior to the statute 1 Vic. c. 26, there were three kinds of testamentary dispositions. 1. That of real estate, which required three witnesses. 2. That of personal estate, which required no witnesses. And 3. That appointing a guardian, which required two witnesses. The 14 & 15 Chas. II., c. 19, s. 6, enabled a father, by will executed in the presence of two credible witnesses, to dispose of the custody and tuition of his child. This section is not repealed by the 1 Vic. c. 26, but left as it was, subject only to the general provisions of the latter statute, which, in defining a will, says the word shall extend to a disposition of the custody and tuition of any child. In ejectment by a guardian appointed by deed or will, the due execution of the deed or will must be proved—*Roscoe's Nisi Prius*, p. 702. The appointment of this guardian is neither a devise of nor a devise affecting real estate—20 & 21 Vic. c. 79, s. 68. If the minor have real estate it may draw to it the custody of that real estate, but that result does not necessarily happen. Upon a point of pedigree a will might be of great importance, and in that way it might indirectly affect real estate; but it could not be contended that title to real estate could be proved by serving such a notice. [Ball, J.—Is not an appointment under the statute of Charles calculated to affect real estate?] It may be calculated to affect it but it does not do so necessarily; it affects it indirectly. [Christian, J.—Does not the guardian in socage acquire an estate in the lands, if any, of the minor?] The appointment of a testamentary guardian differs from devises of either real or personal estate. The service of a notice to quit signed by one of two testamentary guardians is insufficient. This notice ignores the existence of the other guardian; it does not purport to be on behalf of the other, nor require the tenant to deliver up to both. The other guardian might sue the tenant for the rent under the lease which he has not joined in determining. A notice to quit by one of several joint tenants is sufficient,

but it must "be signed by the one on behalf of the others—*Right d. Fisher v. Cuthell* (5 East. 491); *Doe d. Aslin v. Summersett* (1 B. & Ad. 135); *Doe d. Whayman v. Chaplin* (3 Taun., 120). Lastly, both the guardians ought to be parties to the action, because they have a legal estate during the minority of the ward. Guardians in socage had this estate until the age of fourteen years. Testamentary guardians are the same as guardians in socage, with the exception that their estate lasts until the ward attains the age of twenty-one years—Bac. Abridg. title, Guardian, A. 8. A guardian in socage may bring ejectment in his own name while the infant is under fourteen years—*Wade v. Baker & Cole* (1 Lord Ray. 131); *R. v. The Inhabitants of Oakley* (10 East. 491). In *R. v. Sutton* (3 A. & E. 597), the guardian in socage, and not the infant, was held liable for the non-repair of a bridge. [*Christian, J.*—Have you found any authority as to the exact nature of the estate of co-testamentary guardians, whether they are joint tenants or tenants in common?—*Duke of Beaufort v. Berty* (1 Peere Wms. 702). The testamentary guardian is the same as the guardian in socage. [*Christian, J.*—If there are words in the statute making him the same as guardian in socage, no authority is necessary.] The mother cannot in any event be guardian in socage, because she may now inherit to her son.

Battersby, Q. C. and *J. F. Walker*, contra.—The mother is testamentary guardian, and if not, she is guardian in socage. An infant may bring the ejectment in his own name—*Cole on Ejectment*, 584. If the guardian bring the action, he must bring it for the benefit of the infant, 14 & 15 Chas. II, c. 19, s. 7; 2 Starkie on Evidence, 3rd edition, p. 410; *Coke on Littleton*, s. 123. *R. v. Sutton* (3 A. & E. 597), cited on the other side, goes upon the principle that the guardian in socage has a right to go upon the lands for the benefit of the infant, but not otherwise. The whole estate and interest of the guardian is to the use of the infant, and no part of it is to the use of the guardian—*Plowden*, 293. Each of two or three testamentary guardians is a complete guardian, and has all the powers of a guardian, and has an authority coupled with an interest, *Eyre v. Countess of Shaftesbury* (2 Peere Wms. pp. 106, 120); In *Storke v. Storke* (3 Peere Wms., p. 50), one guardian was allowed to retain the custody of two of the children, although there were four guardians appointed—*Doe d. Stace v. Wheeler* (15 M. & W. 623) was an ejectment brought by two out of three co-executors. "If a man appoint several executors, they are esteemed in law but as one person, representing the testator, and therefore the acts done by every one of them which relate either to the delivery, gift, sale, payment, possession, or release of the testator's goods, are deemed the acts of all, for they have a joint and entire authority over the whole"—*Bacon's Abridgment*, title Executor, D. 1; *Comyns's Digest*, Administration B. 12. In *Herbert v. Pigott* (2 Cr. & M. 384), a release by two out of four executors was pleaded to an action brought by the other two, and the court refused to set aside the plea. In *Nation v. Tozer* (1 Cr. M. & R. 174), Baron Parke says, "The act of one executor in disposing of the testator's effects is the act of the other, to give validity to and preclude him

from avoiding it." One joint tenant may sign a notice to quit on behalf of the others—*Doe d. Aslin v. Summersett* (1 B. & Ad. 135); *Alford v. Vickery* (Car. and Mar. 280). One joint tenant may authorise an agent to give a notice to quit—*Doe d. Kinderley v. Hughes* (7 M. & W. 139). It is not necessary that the notice should specify the character in which it is signed, nor need the authority to serve it be in writing; it is a question for the jury. *Lessee of Lord Sligo v. Davitt* (3 Ir. Law Rep. 146); *Lessee LaTouche v. Latimer*, unreported, but cited in *Lessee of Lord Sligo v. Davitt*; *Doe d. Mann v. Walters* (10 B. & C. 626); we asked the judge to leave a question to the jury. [*Monahan, C.J.*—You asked me to leave to the jury the question, if the mother had authority to serve the notice to quit as natural guardian. *Christian, J.*—Did it appear if this man had any heir-at-law? It must be assumed that there was an heir-at-law. Where the property descends *ex parte paterna*, the mother is the natural guardian. The mother can still be guardian in socage. The change in the law can make no difference, because the son is not the first purchaser. [*Christian, J.*—If you make out that she is well appointed testamentary guardian, you do not require to show that she is natural guardian, nor is she.] A guardian has an interest, and may demise, but has no estate. In *M'Cright v. M'Cright* (13 Ir. Eq. R. 323,) Lord Chancellor Brady considers the powers of testamentary guardians, and refers to where Vice-Chancellor Wigram says, "The testamentary guardian has no estate." This ejectment is brought by the infant, for the notice runs—"I require you on behalf of F. R. Cope, an infant," and it is signed, "testamentary guardian on behalf of said F. R. Cope." Both infant and guardian have the right to maintain the ejectment—*Adams on Ejectment*, 49. Then the appointment of a testamentary guardian is within the 68th section of the Probate Act. This is a devise or other testamentary disposition affecting real estate. [*Christian, J.*—The former branch of your argument, that the guardian takes no estate, weakens this. Suppose that a man by will appointed an agent over real estate, and gave him an authority to deal with the tenants, would that be within the section? It would. [*Monahan, C.J.*—It was not under that will that this minor took the real estate, but under the older will; therefore arises the curious question, whether the will appointing a testamentary guardian can be proved by a copy. A man who had personal estate but no real estate, might appoint a testamentary guardian. Will the proof by this probate be admissible because here there is real estate in question? According to your argument the Probate Act would scarcely be applicable where there was only personalty. A father who had no property at all might appoint testamentary guardians, and his son might have real estate *aliunde*. It would be very hard to make the Probate Act apply where the guardian had nothing to do with the real estate. Will it apply to such a thing as the execution of a power remotely through the appointment of a guardian? The object of the section was to relieve the parties from the expense of proving *per testa*. The appointment of testamentary guardians must affect real estate when the powers imposed upon the

guardians by the statute are considered. If they can bring ejectment, make copyhold, &c., it is evident that these acts affect the real estate. The passage cited from Roscoe's *Nisi Prius* (p. 702), states that a will appointing a guardian must be executed agreeably to 1 Vict., c. 26, s. 9, and it goes on to refer to proof by probate at p. 124 and p. 693. Then the notice of using the probate of this will could not be mistaken. [Monahan, C. J.—You might have wanted to show that the minor took the real estate under it]. Such a notice is like the notice to use the copy of a deed; it would be extremely inconvenient that the portion of the will should be set out. This notice sufficiently put the party upon his guard. In the case of a notice to quit, if a party do not object, he is bound. [Monahan, C. J.—That is only where he is personally served, and where silence gives consent]. This case is stronger, because an ignorant countryman when served might not know what to do, but the attorney does know. The point is decided by *Irwin v. Callwell* (12 Jr. C. L. R. 144). [Monahan, C. J.—Your strongest argument is that the Court of Queen's Bench has ruled the point in your favour.] In *Doe d. Thomas v. Roberts* (16 M. & W. 778), it was held that the infants might maintain ejectment. [Monahan, C. J.—In that case there were no testamentary guardians. We do not entertain much doubt but that one of two testamentary guardians may determine a tenancy. We think this tenancy was well determined, assuming that this lady was testamentary guardian. Your two serious difficulties are to show that the Probate Act applies, and that the minor can maintain the ejectment if there be an estate in the guardian.]

Martin in reply.—As to the sufficiency of the notice to use the probate, *Irwin v. Callwell* is binding to a certain extent, but the language used by Lefroy, C. J., confirms the view which we pressed at the trial. As to the proof of the will by the probate, the devise affecting real estate, to come under the 68th section, must clearly affect it. As to guardianship in socage, there is a twofold answer—1. That a mother cannot be guardian in socage, being now able to inherit—Coke Litt., 87, b.; and—2. That no evidence of the age of the minor was given at the trial. As to the sufficiency of the notice to quit, the observation of Lord Tenterden in *Doe dem. Aslin v. Summersett* was extra-judicial. The authority was not questioned. [Monahan, C. J.—There was no evidence of authority.] If Lord Tenterden be right, he is in opposition to what Lord Ellenborough says in *Right d. Fisher v. Cuthell*. In *Goodtitle v. Woodward* (3 B. & Ald., 389), the notice to quit was signed by an agent, and because his authority to serve it was not signed at the time by all the joint-tenants, the plaintiff was non-suited, and a verdict was afterwards entered for him on the ground that the subsequent recognition by all the joint tenants gave validity to the notice. [Monahan, C. J.—That is not law at all; nothing is clearer than that the notice must be operative when served, or it is not operative at all.] *Doe d. Green v. Baker* (8 Taunton, 241). The plaintiff in ejectment must recover on the strength of his own title. He must remove every possibility of title in another person.—*Richards v. Richards* (15 East., 294, note). [Monahan, C. J.—

He must have a legal title entitling him to the possession of the lands.] How can the guardian grant copyhold, &c., if he does not take an estate in the lands?—So *R. v. Inhabitants of Oakley*, and *R. v. Sutton*. "The law has invested guardians in socage not with a bare authority only, but also with an interest."—Woodfall on Landlord and Tenant, p. 40. If the guardian in socage has not an estate, how can the person to whom he grants maintain ejectment? [Christian, J.—That is quite possible; he might grant under a statutory power. Ball, J.—You do not contend that both the guardian and infant have an estate in the lands?] The infant has the seisin, and the guardian has the interest in possession. [Christian J.—The infant would have only a reversion expectant on the term in the guardian. Ball, J.—And if so, what possessory right has the infant?] None. The observations of Vice-Chancellor Wigram are, in *McCreight v. McCreight*, adopted by Lord Chancellor Brady only as respected the personal estate; with regard to real estate, he seems to adopt the statements of *Reg. v. Sutton—Roe d. Parry v. Hodgson* (2 Wilson, 129). The Court of Chancery can remove a testamentary guardian as much as any other trustee who might have a legal estate. [Monahan, C. J.—Could it be that the infant has the legal estate, and yet that the guardian has the power to maintain ejectment? Christian, J.—It is difficult to see how the guardian can bring actions in his own name if he has a mere power.]

Cur. adv. vult.

May 31.—MONAHAN, C. J.—This was an ejectment on the title tried before me. It was proved that the late Mr. Conolly held the premises, and that he continued to hold them as tenant from year to year after his title had determined, and to pay rent to a person who professed to receive it for the minor Cope. The tenancy having been proved, service of the notice to quit was proved, purporting to be signed, and in fact signed, by Cecilia Philippa Cope, who describes herself as testamentary guardian of the infant Cope. Possession being admitted, the plaintiffs went into evidence to show authority to serve this notice to quit. The tenancy was one which commenced before the accrual of the infant's title. In order to prove the right of this lady to serve the notice, the plaintiffs tendered in evidence the probate of the will appointing her testamentary guardian, and proved the service of a notice of their intention to do so. I thought the plaintiffs had not made a case, and non-suited them. The first objection on the part of the defendant was, that the original will being out of the case, the probate could not be received, even if the proper notice had been served, because the 68th section of the Probate Act did not apply to a case in which the will was to be used for the purpose of proving the appointment of a testamentary guardian. An objection which I need not consider is that the notice did not specify the purposes for which the probate would be used. In the case in the Court of Queen's Bench, a general notice which did not state the exact purpose was held sufficient, but it is unnecessary in any event to consider this, because we have come to the conclusion that the original will, and not the probate, must be given in evidence. The 68th section of the

20 & 21 Vict., c. 79, enacts that "in any action at law or suit in equity, where, according to the existing law, it would be necessary to produce and prove an original will in order to establish a devise or other testamentary disposition of or affecting real estate, it shall be lawful for the party intending to establish in proof such devise or other testamentary disposition, to give to the opposite party, seven days at least before the trial or other proceeding in which the said proof is intended to be adduced, notice that he intends at the said trial or other proceeding to give in evidence, as proof of the devise or other testamentary disposition, the probate of the said will, or the letters of administration with the will annexed, or a copy thereof, stamped with any seal of the Court of Probate; and in every such case such probate or letters of administration, or copy thereof respectively, stamped as aforesaid, shall be sufficient evidence of such will, and of its validity and contents, notwithstanding the same may not have been proved in solemn form, or have been otherwise declared valid in a contentious cause or matter as herein provided, unless the party receiving such notice shall, within three days after such receipt, give notice that he disputes the validity of such devise or other testamentary disposition." The question is this, is this devise by a father appointing a testamentary guardian a devise affecting real estate? Because, if not, it does not come within the provisions of this section. In the first place, what does it do? It merely appoints a testamentary guardian; it does not dispose of any property so far as we know: the property of this infant comes to him irrespectively of the will. The only way to make it affect real estate would be by showing that the testamentary guardian has a right over or an interest or estate in the premises of which the infant is seised. We are of opinion that this is not the sort of disposition over real estate which the Legislature intended. That this particular case came under their notice, we do not think at all, but we think they meant a case in which the will disposed of real estate, or created a charge which the testator had the power or authority to impose upon the estate. We know that the appointment of testamentary guardians is not confined to cases of real estate. The guardian has control over the infant's personal property, among other things, but not because the infant might have a small portion of real estate will this section apply. It becomes unnecessary to determine what seems to have considerable difficulty about it, viz., whether, in the case of a tenancy from year to year, the infant can bring the ejectment and the testamentary guardian also. We think the lady gave no evidence that she was a testamentary guardian. But it has been urged upon us that we must presume this property to be fee simple descended *ex parte paternâ*, and that the mother is guardian in socage. It is enough to say that this point was not made at the trial, and that no evidence was given of the age of the infant. The mother *quâ* natural guardian has no right to determine the tenancy from year to year of premises of which the reversion is in the infant.

Rule discharged.

Court of Exchequer.

[Reported by Oliver J. Burke, Esq., Barrister-at-Law.]

M'DONALD v. THE COMMISSIONERS FOR THE REDUCTION OF THE NATIONAL DEBT.

Substitution of service—Corporation—Perpetual succession—April 29, 1863.

On motion to make absolute a conditional order to substitute service of the writ of summons and plaint on the Commissioners for the Reduction of the National Debt, who were living out of the jurisdiction of the Court, by serving the secretary of the Bank of Ireland, it was held, that the commissioners could not sue or be sued in the capacity of a corporate body, inasmuch as they were not a corporation having perpetual succession, and that they existed no further than the paying off the National Debt, and that therefore the motion must be refused.

THIS was an application to make absolute a conditional order to substitute service of the writ of summons and plaint on the defendants, by serving the secretary of the Bank of Ireland, notwithstanding cause shown to the contrary. The action was brought by the plaintiff, a depositor in the Cuffe-street Savings Bank, which was established in the city of Dublin in the year 1818, in accordance with the provisions of the Act of Parliament then in force for the regulation of Savings Banks, and was carried on by trustees under the direction of the defendants, the Commissioners for the Reduction of the National Debt. The Bank failed in 1848, and on examination of its accounts there appeared to be a deficit of £60,000, and the plaintiff was not repaid by the trustees the money which she deposited in the said Bank; and plaintiff in her plaint alleged that the defendants were guilty of neglect and breach of duty in relation to the supervision of the affairs of the said Bank. The affidavit upon which the present motion was grounded, stated that the said Commissioners were, for a long period prior to the failure of the said Bank, fully aware that the said Bank was in insolvent circumstances, and unable to meet its liabilities, and that it became, and was the duty of the defendants to close the accounts of the Bank, and have its affairs wound up, and that in default of receiving proper annual statements of the Bank they were bound to direct a notification of such default in the *London Gazette*, and in the newspaper published in the county where the Bank was established for the information of the depositors. It was further stated that the defendants were, previous to the failure of the said Bank, and still are, such Commissioners, and had notice of the state of the Bank prior to its failure; that the Commissioners, in violation of their duty in that behalf, kept open the account of the Bank, and allowed money to be received from the trustees of Cuffe-street Savings Bank at the Bank of Ireland to the account of said Commissioners, and speculated on the probability of the Bank being able to make up the deficiency in its assets by inducing fresh deposits; that such a course of conduct on the part of the Commissioners was fraudulent towards the new depositors,

of whom the plaintiff was one; that by the several Acts passed for the regulation of Savings Banks in Ireland, the Governor and Company of the Bank of Ireland are the recognized and lawful agents in this country of the defendants, and that all the monies paid by depositors with the trustees of the Savings Banks are, by the several statutes passed, paid into the Bank of Ireland to the account of the defendants; that when monies were so lodged in the Bank of Ireland by the trustees of the Savings Banks to the credit of the defendant, it was the duty and practice of the secretary to inform the Commissioners thereof, and to transmit the same to the defendants, or invest them as may be directed, and for this and every other purpose for which they may be required, the said secretary of the Bank of Ireland acts as the officer and agent of the Commissioners, the defendants; that defendants reside in London out of the jurisdiction of this Court, and the cause of action arose in this country, and defendants' business in Ireland is transacted by the said secretary of the Bank of Ireland; that defendants were well aware of the state of the accounts of the Savings Banks.

The *Solicitor-General* and *Serjeant Sullivan* resisted the application, on the ground that the defendants were not a corporate body, and were not entitled to sue or be sued as a corporation, or in any other manner than as individuals; the Commissioners for the Reduction of the National Debt were constituted under the 26th G. 3, c. 31, for Great Britain—under 56 G. 3, c. 98, for the United Kingdom of Great Britain and Ireland, and under neither of those Acts were the Commissioners for the Reduction of the National Debt formed into a corporation. *Coke Litt.*, 250, a, defines a corporation or body politic to be "a body to take in succession framed (as to that capacity) by policy, and is, therefore, called a body politic, and it is called a corporation because several members are made into a body, and of capacity to take a grant, and this body politic may commence in three ways, viz., by prescription, by letters patent, and by Act of Parliament." Perpetual succession is an element essential to corporations. *Coke Litt.* thus speaks of succession—"This expression in the Common Law is applied only to bodies politic which have perpetual succession." The Commissioners for the Reduction of the National Debt cannot be held to have perpetual succession, inasmuch as they were constituted under the Act for the Reduction of the National Debt, which, when reduced and wiped away, the duty of the Commissioners, would wholly cease, and the Commissioners would no longer exist. The expression "perpetual" was, therefore, inapplicable to the defendants, neither can it be held that the Commissioners are a corporation established in any of the three ways in which *Coke Litt.*, 250, a, says that a corporation may be formed—"A body politic or incorporate may commence and be established in three manner of ways, viz., by prescription, by letters patent, or by Act of Parliament."

Heron, Q. C. and *Wilson* in support of the application—The first Act whereby the Commissioners were appointed was 27 G. 3, c. 3, the preamble of which Act declares the object of the Act to be to make a *lasting* provision for the maintenance of the public credit. The

Irish Act was 37 Geo. 3, c. 27—the Act appointing the Irish Commissioners, and the 56 Geo. 3, c. 98, repealed so much of the Irish Act as appointed Commissioners for the Reduction of the National Debt in Ireland, and the British Commissioners were thereby appointed Commissioners for the Reduction of the National Debt for the United Kingdom. The main question for the consideration of the Court was whether the Commissioners for the Reduction of the National Debt were a corporation or not. A corporation may exist by implication, and it is submitted that the Commissioners for the Reduction of the National Debt are a corporation by implication. *Conservators of the Tons v. Ash* (10 B. & C., 349), decides that a corporation may exist by implication, when being constituted by any legal means it is found that the purposes intended cannot be carried into effect without attributing the corporation character to the body.—*Jeffreys v. Gurr* (2 B. & Ad., 841); *Attorney-General v. Day* (2 Atk., 212); *Ex parte New Port Marsh Trustees* (16 Sim., 346); *Grant on Corporations*, p. 6. A corporation also may be created for special purposes *Viner's Abb.*, tit. Corporation, F. 4—"If the King grant lands to the men or inhabitants of D., *hereditibus et successoribus suis* rendering rent for anything touching those lands, this is a corporation, but not for other purposes. The Commissioners for the reduction of the National Debt were a corporation for the purpose of carrying on the business of the Savings Bank; those duties were clear and well defined by the 9th Geo. 4, c. 92, s. 46, which is as follows: "And for the more effectually ascertaining from time to time the actual and progressive state of the several Savings Banks respectively, be it enacted, That the trustees or managers of any Savings Bank shall annually cause a general statement of the funds of such Savings Bank, invested in the Bank of England or the Bank of Ireland, in the names of the Commissioners for the Reduction of the National Debt, to be prepared up to the 20th day of November in each year, *showing* the balance or principal sum due to all the depositors collectively in such Savings Bank, and a statement of the expenses incurred, and stating in whose hands such balance shall then be remaining; and every such annual statement shall be attested by two managers, or by one manager or one trustee of such Savings Bank; and every such annual statement shall be countersigned by the secretary or actuary of such Savings Bank; and all such annual statements shall be transmitted to the office of said Commissioners for the Reduction of the National Debt in London or Dublin (as the case may be) within six weeks after the 20th day of November in each year; and in case the trustees of any such Savings Bank shall neglect or refuse to obey any orders or directions given by the said Commissioners, or through their officer, pursuant to the directions of this Act, it shall and may be lawful for the said Commissioners to close the account of the trustees of such Savings Bank, and to discontinue the keeping of any further account with the trustees of such Savings Bank, and to direct that no further sum shall be received at the Bank of England or at the Bank of Ireland from the trustees of such Savings Bank to the account of the said Commissioners. Provided always that it may be lawful

for the said Commissioners to re-open such account, and to allow the growing interest of such account during the time of such discontinuance, and to authorise the receipt of money at the Banks of England or Ireland, whenever such Commissioners shall think fit to do so upon such trustees complying with the directions of such Commissioners or their officer. "The 48th section directs that from and after the passing of this Act the following accounts shall be prepared by said Commissioners, and shall be laid before both Houses of Parliament on or before the 25th March, each year; that is to say, the accounts made up to the 20th November next preceding, of all sums received and credited, including interest; and of all sums paid on account of the trustees of the several Banks of Ireland." Such were the duties of the defendants, prescribed by the Act of 9 Geo. 4, c. 92; and it is therefore submitted that the Commissioners are a corporation for the purposes of the Savings Banks.

May 8.—PIGOT, C.B., said that the Court had considered the case, and were of opinion that this motion must be refused. The question, however, was one of considerable difficulty; this difficulty arose from the ambiguous expression used in the Savings Banks Acts. Those Acts imposed certain responsible duties on the Commissioners for the Reduction of the National Debt with respect to the Savings Banks, and the Commissioners, though not a corporation for other purposes, might be so with respect to the Savings Banks. This body, however, wanted an essential requisite of a corporation—namely, perpetual succession. The succession of the Commissioners could not last longer than the paying off of the National Debt, and when that object shall have been achieved, the body must cease to exist.

Landed Estates Court.

[Reported by C. J. Manning, Esq.]

[BEFORE JUDGE HARGREAVE.]

IN THE MATTER OF THE ESTATE OF WILLIAM HASTINGS GREENE AND WILLIAM WARREN HASTINGS GREENE, OWNERS; JANE GREENE, PETITIONER.

Nov. 24, 25, and Dec. 4, 1863.

Settlement—Construction—Portions, when raiseable—Nature of power of acceleration—Interest.

A tenant for life under a marriage settlement, after having encumbered the life estate in the lands settled to its full value, cannot charge the remainder limited by the settlement to his eldest son by accelerating the payment of portions provided for younger children, or burden that remainder with interest accruing in his lifetime. Such charge nevertheless would be valid in case the incumbrances on the estate for life should be paid off, but the tenant for life would be bound to keep down the interest.

Held, that such power of acceleration is a power appendant to the life estate.

THE facts of the case were as follows:—By a settlement, dated 22nd January, 1862, made between William Greene, 1st part; William Hastings Greene, 2nd part; Dominick Sarsfield Greene and Mary Sarsfield Greene, of the 3rd part; John Dean and John Freeman, 4th part; George Tushill and John Edwards, 5th part; and John Bolton Massey and Thomas Rochfort, 6th part; being the settlement on the marriage of the said William Hastings Greene and Mary Sarsfield (the petitioner's father and mother), the said William Hastings Greene and Mary Sarsfield conveyed (*inter alia*) the lands of Grenane and Jerpoint, in the county of Kilkenny to John Deane and Joseph Greene and their heirs, to the use of John Bolton Massey and Thomas Rochfort for the term of 500 years, and subject thereto to the use of said William Hastings Greene for his life, and after his decease to secure a jointure of £500 a year for said Mary Sarsfield for her life in case she should survive said William Hastings Greene, and subject thereto to the use of the first and other sons of the said William Hastings Greene by the said Mary Sarsfield successively in tail male, with remainders over. And it was thereby declared that said term of 500 years was limited to the said John Bolton Massey and Thomas Rochfort to secure the said jointure of £500 for the said Mary Sarsfield; and upon the further trust that in case there should be one or more child or children of the said William Hastings Greene and Mary Sarsfield, besides an eldest or only son, then the said John Bolton Massey and Thomas Rochfort, and the survivor of them, and the executor and administrators of such survivor and their and his assigns, should after the decease of the said William Greene and William H. Greene, and the survivor of them, or after the decease of the said William Greene and in the said William Hastings Greene's lifetime, with his consent in writing, by mortgage, sale, demise, or other disposition of the aforesaid lands and premises, or out of the rents and profits thereof, raise and levy or borrow for the portions of such younger child or children a sum of £10,000, late Irish currency, to be paid to and become a vested interest in such child or children at such ages, days, and times, and in such shares, and subject to such charges, conditions, and limitations as the said William H. Greene should at any time or times by deed, or deeds, or will direct, limit, and appoint: and in default of such appointment, then, as therein mentioned, and in case any such younger child, being a son, should attain the age of twenty-one years, or, being a daughter, should attain that age or marry in the lifetime of said William H. Greene, then payment of his, her, or their share or shares to be postponed until after the decease of said William H. Greene unless he should by deed or writing under his hand and seal consent that same should be sooner paid. And it was thereby provided that no demise, sale, or mortgage of said term of 500 years should be made for raising such portions for younger children until after the decease of the said William Hastings Greene, without the consent in writing of them or the survivor of them under their and his hand and seal; and also some one of said portions

should be payable as aforesaid unless with such consent as aforesaid, *but that the rents and profits of said lands only should be applicable to said trusts.* The said marriage was duly solemnized, and there was issue thereof an eldest son, William Warren Hastings Greene and two younger children, Dominick Sarsfield Greene and petitioner, Jane Greene, all of whom are still living and have attained their ages of twenty-one years. The said William Greene died in or about the year 1829, and the said William Hastings Greene, the petitioner's father, and Mary Greene, otherwise Sarsfield, her mother, are both still alive, the former aged sixty-eighth, and the latter sixty-two. By deed poll, bearing date the 4th day of March, 1847, the said William H. Greene, in order to make a provision for petitioner, and in exercise of the power given to him by said settlement of 22nd January, 1822, appointed to petitioner a sum of £3,000, late Irish currency. And the said William H. Greene *did thereby consent, authorize, and direct* the said J. Bolton Massy and Thomas Rochfort as such trustees as aforesaid *forthwith to raise said sum of £3,000 sterling* by mortgage of a competent part of said estates, and to pay same to the person or persons who should be entitled thereto pursuant to the said appointment. By one other deed poll, bearing date the 14th day of April, 1849, the said William H. Greene, in further exercise of the aforesaid power of appointment, appointed to petitioner a further sum of £2,538 9s. 2d. sterling, making, with the aforesaid sum of £3,000 sterling appointed to her by said deed of the 4th day of March, 1847, a sum of £5,538 9s. 2d. sterling, equivalent to a sum of £6,000, late Irish currency; and the said William H. Greene thereby appointed unto the said Dominick S. Greene a sum of £3,692 6s. 1½d. sterling, being the residue of said sum of £10,000 late Irish currency. And the said William H. Greene thereby directed said sums, and also said sums of £3,000 so appointed to petitioner by said deed of the 4th March, 1847, to be immediately raised and paid, together with interest thereon respectively at the rate of six per cent. from the date of said deed; and said William H. Greene thereby consented, authorized and directed the said Bolton Massy, as surviving trustee of said term of 500 years, to raise by sale or mortgage of all said estates said several sums and pay the same to the persons respectively entitled thereto. The said Thomas Rochfort died, leaving the said John Bolton Massy, his co-trustee, him surviving; and said John Bolton Massy is still living and is now the trustee of said term of 500 years created by deed of 22nd January, 1822, for raising said sum of £10,000, late Irish currency. No interest has been paid to petitioner on foot of her said portion of said sum of £10,000 late currency; and a sum of £2,865 sterling or thereabouts was due and owing to her for interest on said sum of £3,000 sterling appointed by said deed of 4th day of March, 1847, up to 4th day of February, 1863; and a sum of £1855 6s. 4d. sterling or thereabouts was due to her for interest on said sum of £2,538 9s. 2d., to which she was entitled by virtue of said deed of the 14th day of April, 1849, up to the 14th day of February, 1863.

The affidavits filed by the different parties interested in opposing a sale of the lands in this

Court, stated that the said William Hastings Greene incumbered his life estate to an amount far exceeding its value; and a receiver was appointed in the year 1859 at the suit of certain creditors of the said William Hastings Greene, which receiver is still in receipt of the rents and profits. In the year 1847 the said William Hastings Greene being much embarrassed in his circumstances, and being desirous of raising a sum of money, applied to one William S. Vance, a solicitor, in Kilkenny, for that purpose; and Vance proposed that, as the life estate was so heavily incumbered, William Hastings Greene should raise £3,000 by appointing that sum to Jane Greene under the power of appointment of £10,000 contained in the indenture of 22nd January, 1822, and advised that it would be necessary that her consent should be obtained for that purpose. With a view to carry out this arrangement Vance prepared a draft deed of appointment of £3,000 by William Hastings Greene to Jane Greene, which was executed on the 4th day of March, 1847, by William Hastings Greene; and the sum of £3,000, portion of the £10,000, was appointed to Jane Greene as and for her portion of fortune; and she thereby consented, authorized, and directed John Bolton Massy and Thos. Rochfort the trustees of the term of 500 years, forthwith to raise the £3,000 and to pay over the same to the person or persons who should be entitled thereto by virtue of the appointment. In the deed was contained a proviso that the appointment thereby made was not to prevent any further appointment of any further portion of the £10,000, or to prevent Jane Greene from taking a share of the residue thereof in default of appointment. No steps had been taken to raise the £3,000, or any sum on the security of said deed of appointment. By deed, bearing date, the 14th April, 1849—after reciting the said last-mentioned deed, and that after deducting the sum of £3,000 from the sum of £10,000, late currency, equivalent to £9230 15s. 4½d., present currency, there remained a sum of £6230 15s. 4d. still unappointed; and that William Hastings Greene being then desirous to appoint said sum between his younger children in sums that would give to D. S. Greene a sum of £3,692 6s. 1½d., present currency, equivalent to £4,000 late currency, and to Jane Greene a sum of £6,000, late currency, in pursuance of the power contained in the settlement—William Hastings Greene, by said deed of the 14th April, 1849, affirmed and ratified said last-mentioned deed of the 4th March, 1847, and gave and appointed a further sum of £2538 9s. 2d., part of said sum of £10,000 like currency, to Jane Greene, said two sums making together the sum of £5,538 9s. 2d., present currency, equivalent to £6,000, late currency, as and for her portion of said sum of £10,000, late currency; and he further appointed to D. S. Greene the sum of £3,692 6s. 1d., present currency, therein stated, to be part of and the residue of said sum of £10,000, late currency, as and for his portion thereof, said several sums to be immediately raised and paid, together with interest thereon at six per cent. from the times therein mentioned, that is to say, as to the sum of £3,000 appointed to Jane Greene by said deed of the 4th March, 1847, to be paid from the date of that deed; and as to the said sums of

£2,538 9s. 2½d., and £3,962 6s. 1½d. from the day of the date of the deed of the 14th April, 1849. The last-mentioned deed was registered on 4th May, 1849. The witnesses to the execution of said deed of the 4th March, 1847, having died before its registration, same was re-acknowledged by Greene shortly after the execution of the deed of the 14th April, 1849, and registered on the 31st day of May, 1849. Jane Greene never took any steps to raise either of the sums so appointed by said deeds until the present year, when she presented a petition to the Landed Estates Court, Ireland, to sell the reversionary estate in said lands, subject to the life estate of said William Hastings Greene and said jointure of £500 per annum; and by the schedule attached to petition she claimed the sum of £3,000 as if validly appointed to her by the said deed of the 4th March, 1857, with interest thereon, at the rate of six per cent. from that to the present time, and claimed same as the first charge on said lands and in priority to the sum so appointed to herself and D. S. Greene by the said deed of the 14th April, 1849; and she also claimed the said sum of £2,538 9s. 2½d. under the said last-mentioned deed, with interest thereon from the day of the date of the said last-mentioned deed; and by said schedule she appeared as an incumbrancer for the sum of £3,692 6s. 1½d. in equal priority with the said sum of £2,538 9s. 2½d. The said deed of the 4th March, 1847, having been executed under the circumstances hereinbefore mentioned was void; and that the said deed of the 14th day of April, 1849, did not in any manner operate to ratify or confirm same; and that said deed of the 14th April, 1849, did not validly appoint said sum of £3,000, and that the said sum must be now treated as unappointed.

The affidavits of Jane Greene in reply denied all knowledge of the alleged arrangement as to raising the £3000, or that the same was to be executed in her favor by William Henry Greene to enable him to raise £3000 for his own purposes; but on the contrary that her father at all times represented to her that the sums which he had so appointed were intended as a provision for her and for her own exclusive use and benefit. The said William Hastings Greene never informed her either previous or subsequent to the execution of said appointment of 4th March, 1847, that he had executed the same for the purpose of raising for his own use the £3000 thereby appointed to me; and that it never was suggested by the said William Hastings Greene that the said appointment was made as an expedient or with the object of enabling him to raise money for his own benefit.

Chatterton, Q. C., (with him Jellett).—An examination of the settlement shows that the remainder expectant on the life estate is charged with the portion of Jane Greene; and as the portion is now raiseable, and is carrying interest, she is entitled to an immediate sale. The deed imposes no restriction as to the trustees raising the charge. In the case of *Codrington v. Lord Foley* (6 Ves. 364), the rule was laid down that it depends upon the particular penning of the trust, and a fair construction of the whole instrument as to the intention. Upon a limitation to the parent for life with a term to raise portions at 21 or marriage, if there is nothing more, and the interests are vested, and the contingen-

cies have happened at which the portions are to be paid, upon the general rule the interest is payable, and the portions must be raised by sale or mortgage of the term. See also *Smyth v. Foley* (3 Young & Coll. Exch. C., p. 142); *Lygon v. Lord Coventry* (14 Sim., p. 41); *Noel v. Henley* (1 Coll., p. 59); *Foljambe v. Wilbye* (2 Sim. & S., 165); *Kelly v. Kelly* (4 Dru. & W., 40). The case of *Lloyd v. Massey* (11 Ir. Eq. Rep.) would be cited on the other side, but it is distinguishable. There the term was in present, and the case turned solely on the language of the settlement.

Warren, Q. C., contra, for Hugh Greene, a creditor by mortgage affecting the remainder.—It was intended the term should be sold in possession, and not in reversion. The amount of the portions would have been much less, if it had been intended to raise them by a sale of the reversion. In the case of *Lloyd v. Massey* it appeared that H. Massey died in 1849, and a cause petition was filed to raise the charge with accumulated interest from the marriage of daughters, and not merely from the death of Hugh Massey. On appeal the judges differed. Then the case went to the House of Lords, which held that accumulated interest was not raiseable.—See 9 Eng. Jur., 391; 4 Clark & Finnelly, 277. This present case is the same, for here William H. Greene and his mortgagees are cestui que trusts of the term.

Lawless, Q. C., for M'Dowell, manager of Tipperary Bank, the earliest mortgagee of the remainder, called attention to the trusts of the term, "or out of rents and profits," &c. William H. Greene is a party to the two mortgages dated 15th April, 1848, and 25th November, 1850, by William H. Greene and W. W. H. Greene to James Sadleir, and assigned to his client the Tipperary Bank. These mortgages charge the inheritance, and how could he afterwards throw interest on the inheritance? In the ordinary case of a reversionary term, the onus is thrown on the reversion *ab initio*, and by express contract, and it is to be presumed the amount of the portions is regulated accordingly.

O'Donnell, Q. C., for Rev. A. Browne and Nixon, creditors by judgment on the life estate, and mortgagees affecting the life estate and the remainder.—The term is in possession, and there is no authority for carving out of it future interest.

Exham, Q. C., (with him Richards) for William W. H. Greene, the remainder-man, and Dr. Nugent, a joint creditor.—The contract is to raise out of a term in possession, at all events it is expedient not to sell.

Jellett in reply, for petitioner. Nugent is a mere judgment creditor, and has no *locus standi* here. As to the Tipperary Bank and counsel's argument in reference to rents and profits, the trustees have an absolute discretion. The power in the settlement is not a mere power appendant, but of a double aspect, being partly in gross. It could not be destroyed or released as to the estate in remainder. If the trustees recovered the terms, they could raise the principal, and there would only be a personal equity in the tenant for life to keep down the interest. Cited *Lyddon v. Lyddon* (14 Ves., 558); *Bruen v. Berkeley* (2 P. Wms., 484); *Lyons v. Duke of Chandos* (3 Atkyns, 416); *Cotton v. Cotton* (note, 5 Yo. & Coll. Exch., 149).

JUDGE HARGREAVE.—The question which has arisen in this case has its origin on the settlement of certain estates in Co. Kilkenny now sought to be sold, executed on the 22nd January, 1822, on the occasion of the marriage of William Hastings Greene, and certain deeds made in exercise of a power contained in that settlement. The settlement itself was effected by the exercise of a joint power of revocation and new appointment vested in William Hastings Greene and his father under a previous deed of 1816; and by means of that power the lands are limited (after the solemnization of the marriage) to the use that William Greene, the father, should receive thereout during his life an annuity of £500, and his wife, after his decease, a jointure of the same amount, and subject thereto, to the use of trustees for 200 years, and subject to that term and its trusts, to the use of other trustees for 500 years, and subject to that term and its trusts, to the use of William Hastings Greene for life, with remainder to trustees during his life, to preserve contingent remainders, with remainder to use that the intended wife should receive a jointure of £500 per annum, and subject thereto to the use of the first son of the marriage in tail male, with remainders over. The trusts of the term of 200 years are then declared, and they were to secure the annuities given to William Greene and his wife. Then follow the trusts of the term of 500 years, which are, first, to secure the payment of the jointure of £500 a year for the intended wife in case it should become payable, and upon the further trust that in case there should be any children of the marriage besides an eldest or only son, the trustees should, after the decease of William Greene and William H. Greene, and the survivor, or after the decease of William Greene and in the lifetime of William H. Greene, with his consent, under his hand and seal, by mortgage, sale, demise, or other disposition of the term, or any part thereof, or out of the rents, or by any other means, levy and raise for the portions of such children the sum of £10,000 Irish currency, to be divided between them at such times and in such shares as William H. Greene should appoint, and in default of appointment to be divided equally between them, the shares of sons to vest at 21, and those of daughters at 21, or marriage, but if such vesting should take place in the lifetime of William H. Greene, the payment to be postponed until after his decease, unless he should by deed give his consent that the same or any of them should be sooner raised or paid. Then follow clauses of hotchpot maintenance and survivorship, and a proviso that no sale or mortgage of the term should be made for raising such portions until after the decease of William Greene and William H. Greene, and the survivor of them, without their or his consent in writing, and also until some portion should become actually payable, but the rents only to be applicable to the purposes of the term; and then comes the final trust of the term in favour of the person entitled to the next estate in reversion, and the usual clause of cesser. The marriage took place, and there were issue three children, viz., William Warren H. Greene, the eldest son, and Dominick Sarsfield Greene and Jane Greene. William Greene died in 1829, and his wife is also dead; and in the year 1847, William Hastings

Greene, by a deed poll, appointed £3,000 sterling, part of the £10,000 Irish, to his daughter, Jane Greene, and he directed the trustees of the term to raise that sum forthwith; and by another deed poll, dated 14th April, 1849, he confirmed that deed, and appointed to Jane Greene a further sum of £2,538 9s. 2d. sterling, and he appointed £3,692 6s. 1d. sterling, being the residue of the charge, to his second son, Dominick S. Greene. He directed that the entire charge should be immediately raised, and should bear interest at 6 per cent until payment, and he directed the trustees forthwith to raise the sum [of £3,000] thereby appointed. Miss Anne Greene being thus entitled to a large share of the charge of £10,000, presented her petition to this Court for a sale of the lands, and would have obtained such relief as a matter of course but for a circumstance to which I must now advert. It appears that William H. Greene, at various periods from the year 1826 to the year 1847, conferred judgments of a very large amount in the aggregate, some of them for debts which were also secured by mortgages of his life estate. Now, the first deed-poll under which the petitioner, Jane Greene, claims the right to immediate payment, was not registered until the 31st of May, 1849, and so far as that deed-poll affects the life estate of William H. Greene, it is postponed as to its effect to a mortgage now claimed by Mr. M'Dowell as official manager of the Tipperary Bank, and, therefore, to all the judgments which are prior to that mortgage. In short, in the present state of the incumbrances affecting William H. Greene's life estate, the deeds of 1847 and 1849 were and still are practically inoperative to charge the life estate, by reason of the very large amount of incumbrance with which the tenant for life had previously charged it, and which incumbrances still subsist. The consequence of these circumstances was, that at the instance of the creditors in the life estate, the Court on a former occasion, in the exercise of its discretion, refused to make any sale, on the petition of Jane Greene, which would have the effect of turning the life estate into a gross sum of money, to the detriment of the paramount creditors upon it, who preferred to retain it *in specie* under a receiver. Having thus virtually lost the life estate as an available security for her charge, Miss Greene now contends that at all events the remainder expectant on that life estate is charged with her portion, and that as the portion is now raiseable, and is carrying interest, she is entitled to an immediate order for the present sale of that remainder. Against a conditional order to that effect cause is now shown by the remainder-man, William W. H. Greene, and various mortgagees and judgment creditors upon his estate, which has been enlarged into an estate in fee. The point at issue is one of great importance to both parties. It has been discussed very fully and ably on both sides, and I believe all the cases bearing on questions of this nature were cited and commented upon. These cases are of two classes; an example of one class is *Codrington v. Foley* (6 Ves., 380), in which it is held that a portion must be raised by sale of a reversionary term, because by the express terms of the settlement it is actually raiseable, and there is nothing upon which it is charged, or out of

which it can be raised except the reversionary term. In cases of this sort, the parties to the settlement understand that the term may require to be sold before it comes into possession; and, knowing this, it is to be presumed that they fix the amount of the portions with a view to that possibility, and they take care that it is not more onerous upon the remainder-man than they actually intend it to be. A specimen of the other class of cases is to be found in *Lloyd v. Massey* (9 Jur., N. S., 391) as ultimately decided. There the circumstance that the whole of the rents and profits were appropriated during the existence of a life leaving no fund out of which interest could be paid during that life was considered as demonstrating the intention of the parties that interest was not to be charged and accumulated against the remainder-man. The present case does not fall accurately into either of these classes; and the point which I have to rule is not exclusively one of construction, but depending also on the application of equitable principles. The primary intention of the parties to the settlement of 1822 no doubt was, that if William H. Greene made the portions payable in his lifetime, he out of his life estate should (as he would be equitably bound to do) pay the interest of the charge, or of any mortgage made to raise it; or if it was raised by a sale, that he should lose the rents of the part of the estate so sold. The main question is, was it competent to William H. Greene, after having pledged his life estate to its full value, and thus got its value in his pocket, to exercise the power of acceleration, when the only effect of that exercise is to burden the remainder of his eldest son, with the interest accruing during his lifetime. I think this power of acceleration, vested, as it is, in the tenant for life, is a power appendant to the life estate. Its exercise affects the life estate primarily, but it also binds the remainder; and thereupon the life estate becomes the primary fund to pay the interest in relief of the remainder. Should the life estate prove insufficient to pay the interest, in consequence of the estate being wholly or partially unproductive, the arrear of interest will be a valid charge on the remainder; but if from any cause the interest is not paid by the life estate, the remainder-man can in such case get a receiver over it, and thus protect his own estate. That being so, is it competent for a tenant for life to sell the life estate, and then, having made away with and put into his own pocket the primary and indemnifying fund, to charge the reversion by accelerating the payment of the portions? It appears to me that it would be inequitable for him to be allowed to do so. The sale of the life estate would extinguish the power which is appendant to it; and as the power could not afterwards be exercised against the purchaser of the life estate, so neither could it be exercised against the remainder-man. Now, if the power can be released by express terms, or extinguished by any act of the tenant for life, which necessarily implies such extinguishment, such as a sale of the life estate, so it may be postponed in its operation and effect by any previous act of the tenant for life which would make it inequitable for him to exercise it. In the present case it has been held that so long as the mortgages and the judgments prior to them exist and affect the life estate,

the power of acceleration cannot be exercised so as to weaken their security on the life estate. Mortgagees having the security of the life estate by the express contract of the tenant for life, are clearly entitled to hold their security against the petitioner who derives under the voluntary act of the mortgagor. Judgment creditors having no contract for the security of the life estate have no such equity, but they can make use of the equity of any mortgagee who is pious to them. The life estate is thus in effect aliened by the tenant for life; the remainder-man's indemnity is put into the pocket of the tenant for life, who then proceeds to exercise the power at the exclusive cost of the remainder-man. This appears to me to be contrary to equitable principles, and to produce a result not at all contemplated by the settlors at the time. The term was limited prior to the life estate, manifestly for the purpose of providing for the event of the portions becoming raiseable in William H. Greene's lifetime. Any contemplated sale or mortgage could only be of the term in possession, so as to burden all the successive owners rateably, and according to the extent of their interest. If the remainder-men became liable to a charge payable in the lifetime of the tenant for life, it must have been considered that he would have the life estate to resort to in order to keep down the interest. He could not be made liable to any such interest, except by the voluntary act of the tenant for life; and in equity such act ought not to be effectual against him, if the tenant for life has already made away with the life estate. The view which I take is this, that the power being appendant and not simply collateral, is entirely under the control and within the power of the tenant for life, either for the purpose of honestly exercising it, or releasing it, or suspending, postponing, or extinguishing it; and that such release, suspension, postponement, or extinguishment, necessarily flows from any act of the tenant for life which would make it inequitable for him effectually to exercise it. What has taken place here is the suspension of the power, not in reference to its exercise (which I conceive in this case to be quite valid), but in reference to the operation and effect of such exercise. That suspension of effect may be removed by Mr. Hastings Greene paying off his creditors from other resources, or even by removing such an amount of incumbrance as would leave the life estate free in so much of the property as would provide for the payment of the charge. The suspension may become a total extinguishment of the power, and the annulling of any previous exercise of it, if any mortgagee should sell the life estate either under a power, or by the process of this Court or the Court of Chancery. In the meantime pending one or other of these results, the suspension of the power is at present so complete, that I cannot give effect to its exercise by selling the reversion, any more than I was able to do by selling the estate in possession. I have stated the result of my consideration of this case, without professing to discuss in detail the various arguments used at each side by counsel. The principal question is, What is the nature of this power of acceleration. The petitioner contends that it is to be treated as if it were vested in a third party; that it is, therefore, simply collateral, and cannot be released,

extinguished, or otherwise affected as to its exercise. I am satisfied, however, that the power is appendant, just as a power of leasing vested in a tenant for life, who by its exercise binds both his own life estate and all estates coming after him. All the rest follows, if this proposition of law be established. There was also another view of the case put forward on behalf of creditors whose demands affect both the life estate and reversion, though indifferent priorities. It is contended that William H. Greene could not, after joining his son in a mortgage of the inheritance in possession, exercise this power at all to the prejudice of the mortgagee, either by charging the life estate or by charging the reversion, so as to bring about its immediate sale. I think this argument would have some influence on the discretion of the Court if used by a creditor who has, by a joint contract with the father and son, a mortgage affecting the entire estate in possession. A judgment creditor, however, can use no such argument, for he does not acquire any security by contract; and there would be no breach of contract in diminishing the security by the exercise of a power of charging. I also wish to add a few words in reference to an argument on behalf of the petitioner, to the effect that, although the remainderman is deprived of the indemnity of the life estate, yet that he may, on the death of the tenant for life, have recourse to his assets as a simple contract creditor for the amount of arrears of interest suffered to accrue against him. I think the parties to the settlement, especially those who contract for the eldest child of the marriage, did not contemplate this kind of indemnity, but intended that the estate for life should bear the interest, and should remain in a condition to do so unaffected by any acts of the tenant for life. I allow the causes shown. As to costs, all the parties showing cause represent only one estate, the remainder. Petitioner must pay one set of costs, which I think ought to be paid to the earliest mortgagee of the remainder who has shown cause, namely, Mr. McDowell, Official Manager of the Tipperary Bank.

Cause allowed.

Consistorial Court of Dublin.

THE OFFICE PROMOTED BY THE REV. LAUNCELOT
DOWDALL v. REV. JAMES HEWITT—Dec. 5.

Offertory—Proprietary chapels—Alms—Napier's Act.

The alms collected, whether at the offertory or during divine service, in a proprietary chapel, not having a district assigned to it, belong as of right to the rector of the parish in which the chapel is situated, to be disposed of as he and the churchwarden shall direct, and that notwithstanding Napier's Act, 14 & 15 Vic., c. 72.

THE facts of this case will sufficiently appear from the

judgment of the court. The question arose on the admissibility of the articles.

Dr. Walsh, Q.C., advocate for the promovent.

Dr. Ball, Q.C., advocate for the impugnant.

DR. BATTERSBY, Q.C., V.G.—This is a suit promoted by the Rev. Launcelot Dowdall, rector of the parish of Rathfarnham, against the Rev. James Hewitt, incumbent or perpetual curate of Zion Church Rathgar, in the same parish, to compel the latter to pay over the alms collected in said church according to law, and that he may abstain from misapplying same in future. The pleading states these alms to have been collected at the "offertory" as sacramental alms. No such proceeding as this has been taken in Ireland before, except in the case of *Mages v. The Bishop of Cashel*, and, from the statements made on the last court day, it would appear that the present suit had arisen not so much from a desire to settle the right to this offertory, as from the circumstance that, upon Mr. Hewitt's appointment to the perpetual curacy of Zion Church, he insisted on a title to discharge the duties of rector or some of them, throughout the whole parish of Rathfarnham, a title which Mr. Dowdall denied; and to prevent Mr. Hewitt getting a footing in the parish by having a district assigned to his church pursuant to the statute in that behalf, Mr. Dowdall refused to consent to the assignment of such district by the Archbishop, and commenced this suit. If Mr. Hewitt made such claim, he mistook his rights; for, as a curate with a district, he could not go beyond it, and, not having a district, as the fact is, he could not perform any of the offices of a minister, out of his own chapel, without incurring severe penalties. Mr. Dowdall, on the last court day, was willing that a district should be assigned to the Zion Church, and that the right to the offertory should be referred to the Archbishop. Mr. Hewitt postponed until this day his assent to or dissent from that proposition, and he now refuses it. The first question seems to be, What is the offertory? The term appears to signify both that part of the Communion Service which is read while the alms are being collected, and the alms then given. Rubrick, 2 Ed. VI., M. Gib. Cod. 474, It is said, "Whyle the clearks do sing the offertory, so many as are disposed shall offer to the poore mene's box, everyone according to his habilitie and charitable mynd." Ayliffe in his *Parergon*, 393, says:—"It was always the custom for the communicants to offer something at receiving the Sacrament, as well for holy uses as for the relief of the poor, which custom is, or ought to be, observed at this day." Before the Reformation, it appears that the priests of proprietary chapels were in the habit of taking these offerings to themselves, to the prejudice of the incumbent of the parish; and to prevent this it was provided by a legatine constitution of Othobon, Cardinal Legate, 52 Hen. III., A.D. 1267, quoted I Bolingbroke, E.L. 279, that—"When a private person desires a proper chapel and the bishop grants it for a just cause, yet he always uses to add, 'So that it be done without prejudice to the right of another.' And we, pursuing the same wholesome method, ordain and strictly charge that the chaplains ministering in such chapels as have been granted with a *saving* to the rights of the mother church, restore to the rectors of that church, without making any difficulty, all the oblations and other

things which ought to come to the mother church, if they had not intercepted them, and which, therefore, they cannot in justice retain. If anyone contemptuously refuses to do it, let him be suspended till he hath made restitution." The offertory was anciently for the use of the priest, but at the Reformation it was changed into alms for the poor—1 Burn, E. L., 370; Ayliffe Parergon, 394. Ayliffe says that this change was made by the statute 25 Hen. VIII., which abolished altar oblations to the priests; but however this may be, it is clear that at this day, according to the Rubric, "Money given at the offertory shall be disposed of to such pious and charitable uses as the minister and churchwardens shall think fit, wherein, if they disagree, it shall be disposed of as the ordinary shall appoint." Now, who are "the ministers and churchwardens?" Are they those of the parish church only? or are they the officiating clergymen and churchwardens of every chapel, included in the words of the Rubric? The Act of Uniformity, 17 and 18 Car. II., c. 6, s. 1, reciting that "as nothing conduceth more to the honour of God, the settling of the peace of a nation, which is desired of all good men, nor to the advancement of religion, than an universal agreement in the publique worship of the Almighty God, both Houses of Convocation had presented unto his Majesty's Lord Lieutenant one book, hereunto annexed, entitled, 'The book of Common Prayer,' &c. Therefore to the intent that the greatly desirable work of uniformity in Divine worship may be obtained, and that every person within this realm may certainly know the rule to which he is to conform in publique worship and administration of sacraments, and other rites and ceremonies of the Church of Ireland," it enacts that all ministers shall be bound to say and use the Morning Prayer in such order and form as is mentioned in the said "book." And by sec. 2, "every minister shall openly, publicly, and solemnly read the Morning and Evening prayer, by and according to said Book of Common Prayer; and after such reading, shall openly and publicly before the congregation there assembled declare his unfeigned assent and consent to the use of all things in the said book contained and prescribed on pain of deprivation." Now that "book," in the part relating to the Communion Service, provides that "whilst the sentences of the offertory are in reading, the deacons, churchwardens, or other fit persons appointed for that purpose, shall receive the alms for the poor, and other donations of the people, in a decent basin to be provided by the parish for that purpose." And, subsequently, that after Divine service is ended, the money given at the offertory, shall be disposed of as I before said. The law on this subject was fully considered and explained by Sir John Nichol, in the case of *Moysey v. Hillcoat*, (2 Hag, 30.) That was a suit promoted in 1828 by Dr. Moysey, rector of the parish of Walcot, to compel Dr. Hillcoat, owner and officiating minister of the chapel of Queen's-square, licensed on the nomination of the said Dr. Moysey, to pay over to said rector the money collected at the offertory in said chapel. The licence of Dr. Hillcoat was nearly in the same words as that of Mr. Hewitt, except that the former authorised the performance of "all ecclesiastical duties belonging to said office,"

which authority is not included in the licence to Mr. Hewitt; and the latter also excepts baptism and marriages. Dr. Moysey had himself acted as curate of the chapel, and as such received the various offerings while curate, which he afterwards claimed as rector from the succeeding curate. Dr. Hillcoat insisted that the sacramental alms received in the chapel had been constantly, since the opening thereof in 1733, at the uncontrolled disposal of the minister therein officiating and of the proprietors thereof. Sir John Nichol, p. 48, says, "*prima facie*, all parochial duties are committed to, and imposed upon, the parish incumbent, and all fees and emoluments arising from the performance of those duties, in like manner, belong to him. Of common right, all parochial dues, whether from tithes or other sources, belong to the presentee of the patron," and at p. 49, "chapels possess no parochial rights, unless acquired by a composition with the patron, incumbent, and ordinary. I am not aware of any chapels where the patrons or proprietors (forming themselves into a sort of joint-stock company) can appropriate a portion of the Church dues—p. 53. The nomination appoints Dr. Hillcoat to perform the office of officiating minister of Queen's Chapel, &c. There is nothing that appoints Dr. Hillcoat to the exercise of all parochial rights, to the cure of souls, and to the occasional administrations, in all parts of the parish, and it does not grant anything which belonged to Dr. Moysey as rector, neither the parochial duties, nor the surplice fees, nor the power of interfering and intromitting in all rights duties, and offices which had been committed to Dr. Moysey as incumbent of the parish—p. 54. The alms received during the reading of the offertory before the Communion are specially directed by the Rubric to be collected in a decent basin, to be provided by the parish which shows that the collection, wherever made, is a parochial matter, with which persons connected with a private chapel have no concern. Again, after the Divine service is ended, the money given to the offertory shall be disposed to such pious and charitable uses as the minister and churchwardens shall think fit, wherein, if they disagree, it shall be disposed of as the ordinary shall appoint. These directions as to the "parish" and the "churchwardens," who are officers of the parish and not of the chapel, lead me to construe the "minister" to mean "the minister of the parish," and they show that the Rubric intended that alms received at the Communion, as well as at private chapels in the parish church, should be at the disposal of the minister of the parish, and of the churchwardens, and should not belong to the officiating minister, nor to the proprietors of such chapel. In any view that I am able to take of this case, I cannot consider that this chapel has acquired any local rights at all encroaching on the parochial rights which belong to the parochial incumbent, beyond those to which he has directly and specifically consented, viz., the payment for accommodation by those who take pews. To the emoluments arising from those pews, Dr. Hillcoat, uniting both characters of officiating minister and sole proprietor, is entitled; but to them he is limited. Here is no district, no chapelry which connects any particular inhabitant with this chapel; here is nothing carved out of the parish, nor out of the parochial rights of the

rector. The general duties of the parish rest upon the rector; he is bound to perform them, and he is entitled to all the emoluments derived from them. This is the policy of the law, to keep these duties entire and simple, unless they have been subdivided and parceled out by competent authority"—p. 56. In Watson's Clergyman's Law, 311, referring to the statute of Uniformity, it is said:—"If in reading the Morning and Evening Prayers the minister shall stand or sit when he is directed to kneel, or kneel or sit when he should stand, or shall read them in other order than is appointed, or shall omit anything that is appointed to be read on certain days, or misplace the prayers in reading them, or read in one day what is appointed to be read on another, or do not celebrate and administer the sacrament in such order and form as is appointed, he is punishable by law; which shows that the Rubric must be implicitly obeyed. Mr. Hewitt's advocates admit that down to the passing of the Act 14 and 15 Vict., c., 72, in the year 1851, Zion Chapel would have been considered a proprietary chapel, as described by Sir John Nichol; but they say that this chapel, by sections 2, 23, and 27, is made a perpetual cure and benefice, and the officiating clergyman therein a perpetual curate and incumbent, and therefore, that he had acquired within his chapel all the rights which the incumbent of the parish and churchwardens previously had. But the words "incumbent" and "benefice" confer no right or power, and whether perpetual or temporary, the clergyman of a proprietary church is not a complete incumbent with all the attributes of a rector. The latter can baptize and solemnize matrimony, when admitted and instituted, without any special licence. (Watson's Clergyman's Law, 314). Mr. Hewitt can do neither, for these matters are expressly excepted from his licence, and he is but a curate, though a perpetual one, having authority to the extent of his licence but no further or otherwise. And even if he had a district assigned to his church under sec. 13, by s. 14 it is provided that "nothing therein contained shall be construed to discharge the incumbent of any such parish, a portion of which shall be included in any such district, or any other ecclesiastical person having cure of souls within the same, or his successors, from the cure of souls or other parochial duties in any such district, but which said cure of souls shall remain as heretofore." From which it plainly appears that the rector is not ousted of any of his rights by the appointment of a curate, though an independent one, to perform Divine service within the chapel, or even beyond it to the extent of his district, if a district be assigned him, which has not been done here. It is then urged that by sections 25 and 27, chapelwardens may be elected, who shall have the like authority within the said church or chapel as churchwardens in the case of a parish church have, and shall be competent to recover by all proper means and proceedings the pew rents, and other dues belonging to the said church or chapel; and that therefore the curate and chapelwardens are entitled to receive and distribute the offertory. These sections, however, do not mention the offertory as the English Act does, and they appear to apply only to the ordering of matters within the church, and to the recovery of pew rents and such things as may be legally recovered, but not to the offertory, which is

purely voluntary as a part of the ceremony, and cannot be recovered if refused by the communicants. It is to be observed, too, that, so far as appears upon the libel before the Court, no chapelwardens of Zion Church have been appointed, and the claim of Mr. Hewitt is, to receive this offertory himself, and to distribute it amongst his congregation as he thinks proper, without the assistance or control of any churchwardens or chapelwardens. This would involve a state of things wholly unknown to the Church. The congregation of Zion Church consists of the pewholders and the occupiers of free seats, without reference to, or any connection with, any particular parish or district. Mr. Hewitt cannot visit as clergyman, or go through any part of the parish in order to ascertain the state of the parishioners. Section 14 allows him "the care of the sick and other pastoral duties," only in case of a district being assigned to his church, and if he were to distribute the offertory where his licence confines him within his own chapel, he could only do so to such persons as might come there for alms, no matter from whence, unless he and his trustees and pewholders should think proper to divide it amongst themselves. A forcible argument against Mr. Hewitt's view of the statute arises from the English Act, 8 and 9 Vict., cap. 73, sec. 6, which provides for the appointment of churchwardens for district chapelries, and enacts that money given at the offertory at such churches shall be disposed of by the minister and churchwardens of such Church, in the same manner as the money given at the offertory at any parish church is by law directed to be disposed of by the ministers and churchwardens of such parish. There is no such provision in any Irish Act. Sec. 7 of the same English Act provides for the appointment of churchwardens for any new church without a district, and does not authorise them to interfere with the offertory, but enacts that if a district be assigned to such a church, they shall thenceforth have the same power as churchwardens appointed under the previous section; thus showing that the Legislature considered that, without express words to the contrary, the right of the rector and churchwardens to the offertory would continue in a parochial district, and that, in the case of a church without a district, it ought not to be taken from them. In the case of *Mages v. The Bishop of Cashel* (9 L. E. R., 319), before Lord St. Leonards, it appeared to have been conceded by all parties that offertory received in a proprietary chapel belonged to the incumbent and churchwardens of the parish, and not to the curates or trustees; but the case went off on another point. The case of *Reg v. Poor Law Commissioners* (2 J. and S., 721) has been relied on as showing that the ministers of a district church is the minister meant by the Rubric. It seems to me to point the other way, and to show that in such a case the rector of the parish continues rector of the district, with all his original rights and privileges, except only the right in the curate to officiate in the district. In that case the district of Grangegorman was made a "separate and distinct district or parish," under the statute 7 and 8 Geo. IV., c. 43, s. 23-4-5-6; and by s. 29 it was enacted "That every such district or new parish to be formed under the authority of that Act shall have all parochial rights by law appertaining to any parish for the purposes in that act mentioned,

and for all other purposes whatever in like manner, to all intents and purposes as other parishes may by law be entitled unto; and that every such district or new parish shall be discharged and exempted from all claims and charges whatsoever as part of any former parish or parishes, saving, nevertheless, to the rectors or incumbents of the several adjoining parishes and their successors, all their rights as rectors or incumbents of the respective portions of such districts." Napier's Act does not contain any such terms as the foregoing, nor does it anywhere profess to confer upon the curate a parish or parochial rights, and yet in that case it was held that under the poor Law Act, 1 and 2 Vic., c. 56, which provides that in the appointment of a chapel, preference should be given to some clergyman of the Established Church officiating within the parish in which the workhouse should be situated, the rector or vicar of the original parish continued to be the principal clergyman "officiating" within the district or the parish, and the person responsible for the due administration of spiritual duties towards the inmates of the poorhouse, and that, upon the refusal of the perpetual curate, the curate of the parish was entitled to the appointment. The Court of Queen's Bench thus taking the same view of the subject as Sir John Nichol, I cannot see any privilege or power in a perpetual curate, under Napier's Act, which the curate before Sir John Nichol had not. Both derive authority from the bishop's licence, and from that only. Of the two, the licence of the former was, if anything, the more comprehensive; and I am bound by the authority of that eminent judge. But, taking the judgments of the two courts together, it is plain that both looked upon the incumbent of the parish as still continuing rector of that part of the parish within which the new church is, and, as such, minister for all matters not expressly taken out of his control by statute, which the offertory was not; and, therefore, he, as such minister, and the churchwardens of the parish, are the persons to dispose of the offertory, whether collected in the parish church or in other churches or chapels within the parish. On this motion the Court has no power to do more than either admit the pleading to proof or reject it. But it is clear, and, indeed, admitted by the advocates on both sides, that down to the year 1851, the curate of a proprietary chapel could not interfere with the neighbouring parishioners, nor take to himself, or for his own purposes, the money contributed at the offertory. For the reasons already given, it appears to the Court that the law continues the same now as it was before in the case of the curate of a proprietary chapel, without churchwardens and without a district, such as Mr. Hewitt appears to be. The apparent object of the law is to leave the rector of a parish to discharge the duties of it upon his own responsibility and without the interference of other persons, who might, perhaps, be gifted with more seal than discretion; and for this reason even the bishop, without the consent of the incumbent, cannot authorize any clergyman to interfere in his parish. Whether the law in this respect be wise, it is not for this Court to say; but, being as it is, this motion must be refused with costs, and the libel admitted to proof, and a day assigned to Mr. Hewitt to answer it.

Court of Bankruptcy & Insolvency.

[Reported by John Levy, Esq., Barrister-at-Law.]

[BEFORE LYON, J.]

RE ALEXANDER HALL.—Nov. 1863.

Partnership—Carrying on trade with a view to test if it would be profitable; and if so, then to form a partnership.

Where H. carried on an extensive wholesale woollen trade in Dublin, wholly on his own account, had agreed with M. to become the manager and partner in a separate and larger concern which had been conducted by and belonged to M. in Huddersfield; and a portion of the agreement was that M. should come to Dublin, and there superintend the separate trade which was carried on in the name of H., though on no definite or conclusive agreement, but with a view to test its capacity and determine was such separate trade worth being carried on. Held—That although the Dublin house was not carried on as an adjunct to or part of the co-partnership constituted in the Huddersfield concern, and although he did not intend to commit M. to a partnership with him in the Dublin trade, yet that M., by thus superintending, became in fact a partner in such trade; and that a claim made by the executors of M. to be admitted as creditors on the estate of H. for goods sold and cash supplied by the Huddersfield concern to the Dublin concern should be disallowed, but without prejudice to any claim the executors might have under any special agreement with H.

THE facts of the case were as follows:—The late Mr. Thomas Mallinson and the bankrupt, Hall, who traded in William-street, Dublin, as a woollen merchant, were brothers-in-law. Mallinson had been the member of an old established firm at Huddersfield, which had for many years traded with very considerable success as wool factors and wool merchants, under the name of George Mallinson & Sons. In 1860 the health of Mr. Mallinson began to fail; and his medical advisers ordering a change of air and residence, negotiations were entered into by him with Hall, with a view of getting him to become a partner in and undertake the management and control of the Huddersfield business in both concerns. Ultimately an arrangement was come to on or about the 1st of July, 1861, whereby it was agreed upon that Hall should undertake the management of the Huddersfield concern at £500 a year salary, and that he should be admitted a partner in the Huddersfield concern and be entitled to a moiety of the profits without bringing in any capital. In pursuance of this arrangement Hall went to reside in Huddersfield in Mallinson's house; and Mallinson, who

had been previously anxious to find a suitable residence in Leamington, took possession of Hall's house in Fitzwilliam-street, Dublin, and came to reside there with his family. Hall, previous to his departure for Huddersfield, executed a power of attorney in favour of Mr. William Blood, empowering him to accept and endorse all bills on his behalf, and to manage the William-street business. The William-street house, previous to this arrangement, stood indebted to the house of Mallinson & Sons in the sum of £4729 for goods sold and delivered and cash advanced; and Mallinson had also become surety for the bankrupt, his brother-in-law, for about £10,000. Mallinson came to Dublin on the 17th July, 1861, and went to reside at Hall's house in Fitzwilliam-street, where he remained up to the 17th April, 1862, when his health became so extremely bad that he was obliged to remove to Malvern, where he died, in the early part of 1863. Mallinson, during his nine months' residence in Dublin, was in the habit of going over to Huddersfield and taking his place as a member of a banking company there about once in each month, and during the remainder of the time he went down to the place of business in William-street, wrote letters in the office there, and gave advice and suggestions to Blood, the manager, who acted under the power of attorney given by the bankrupt, and thus took part in the superintendence of the William-street concern. On the death of Mallinson the William-street concern, which had been at the time of the partnership and for some years previously in a sinking condition, found itself unable, without his aid, any longer to meet its engagements; and on the 7th day of May, 1863, a petition was filed by the bankrupt under the arrangement clauses of the Irish Bankrupt and Insolvent Act; and in that petition he stated that the sole trade was carried on by him in William-street; and he attributed his inability to discharge his engagements to his not having been able to give his personal superintendence to his Dublin business. On the first meeting that took place before the Court on the 2nd day of June, 1863, the bankrupt was examined by counsel on behalf of creditors when he stated that on his leaving for England he left the management of his business in Blood's hands, and most positively denied that there was any partnership between himself and Mallinson in the Dublin business, or that Mallinson ever had any interest, or in any way agreed to participate in the profits of such business. At that meeting, on the application of the executors of Mallinson, who expressed themselves dissatisfied with the conduct of Hall, the proceedings were adjourned into bankruptcy. The schedule filed in the bankruptcy was the same that was filed in the arrangement proceedings; and the assignees, with a view of questioning the statements therein as to his being solely interested in the William-street house, took out a meeting for the examination of witnesses before the chief registrar on the 18th of July, 1863. Mr. Sloan, one of the executors of Mallinson, attended at the meeting with books, witnesses, and documents, and instructed counsel to attend and examine the witnesses who might be produced by the assignees. The chief registrar, however, decided, as the assignees had determined to have the meeting a private one, he was bound to exclude the counsel for the executors of Mal-

linson, and would not allow him to attend or cross-examine the witnesses. Counsel therefore lodged a written protest against this ruling. Several clerks in the William-street concern were then privately examined by the assignees, some of whom deposed that Mallinson, during his stay in Dublin, had taken an active part in controlling and managing the business there. Hall himself was examined, and there stated that it was Mallinson's wish to go into the Dublin business, but that he (Hall) objected until Mallinson saw its working for twelve months, at the end of which time, if Mallinson thought it worth while, he was to have half the profits so made during the twelve months of trial if profits there were. Hall also stated that if there was no partnership formed in the Dublin business at the end of twelve months Mallinson was to get no profits. On the next day Hall, with the assent of the assignees, verified in Court the schedule filed by him; his final examination was passed without objection, and he obtained his certificate. The executors of Mallinson filed a proof according to the course of the Court for the sum admitted by the bankrupt's schedule to be due to them; and the assignees obtained liberty from the Court to file a discharge by way of answer or set off to that proof, and in that way the case came before the Court for argument.

Heron, Q.C., Patrick Martin with him, relied on the fact that the Dublin house had always been carried on as a separate and distinct business by the bankrupt under the name of Alexander Hall; and that the books and balance-sheets showed that there was nothing more than a separate trading by Hall alone. That the burthen of proving a partnership lay upon the assignees, who had no proof whatever to sustain that proposition, as the evidence taken *ex parte* on the 18th of July was inadmissible against the executors of Mallinson, who were prevented from being present or cross-examining witnesses; and no notice of using this evidence in support of the discharge having been given. [*Lynch, J.*—I will not now prevent the assignees from relying on this evidence, which is on the file. I certainly, however, will give you liberty to cross-examine the witnesses if you so desire; but as you are in default in not having made application sooner, you must pay the costs of the day.] Even if this evidence be admitted, the most, it is presumed, it can prove is an option given to Mallinson by Hall to enter into partnership and take the profits at the end of twelve months. They cited *Heyhoe v. Burge* (9 C. B. 431).

Serjeant Armstrong and Kernan, Q.C., for the assignees, contended that there was in law clearly a partnership. Although they should admit that Hall stipulated with Mallinson that he should not be at any loss, still it was equally clear that if profit was made, he was to participate in it. Such an agreement constitutes a partnership, where the rights of creditors were in question. They cited *Farredy v. Hordern*, (Jacob. Rep. 144); *Gilpin v. Enderby* (5 B. & Ald., 954); *Bond v. Pittard* (3 M. & W. 357); *Waugh v. Carver* (2 Smith's Leading Cases, 726.)

LYNCH, J.—The case is now before me on the claim of Mr. Shaw, as executor of the late Mr. Thos. Mallinson, to be admitted a creditor on this estate for the sum of £11,597 9s. 11d. It is an admitted fact in this case that Mr. Thomas Mallinson and the bankrupts

were partners in trade in the Huddersfield concern, and that this debt was contracted with the Huddersfield house, for goods and cash supplied by it to the business carried on in this city in William-street, and no question is raised as to the correctness of the amount now claimed; but the assignees, by way of discharge, insist that Mr. Mallinson was himself a partner in the William-street house at the time this debt was contracted, and consequently that he cannot now prove this debt as against the estate, and in competition with the trade creditors therein. Very lengthened examinations have taken place in this case, a vast amount of correspondence has been read to me, and a great number of affidavits have been filed on both sides—a mass of illegal evidence has been put on the files of this court—very little care seems to have been taken to bring an orderly or arranged case for hearing before me, and the case is laid before me in a form to show me that a very serious question exists, rather than by way of help to me to solve it. Yet the case is one, even by reason of the amount of property at stake, which deserved more attention for the orderly bringing of it forward. On the part of Mr. Shaw, counsel protest against evidence while they use it; and in truth I feel that a license has been indulged in in this case, both as to the manner in which evidence was obtained, and the matter thereof, unusual, and forming a precedent to be avoided. But no proceeding was ever taken to set this matter right. As a matter of course I would have directed the witnesses to be recalled, and have allowed them to be cross-examined, and I would not have allowed one word of their evidence to be used against Mr. Shaw unless this order was complied with. At this hearing I made the same offer to the parties when the objection was stated, and I offered to let the case stand for that purpose; but, they preferred to make their protest, and use the evidence, and have the case heard as it then stood. And thus, calling on me to proceed, I felt bound to do so; and I have endeavoured, as far as lay in my power, to sift the evidence, acting on such facts as legally bound the parties, and arriving at the best conclusion I could in this complicated, and, in its circumstances, somewhat unusual case. I say, without hesitation, that I have felt very great difficulty in arriving at a conclusion. The case is in its circumstances novel and out of ordinary course. But the creditors, seeing all these circumstances, have thought it right to raise this question, and have thought it prudent to litigate it. They have a right to demand my opinion and judgment on it, and I am bound in duty to give that judgment now. In a case thus circumstanced, I feel it an enforced duty to canvass the case, and declare the grounds of my decision, stating what I conceive to be the facts proved, and stating my deductions from these facts. The proposition chiefly insisted on by the assignees was, that there was a partnership in Dublin constituted between Mallinson and Hall at the same time as the admitted partnership in the Huddersfield house was founded; and that this joint concern was carried on by Mallinson as the acting partner in Dublin, while the Huddersfield branch was carried on by Hall as the acting partner there. They, however, further insist that the acts and con-

duct of Mallinson, even if he was not a partner, have made him liable as such to creditors. Of course, these propositions are quite distinct, and as to the latter, namely, the existence of this *quasi* partnership bringing liability to the creditors, the decision of this Court could not prejudice the creditors if Mallinson's estate is solvent to meet such a liability. The most important question, however, for me to determine is, "was there a partnership?" and can I admit this proof now? On this point I will state what in my opinion was done, that I may thereby distinguish my view as to matters of fact from the legal consequences which I think result therefrom. At an early period in the year 1861, the proposition for a partnership was entertained between Mallinson and Hall. Mallinson was then in ill-health, and he wished to be relieved of the labour attendant on the management of the Huddersfield House. The Huddersfield concern was manifestly regarded as the chief and principal business, and to the regulation of the terms of partnership, as to it the chief attention was directed. The correspondence respecting it is clear, definite, and precise, but it is not unimportant to remark that even as to it there appears to have been no formal instrument of partnership, or any other ascertainment of its terms, than that shown by the correspondence; but this partnership is quite clear, and a definite term for its existence was settled. As to Dublin, the case is quite different. The Dublin house was not regarded as a necessarily continuing trade; it was spoken of chiefly as to its capacity in altered circumstances, and its utility if carried on in aid of the larger business; but Hall himself in his letter, 9th Feb., and elsewhere, spoke of the partnership as necessitating the sacrifice by him of his Dublin trade. In the correspondence there certainly exists no stated terms of any partnership in Dublin; nothing is said therein as to its management or direction, and no term of partnership was ever canvassed; but this I think can plainly be deduced from the correspondence, namely, that it still remained doubtful whether the Dublin house was to be carried on at all. But out of that correspondence I certainly cannot deduce the proposition that it was ever contemplated that Hall being the principal in management at Huddersfield, was to have a separate trade carried on by him in Dublin. The terms of arrangement, and the whole tone of the correspondence, seem to me to be inconsistent with such a proposition. Hall gave up Dublin, and sacrificed his prospects there by taking the control at Huddersfield, and he got in recompense £500 a-year. It never seems to have been contemplated that he should still retain the Dublin house in his sole management. Certainly, it is impossible, in the correspondence before me, to trace out the arrangement come to as to the Dublin house, if any such arrangement was ever in fact come to. But indeed, in my opinion, no definite arrangement was ever arrived at. It was not arranged that the Dublin house should exist—it was a matter, in fine, whether there should be a Dublin trade concern at all. It, however, is very clear—still confining myself to the correspondence—that Mallinson came to Dublin; that he took upon himself to control and direct the concerns; that he regulated its trade operations, and had an absolute

will to exercise as to everything done there. One theory advanced is, that he came to Dublin merely as an invalid, and that he merely resided in Dublin, as he contemplated to reside at Leamington. The saying that he resided merely as an invalid, because of the beneficial effect of our climate, and that his residence here was in nowise different from a residence in Leamington, seems to me to push the matter to an absurd proposition on the evidence before me, and on the disclosure in the correspondence. He took an active share in all the details of business—he established himself in a special office of the concern—and his letters say little of his health—but say a great deal of his knowledge of the whole working of the trade, and his keen insight into its requirements. An opposite theory is advanced by the assignees, and they insist that he came over to Dublin to carry out a concluded arrangement for a Dublin partnership, in connexion and coextensive with the partnership in Huddersfield. Now, in my judgment, this theory is equally in conflict with the evidence. The whole evidence shows that the Dublin business always remained subject to future arrangement and settlement. The correspondence palpably shows that the Dublin house, as a future and continued trade, was an unsettled matter; its existence and its extent of time not definitely arranged, and the form and manner of its management never even stated; and, therefore, I feel compelled to reject the proposition that the Dublin house was carried on as an adjunct to, and part of, the co-partnership constituted by the arrangements before July, 1861. In my opinion, Mallinson came to Dublin in 1861, thinking that its climate would be beneficial to him, and that coming to Dublin he undertook the William-street trade on no definite concluded agreement as to it. That it was carried on by him in connection with Hall, not as manager for Hall or on any such terms, but as manager of it as part of their general business for the time being, subject, however, to future arrangement as to it. In my opinion, he managed, controlled, and directed that trade as principal, intending to see its full resources, and to judge of its capabilities, he setting it in order, both as to its trade operation and its internal management, giving it a trial before it was finally adopted as part of the continuing trade; but during this time, in my opinion, he was to all intents and purposes a partner interested in the trade as his trade, quite irrespective of any rights he might have as against Hall on any special agreement between them. In my opinion he undertook to carry on their trade, not then having arranged any terms of partnership, but as having a right to continue it and participate in its profits. I do not understand the case of a tentative partnership, capable of being undone at the end of a year. In my judgment it was a partnership pure and simple for the time being, though in partnership arrangements Mr. Hall might, in account afterwards, have been brought in charge between themselves on some special arrangement as to it. It is not necessary on this claim that I should define the rights *inter se* of Hall and Mallinson; but I think I cannot allow this claim simply as a creditor to become a proof. This conclusion I have arrived at chiefly from the correspondence—I do not specify the letters—that

would be unduly tedious to do. The entire correspondence is about his own business, not Hall's business. It is not the correspondence of an invalid writing from the place of his temporary sojourn; he contemplates at times a lengthened residence as a man in trade here, and the proposal as to directorship in Dublin, and the hint as to a place at the board of the Bank of Ireland, are also inconsistent with the case most pursued by Mr. Shaw's counsel. Can it be said that Mallinson contemplated a continued residence in Ireland, as unpaid manager of Hall's business. Such proposition seems to me an absurdity. The next class of evidence is the parol evidence and affidavits, excluding at present Hall's evidence. This evidence consists of the clerks in the establishments as to acts and declarations, and the evidence of strangers as to declarations by Mallinson. I do not place my judgments on declarations at all, and indeed in such a case as this they are very weak evidence, if at all admissible, considering the time many were made as deposed to. Mallinson's position was peculiar, carrying on a partnership for trial of its capacity; and is it not impossible that he may have told third parties quite a different thing from what he would declare to them he was acting as master over, without intending anything at all unfair by such apparently contradictory statements. But as to the clerk's evidence of facts, the question may fairly be put, what other acts to show authority in the business could be done than was done by Mallinson? Craig is attacked indeed as unworthy of credit, and the mode of asking leading questions of him is justly found fault with, and the absence of the party who should have had an opportunity to examine him is also relied on. I have already stated my wish and anxiety and my offer to have this objection removed; but, placing as I do very slight weight on this testimony here, it remains rather to show that Mallinson acted in accordance with the natural import of his letters rather than as establishing in themselves a case against him. But, lastly, I apply myself to Hall's evidence. Both parties have insinuated certain sinister motives against Hall. But it is fair towards Mr. Hall (who passed with credit his final examination) to say, that at all times Mr. Hall impressed me most favourably by his candour, his open manner of answering, and his anxiety to give all the information required; and I see no reason whatever for questioning the perfect truth of all matters deposed to by him. Of course it is quite another thing to deliberate upon the conclusion drawn by him from the facts he states. In his evidence given on the 2nd June, 1863, Mr. Hall says expressly that Mr. Mallinson had no interest in William-street, and that he was not a partner with him; but, in answer to question forty-five, he says, "Mr. Mallinson offered to become a partner with me in William-street; I said not—not on any terms, till you see the working of it; remain there for twelve months—see for yourself: and if you see it is worth your while to enter into partnership, very well; but if not, let us give it up." This I take from the examination of the 2nd June. It shows Mallinson's readiness at once to become general partner in William-street as well as at Huddersfield, and quite removes the theory of mere residence as an invalid in Dublin (rather a

curious place to select). But the nature of the arrangement is more specifically detailed in Hall's evidence given on the 16th Juy, 1863. To questions 352, 353, 354, he gives an account of what took place. He says—"No doubt that ultimately there was to be a partnership at the end of twelve months, and that the stock was taken; if anything was made on the year's trading, Mr. Mallinson was to have half of it." "We took stock in July, 1861; we would take stock in July, 1862, and if there was any profit on the year's trading Mr. Mallinson was to have half of it." He adds, "and this is perfectly consistent with what I said before at the first private meeting." Now, here I must observe that I have nothing to do with Mr. Hall's consistency, nor as to the conclusions he may draw. He still affirms that there was no partnership, and I believe he honestly gives his evidence, and conscientiously believes that Mallinson should not be made liable in respect of William-street; but I must examine the facts deposed to by Hall, and form my judgment upon them, and draw the legal conclusion resulting therefrom. I here find that Mallinson entered into the business in William-street, superintended and controlled it to test its capacity, and with a view to determine whether it was worth being carried on, and that for the time so engaged in trial he was to have half the profits, if profits there were. Again Hall says—"I must be consistent with what I said; I cannot state anything else. I can only tell you that Mr. Mallinson wished to go into the partnership, and that was the understanding; but I said, 'there will be no partnership in the Dublin concern for twelve months. I want you to see its working; if you see it worth our while to carry it on, well and good, and if any money is made during the twelve months, you shall have half of it.' But I would not allow any partnership before the twelve months. If at the end of the twelve months it was worth while to carry on the Dublin concern, it could be done on that condition." Now, in my judgment this evidence of Hall is entirely borne out by all the evidence in the case, and perfectly explains the various seemingly contradictory statements made by Mallinson on several occasions. Mr. Hall may have intended by what was done not to commit Mallinson to a partnership till he had full experience of the nature of the trade; but his mode of gaining that experience was by being, in fact, a partner during the time of trial, and Hall's intention cannot prevent him from being such partner, the intention being, in my judgment, only capable of being carried out by the cessation of the partnership in Dublin at the end of the twelve months, and Hall and Mallinson *inter se* regulating their respective rights on the basis

intended by Hall. In my judgment Mallinson became, in fact, a partner in William-street—the acting partner, with an interest therein, and with a right to participate in the profits; and no medium case is made for him, but simply the case that he was a total stranger to the business in William-street—a case, in my judgment, utterly inconsistent with every part of the evidence laid before me. Indeed, I must say that on both sides this case was argued on extreme propositions, equally untenable. For the assignees it was argued that Mallinson came over to Dublin, on a concluded bargain, to carry on its trade as an adjunct to, and part of, the English partnership; while for Mr. Shaw it was argued that Mallinson came to Dublin as an invalid for residence there, and that he was a total stranger to the Dublin trade throughout. But the whole intermediate state of facts between these two extreme views has been left totally without explanation, and I have had to work out for myself the real relationship of the parties, and, without assistance, to apply the law to it. I believe, as a fact, that Mallinson came to carry on the Dublin trade, not yet assenting to its continuance as a part of the general trade, or rather yielding to Hall's request that it should not be then so considered, but that he substantially came in present partnership, and so conducted the trade. In my judgment, this made him, in law and in fact, a partner; and I cannot, therefore, allow this claim, as exhibited, to become a proof; but I disallow it as a proof expressly, without prejudice to any claim which Mr. Shaw may be advised to make against the assets arising out of any agreement with Hall or otherwise, notwithstanding the existence of the partnership in Dublin from July, 1861. I expect that this decision of mine will be brought before the Court of Appeal, and I greatly wish it. That Court has power, if they deem it advisable, to have the case tried before a jury, and I seldom have heard a case more suited for such tribunal. The amount of property involved in this case is considerable; the principle involved is one very important to the public, and I have openly stated the difficulty I felt in coming to a decision, but I have also fully stated the grounds on which my decision is founded, that the parties may have the fullest opportunity of considering the weight to be attached to my judgment. Considering, however, the nature of Hall's evidence, and remembering that the claimant here is in execution, I think he was almost bound to litigate the case; and I regard this litigation as necessarily produced by the disclosures made in this Court, and, therefore, I am of opinion that I should disallow this claim, without costs. The assignees to have their costs out of the estate.

Rolls Court.

[Reported by John Munroe, Esq., Barrister-at-Law.]

IN RE MANN.—Dec. 16.

Notary public—Seal—Judicial notice.

Where a power of attorney was witnessed by a notary public, and attested under his notarial seal—Held that the handwriting of the party by whom the power of attorney purported to be signed should be verified by the affidavit of some person resident in this country.

THIS was a petition for liberty to draw out a sum of money lodged under the Trustee Relief Act in the Bank of Ireland with the privy of the accountant-general to the credit of this matter, under the following circumstances:—A testator died in 1859 having by his will bequeathed legacies of £1000 and £100 respectively to William Mann and John Bell, who at the time of testator's death were resident in Australia. They executed a joint power of attorney to one John Mannsell authorising him to obtain and forward the amount of their legacies. The executor refused to pay over the money, but lodged it in the bank to the credit of the cause.

Devit now argued that the power of attorney was sufficiently attested to enable the executor to act under it. It was witnessed by the notary public, and sealed with the notarial seal. The statute 15 & 16 Vict. c. 86, for amending the practice in the Court of Chancery, after enacting in sec. 22 that all pleas, answers, examinations, affidavits, &c. may be sworn in any of the colonies before any judge, court, notary public, or person authorised to administer oaths in such colony, went on to provide that "the judges and other officers of the said Court of Chancery shall take judicial notice of the seal or signature, as the case may be, of any such court, judge, notary public, person, consul, or vice-consul, attached, appended, or subscribed to any such pleas, answers, disclaimers, examinations, affidavits, affirmations, attestations of honour, declarations, acknowledgments, or other documents to be used in said court." Under this section it was decided in the case of *Armstrong v. Stockham* (24 L. J. Ch. 176), that a power of attorney executed in the British Honduras, in the presence of a notary public, might be proved in a court of equity by the production of the notary's certificate under his hand and official seal. This of course was an English statute, and a decision under such statute. The Irish Evidence Act, however, 14 & 15 Vic. c. 99, contained the following provision in the ninth section:—"Every document which, by any law now in force, or hereafter to be in force, is or shall be admissible in evidence of any particular in any Court of Justice in England or Wales, without proof of the seal, or stamp, or signature authenticating the same, or of the judicial or official character of the person appearing to have signed the same, shall be admitted in evidence to the same extent and for the same purpose in any court of justice in Ireland without proof of the seal, or stamp, or signature authenticating the same, or of the judicial or official character of the person appearing to have signed the same."

This enactment extended to Ireland the benefit of the above provision and the principle of the above decision.

The MASTER OF THE ROLLS said he could not make the order which was now sought. The general order of the 14th February, 1860, was explicit on the subject. It provided "That in all cases in which a power of attorney relating to funds standing in the name of the accountant-general of the court shall be executed in any of her Majesty's colonies in accordance with the practice of the accountant-general's office, except that the affidavit of perfection shall not have been made before a master in ordinary or extraordinary commissioner for taking affidavits in Chancery, the accountant-general shall be at liberty to receive and act upon the same without any special order of the Court, provided the handwriting of the party by whom the power of attorney purports to be signed is verified by the affidavit of some person resident in this country." He would, therefore, make the usual order that the sums should be paid to the legatees or their attorney lawfully authorised, leaving it to the accountant-general to act under the instrument in question if he thought proper to do so.

Order accordingly.

Court of Queen's Bench.

[Reported by William Woodlock, Esq., Barrister-at-Law.]

SCOVELL v. GARDINER.—May 28, June 27.

Exemption from future taxes—Meaning of words "charged and chargeable on premises"—Dublin Corporation Waterworks Act, 24 & 25 Vict. c. clxxii., loc. and pers.—Domestic water-rate.

A lease made in 1848 contained a clause exempting the tenant from the payment of "all rates and taxes charged and chargeable on the demised premises except the tenant's proportion of poor rate." Held—That under the clause the tenant was exempted from payment of the domestic water-rate imposed by the Dublin Corporation Waterworks Act, 24 & 25 Vict. c. clxxii., loc. and pers.

THIS was a special case submitted by the parties for the opinion of the Court. The case was as follows:—"Whereas George Scovell and Whitmore Scovell, the plaintiffs, have sued William Pugh Gardiner, the collector of customs for the port of Dublin, to recover from him the sum of £220 under the circumstances hereinafter mentioned; and whereas the plaintiff and defendant have agreed to state a special case for the opinion of the Court under the Common Law Procedure Amendment Act, 1853, as to whether the plaintiffs are entitled to recover the said sum; and the defendant, as such collector, has agreed in the event of the Court deciding in favour of the plaintiffs in this case, that the plaintiffs shall be entitled to be repaid said sum of £220 by the defendant; the facts of the case upon which the opinion of the Court is sought are the following, viz:—The revenue stores and ware-

houses known as the Dublin docks are the freehold property of the Crown, which is represented in this case by the defendant. And by lease dated the 16th day of November, 1848, and made between the Right Honourable John Russell, commonly called Lord John Russell, the Right Honourable Sir Charles Wood, and William Gibson Craig, being three of the Lords Commissioners of her Majesty's Treasury of the 1st part; the Commissioners of her Majesty's Customs of the 2nd part; Charles Andrew Scovell, of the Custom-house in the city of London, Esq., secretary to the said last-mentioned commissioners, of the 3rd part; and John Scovell, Henry Scovell, since deceased, and George Scovell, all of Scovell's-wharf, Southwark, and county of Surrey, and of the city of Dublin, warehousemen, wharfingers, and co-partners in trade, of the 4th part, the said parties of the 1st part demised the premises therein described, with the cranes and machinery upon and belonging to the same; as also the full and free use of the quays and wharves and of the cranes and machinery thereon to the said lessees, the plaintiffs, their executors, administrators, and assigns, for twenty-one years from the 29th September, 1848, at the rate of £5,600, payable half-yearly on every 25th March and 29th September, to a copy of which lease, marked with the letter A, and signed by the plaintiff's and defendant's attorneys respectively, the plaintiff and defendant refer, and agree to have same taken and considered as if incorporated herewith in like manner as if this case were a pleading under the Common Law Procedure Amendment Act, 1853. The said lease contains the usual covenants, provisions, and conditions; and, amongst others, the proviso following, that is to say,—“Provided always, and it is hereby declared and agreed by and between the parties hereto, and these presents are upon the express condition that the said John Scovell, Henry Scovell, and George Scovell (meaning Henry Scovell, deceased, and the plaintiffs), their executors, administrators, or assigns, are not to be liable for or to pay any rates or taxes whatever charged or chargeable upon the said demised premises or any part thereof, save and except their legal proportion of the poor rates.” The said lessees, from time to time after the execution of the lease and until the period hereinafter mentioned, when any rates or taxes were demanded of them by the collector of rates for the said premises, referred him to the defendant as collector of customs of this port, who paid same until an Act called “The Dublin Corporation Waterworks Act, 1861,” 24 & 25 Vict. c. clxxii, was passed. By that Act it is, amongst other things, enacted in the words following, that is to say, “It shall be lawful for the corporation, and they are hereby authorised and required in the month of December in every year by precept under their common seal, to order and direct the collector-general to apportion and levy in lieu of the rates hitherto levied under the provisions of the recited Acts or any of them, a rate to be called “The Domestic Water-Rate,” not exceeding one shilling in the pound upon and from the occupiers of all houses within the borough of Dublin according to the annual value of such houses as the same now are or shall from time to time hereafter be valued or rated in pursuance of the 15 & 16 Vic. c. 63, or any Act or Acts amending the same.”

The said warehouses at the Dublin docks are valued at £4,800; and the collector of rates having obtained from the corporation the necessary authority, demanded from the plaintiffs (the said lessees) the sum of £220, being the amount of the domestic water-rate at 11d. in the pound upon the said valuation of the then current year of the premises so leased to them, and they thereupon forwarded as usual the notice to the defendant as the collector of customs that the amount might be paid by him. The said defendant in reply to said notice stated to the plaintiffs that the rates mentioned in the lease were those then in existence and then chargeable, and that the said lease did not apply to rates, the levying of which should be authorised by any Act passed subsequently to the date of the said lease. The plaintiffs submitted that they were entitled to exemption from the rates so assessed under the said Water-works Act, the terms of the lease being sufficient to exonerate the lessees not only from taxes payable out of the premises at the date of the lease (save poor's-rate), but all others to be afterwards charged thereon. The plaintiffs having refused to pay said rate, and the application for the said rate having been frequently repeated by the said collector of rates, the plaintiff paid same, intending to deduct it from their rent under the lease; but the amount of that rent in full having been demanded in the month of December last, and such deduction having been refused to be assented to, the plaintiffs proposed to the defendant, as collector of customs, to make the point in question as to the right to deduct said rates the subject of a special case, which was accordingly agreed to. The defendant contends that the proviso does not include taxes to be imposed *after* the date of the lease; and the plaintiffs contend that such is not the proper construction of said proviso or of said lease. The plaintiffs do not, nor does either of them, reside at the docks, and have merely an office there for the management during the day of the business appertaining to them as lessees; nor does any person whatsoever reside in or sleep on the premises or any part thereof; and the plaintiffs accordingly submit that they are not occupiers within the said Act. They also submit that the words “charged or chargeable” in the lease are to be read as if those words were “charged or to be charged,” and should be taken as exempting them from liability not alone to all rates or taxes whatever then authorised by the law, but also to all rates or taxes whatever for the imposition of which the Legislature might *thereafter* give authority. The defendant submits that by the 2nd section of the Waterworks Act (the interpretation clause) the word “houses” used with reference to any rate is declared to include any dwelling-house and any premises any part of which shall be used or occupied as a shop, warehouse, counting-house, chamber, or office of any description, or stable, or coach-house. The plaintiffs also submit that if the Legislature intended that the Waterworks Act was to make a person liable to rates who had been exempted from liability by such a proviso as that hereinbefore set out, it would have expressed the words “anything in any instrument hereinbefore executed to the contrary notwithstanding,” or some words to that or the like effect. The plaintiffs and defendant have agreed that no objection shall

be raised on the ground of any misjoinder or nonjoinder of parties, and that the Court shall be at liberty to draw all inferences of fact, and that error may be brought on the judgment of the Court in this case, and that the costs shall abide the result of the decision of the Court. The plaintiffs and defendant have accordingly agreed to submit the following questions for the opinion of the Court: 1st,—Whether the plaintiffs are occupiers of the premises in the case mentioned within the meaning of the Dublin Corporation Waterworks Act, 1861. 2nd,—Whether the word "houses" in the said Act has reference to premises such as those in the preceding case mentioned. 3rd,—Whether the plaintiffs are liable to be rated and assessed to the domestic water-rate under and by virtue of said Act. 4th,—Whether the plaintiffs are, upon the true construction of the said lease, entitled to deduct or be allowed out of the next gale of rent payable by them the amount heretofore paid by them in respect of the said water-rate, and so from time to time out of future gales such sums as they shall or may hereafter pay in respect of future assessments of such rate. 5th,—Whether the proviso in that regard in the lease referred to by the foregoing case exempting the lessees from liability to rates and taxes charged or chargeable on the premises thereby demised, applies not alone to all rates and taxes charged at the execution of the said lease, but to all or any such to be afterwards imposed by authority of Parliament either on owners or occupiers." Besides the proviso stated in the case it is necessary to advert to the following recitals in the lease:—"And whereas the said John Scovell, Henry Scovell, and George Scovell were at two lettings by public auction which took place respectively in the long room of the Custom-house in the city of Dublin, on the 22nd July, 1841, and the 25th January, 1843, declared the bidders of the highest amount of rent for a lease of the premises hereinafter more particularly described, which said premises were divided into two lots and known as the custom-house revenue stores, adjoining and within the walls of the docks at Dublin aforesaid, denoted by the words "lot 1," "lot 2," on a certain plan then referred to, and subject to the printed particulars and conditions of letting then and there exhibited; and in pursuance of such biddings and of the agreement signed at such public lettings by the said Henry Scovell on behalf of himself and his said co-partners, were put into possession of the said premises and are now in the occupation thereof; and whereas the said John Scovell, Henry Scovell, and George Scovell having considered that they have grounds to be dissatisfied with the large amount of the said declared highest biddings (which was the sum of £4,350 for that portion of the said premises called "lot 1," and £2,800 for that portion thereof called "lot 2") did make an application to the said Lords Commissioners praying that they the said John Scovell, Henry Scovell, and George Scovell might for reasons stated by them be allowed to retain the occupancy of the said premises at a much lower rate than what they had bid for the same; and said John Scovell, Henry Scovell, and George Scovell did cause a notice to be given the said Commissioners of the Customs and their secretary of their intention to surrender the said premises on the 29th day

of September, 1848, in the event of their said application not being complied with; and whereas a letter was received by the said last-mentioned Commissioners from Sir Charles Trevelyan, one of the secretaries to the said Lords Commissioners, dated the 11th day of September, 1848, stating that their lordships were pleased to sanction the said Commissioners of Customs entering into a negotiation with the said John Scovell, Henry Scovell, and George Scovell, for a lease to them of the said premises for a term of 7, 14, or 21 years, at a yearly rent of £5,600. . . . and the said Commissioners of Customs having communicated the contents of said letter to the said John Scovell, Henry Scovell, and George Scovell, they have in answer signified their readiness to accept the terms mentioned in the said letter; and did, in pursuance thereof, sign a memorandum of agreement of the terms, stipulations, and covenants that should be contained in such lease."

Jellett (with him *Brewster*, Q.C.) for the plaintiffs.

—There will be two principal questions submitted on the construction of this instrument—first, whether or not a charge in the nature of the domestic rate as established by the Dublin Corporation Waterworks Act, comes within the clause in the lease exempting the tenant from the payment of all rates charged or chargeable on the premises: and secondly, assuming that it does, whether the proviso is not restricted to rates in existence at the date of the lease. On the first point, the exception as to poor-rate is strongly in our favour. Even though the water-rate be not strictly a charge on the premises, but only on the occupier in respect of his occupation, the terms of the proviso may be construed by the meaning of the exception from it, and whatever is included in the exception will be held to be included in the proviso.—*Lis-towel v. Gibbins* (9 Ir. C. L. Rep., 223). The exception here is the tenant's proportion of poor-rate. The rates, then, from the payment of which the tenant is exempted, are rates in the nature of poor-rate. Poor-rate is only a personal charge on the occupier in respect of his occupation.—*Palmer v. Power* (4 Ir. C. L. R., 191). The domestic water-rate is in this respect of the same nature as poor-rate, not, strictly speaking, a charge on the lands capable of being enforced in the Court of Chancery, but a charge on the person occupying—Stat. 24 & 25 Vict., c. clxxii. loc. and pers. ss. 55, 65, 66. Referring to the Acts recited in the preamble, we have it on the present Act that it does no more than supply a different supply of water from a different source from that given in the old Acts, but the rate imposed by it is not, strictly speaking, new. The reservation of rent and the clause of exemption in the lease are both equally contemporaneous with the demise. All the words in the clause point to the future. The meaning of the words "charged and chargeable" plainly is, all taxes "then charged or which thereafter *might be chargeable*" during the continuance of the demise. The future is embraced by the word "chargeable." *Brewster v. Kitchen* (1 Lord Raym., 317); *Giles v. Hooper* (Carth. 135,) are authorities on this case, and shew that on a clause of this kind the tenant will be held exempted from future taxes. Therefore, on the words of this proviso, the construction to be given to it is, that this

is a declaratory statement in the lease, that so long as the tenant holds the premises in the lease, he is to hold them free from all rates in the sense in which the excepted rate, poor-rate, 'is excepted, and, therefore, he is entitled to hold them free from this domestic water-rate.—*Hurst v. Hurst* (4 Exch., 571).

Jebb and M'Donogh, Q.C., for the defendant.—In the first place the domestic water-rate is not a tax charged or chargeable on the demised premises. That is shewn by *Palmer v. Power*, which is founded on *Lally v. Concannon* (3 Ir. C. L. R., 557). Both those cases shew that poor-rate is not a charge on premises, and this is a tax of that nature. Then as to the exception in the lease of the tenant's proportion of poor rate, that makes no difference. At the time the lease was granted, in 1848, it was illegal to insert in a lease any covenant by which the landlord would be relieved of his liability to his portion of poor-rate, and this was a common provision in leases at that time. Stat. 14 & 15 Vict., c. 104, s. 12, changed the law as to poor-rate. Stat. 12 & 13 Vict., c. 91, s. 70, and Schedule C., shows that if poor-rate is merely a personal tax, the water-rate is so also. As to *Listowel v. Gibbings*, it merely shews that an exception will be resorted to, to shew what is included in a proviso where there is ambiguity, but there is no ambiguity here. In none of the cases cited on the other side is the word "chargeable" used alone. In all there were words pointing to the future. The word "chargeable" means taxes which are now in existence, and are capable of being made a charge on the premises, though not now charged. Then, rates which are not charges on the land are not within a covenant by a lessor to pay taxes on the land demised.—*Theed v. Starkey* (8 Mod., 314). The cases on the point are collected in *Platt on Covenants*, 222, note b. Section 78 of the Poor Law Act shews a distinction between poor-rate and water-rate, as, in default of the occupier paying, it fixes the rate on the land. It was formerly doubtful whether poor-rate was a charge on the land.—*Case v. Stephens* (Fitzgibbon, 297). The word "chargeable" must be construed in its primary sense. We must not resort to the secondary sense of a word unless it was impossible to construe the words in its primary or natural sense.—*Hurst v. Hurst* (Parke B.'s judgment). This rate is a new tax, and, therefore, not within a covenant concerning even future taxes.—*Bythewood's Conveyancing*, p. 418, edn. of 1840. Wherever a proviso in a deed is intended to have a prospective operation, the language is clear, and the word "hereafter" is always used.—*Watson v. Atkins* (3 B. & Ald. 647); *Rex v. St. Luke's Hospital* (2 Bur., 1064). The provision is for everything which the parties then knew to be a charge, or which the parties then knew might be in future charged; but it was not their intention to exempt the tenant from a tax which no one knew anything of at the time. They also cited *Smithett v. Blythe* (1 B. & Ad., 509), referring particularly to the passage in Lord Tenterden's judgment at p. 519, "the exception cannot give a greater effect to the grant than its own terms admit of;" and *Richardson's Dictionary*, *sub voce* "chargeable," quoting *Burke's Speech on the Nabob of Arcot's debts*.

Cup. adv. vult.

June 27.—*LEFROY, C. J.*—In this case a case has been agreed upon between the parties. The action was brought by the plaintiffs to recover a sum of money paid by them as water-rate, and the question is as between them and the defendant, whether they are liable to the payment of that rate. That question depends on the construction of the proviso in the lease, and we are induced to think that the tenant is entitled to the deduction which he seeks. We are all agreed in our decision, and I shall now state the matters which it appears to us important to refer to. The lease bears date the 16th November, 1848, and was made between Lord John Russell, Sir Charles Wood, and William Gibson Craig, three of the Commissioners of the Treasury, of the first part; the Commissioners of the Customs of the second part; the Secretary to the Commissioners of the Customs of the third part; and the defendants of the fourth part. It contains a recital that the defendants were, at two lettings by public auction, declared the bidders of the highest amount of rent for a lease of the premises after described, and in pursuance of such bidding, and of the agreement signed by Henry Scovell on behalf of himself and his partners, were put into possession of the said premises, and were at the date of the lease in possession thereof, and that the defendants, having considered that they had grounds to be dissatisfied with the large amount of the said declared highest biddings, made an application to the Lords Commissioners, praying that the defendants might, for the reasons stated by them, be allowed to retain the occupancy of the said premises at a much lower rate than what they had bid for the same, and the defendants gave notice to the Commissioners of Customs of their intention to surrender the premises on the 29th September, 1848, in the event of their application not being complied with, and that there was a letter received from one of the secretaries to the Commissioners of the Treasury sanctioning the Commissioners of the Customs in entering into a negotiation with the defendants for a lease to them at a rent of £5,600, and that the defendants had signified their readiness to accept the terms mentioned in the letter. It is quite evident, therefore, from that recital, that whatever was the nature of the agreement, that there was an agreement at the time—that there were certain terms agreed on—but it is plain that the agreement contained a power of surrender, for they specify that, and say they will not take a lease unless the proposal is accepted. Well, what follows? The amount of it is this, that they, having a power of surrender and complaining of the excessive rent which had been reserved, forwarded their complaint with a notice that if relief was not given they would surrender. But what they sought was the occupancy, which would enable them from time to time to have surrendered. What is the answer to that? "If you take a lease, and bind yourself to the rent, not an occupancy merely, if you take a lease, we will let you have the estate at such a rent, subject to the several clauses which we propose." Carry out this arrangement the lease is made to the plaintiffs, their heirs, executors, administrators, and assigns, for 21 years, from the 29th September, 1848, at the rent of £5,600. Now, after the demise and the reservation of the rent follows this

proviso, i.e., an agreement that the plaintiff was not to be liable for, or to pay any rates or taxes whatever charged or chargeable on the said demised premises, saving the tenant's proportion of poor-rate. Now, if words can express the meaning of parties so as to leave the matter beyond a doubt, it does appear to me that these words do put beyond the possibility of a doubt the right of the tenant to be exempted from any rates or taxes during the lease, if the covenant, if the words of the proviso are of any avail. I do not know how parties could provide language to secure the tenant, or what words can mean, if they do not mean that save only as to poor-rate the tenant is to be excepted. Is not the very circumstance of the exception decisive? All the authorities, from Plowden down, are decisive as to the construction of the clause, that *expressio unius est exceptio alterius*. The one exception there is, and therefore, by the general rule of law, that where there are several words, and that you can give to each word according to the subject-matter a meaning, you are not to suppose that any two of the words are identical, and were used in an identical sense. You are to give to every word its sense, and it is plain that the words "charged or chargeable" properly, and in their natural sense, make a provision for the whole continuance of the lease, and that their proper acceptation is that which would strike one at once, namely, "what is now charged or may become chargeable hereafter:" and how natural is that? The parties have entered into an agreement for what they thought too high a rent, but it is evident they had a clause of surrender, and they gave a notice, and the gentlemen on the part of the Crown insist they shall, by taking a lease, be bound, and if they insist on the covenant to pay rent, it is subject on the other hand to the tenants' privilege to be exempt from rates or taxes then or thereafter charged or chargeable on the premises, save only their portion of poor-rate. When the application was made by the Commissioners of Customs to the Secretary of the Treasury, what is the direction they got? To enter into the negotiation with the tenants, and accordingly the negotiation was had, and we have the recital that upon that negotiation the Scovells agreed to take a lease on the terms of such a rent, together with and subject to the several covenants and provisos herein-after contained, and this is as much a consideration that they are entitled to, as the rent is to the Commissioners? Then, what fact is there? That ever since this lease, when they were served by the collector of rates and taxes in Dublin with a demand for rates and taxes, they took it or sent it to the Custom House, and those rates and taxes were always paid, from that time to this, by whoever received the revenue. I admit you are not to construe a contract, or make it or vary it by matters *dehors*, but when you find that a contract itself has words importing that which is stated to have been the way it was followed up, it is perfectly decided that you may construe the terms of a contract by that matter of fact. I remember a case in which the House of Lords decided that though you could not, if there were not words in a deed importing perpetuity, turn a lease for lives into a perpetuity, although there was a usage of renewal, yet if the terms have a degree of vagueness, they may be inter-

preted by the way they have been acted upon. Here, then, we have the way the contract was acted upon. Therefore, on settled principle, I think that this is stronger than the case of *Brewster v. Kitchen*. Indeed, I think it scarcely requires an authority at all. Each case may be best decided in itself, with the circumstances under which it was made, which may be adverted to for the construction which the words bear, though there may be another construction put on them.

O'BRIEN, J.—I shall state very shortly my reasons for concurring. The question is, as to the effect of the proviso in this lease, that the tenant should be bound to pay rates charged or chargeable on the premises, except the tenant's proportion of poor-rate. That proviso follows immediately the reservation of the rent, and on reading it, nothing would be more clear to the mind of an ordinary person, not aware of the nice distinctions raised at law on the meaning of words, than that that no rates or taxes, whether present or future, chargeable on the premises, should be paid by lessees, except the proportion of poor-rate. Now, the first question is, whether this water-rate tax, supposing it to have been in existence at the time, can be considered as coming within the description in this proviso as "rates and taxes charged or chargeable on the premises." It is contended for the Crown that the water-rate is not a rate charged on premises, but merely on the occupier, that is to say, charged on the occupier with respect to the premises, and it is also shewn, I think, that so far as the remedy goes for recovery of the rate, it is one applicable to a personal demand, and therefore the counsel for the Crown contended that it was not properly, in the proper sense of the word, a rate charged on the premises. Now, in carrying out what we think was the manifest intention of the parties, we do not go beyond what we are authorised to do by well-considered decisions. I refer first to *Hurst v. Hurst* (4 Exch., 571), in which the question arose upon a covenant by the lessee to pay "all taxes, charges, rates, tithes, or rent charge in lieu of tithes, dues, and duties whatsoever, as then were or should at any time thereafter during that demise be taxed, charged, assessed, or imposed upon the demised premises;" and Parke B., in his judgment, at p. 576, says, "In truth, rates of this description are not imposed on the land itself, but on the occupier in respect of his occupation." And I think what he calls the secondary sense of these words may well be acted on in the present case, and that even if the case rested there, we should consider in a case of this nature, having regard to the covenant and the purposes for which the instrument was entered into, that a tax which like the water-rate is not charged on the premises, but on the occupier in respect of the premises, comes within it. But the case does not rest there, because in the proviso there is, we find, an exception as to poor-rate. Now, it is a sound rule of construction, that where there is a proviso and an exception out of its subject-matter, that implies that the matter so excepted falls within the general description of the proviso. We were referred to a case in this Court, in which he acted on that rule, namely, the case of *Listowel v. Gibbings*, but it does not, require authority for a proposition so clear as that though the

phraseology of the parties is not technically correct, they considered that but for the exception the subject-matter of it would have fallen within the previous description. What is the nature of that? It has been settled in this Court, in *Lally v. Concannon* and *Palmer v. Power*, that the poor-rate is not a charge on the land, but on the occupier in respect of the land. What, then, is the conclusion we are to draw? Why, that the parties understood that if in this case they had not excepted the poor-rate from the proviso in question, the Crown would have been liable to pay the tenants' proportion of poor-rate also. When the intention can be collected from the instrument itself, we should give effect to it, though the language of it is untechnical. It manifestly shews that all rates similar to poor-rates should be paid by the Crown. Well, the matter does not rest even there, because Mr. Jellett in his very clear summary of the statutes relating to the pipe-water on the second argument of this case referred us to two or three, shewing that the then existing water-rate was dealt with by the legislature in terms, shewing that they considered it in popular terms as a charge on the land, so that following the declaration in the statutes the parties to this lease adopted a similar declaration. One of those statutes of the 42nd G. III., c. xcii., (Irish) loc. & pers. The third section of that Act gives in terms power to the Corporation to levy the rates from the owners and occupiers only of every dwelling-house. It then provides that that rate shall be levied according to the rate of the Ministers' Money. The fourth and fifth sections provide for the supply of water used in houses and public buildings, and then the sixth section contains these very remarkable words. "Provided always, and be it enacted that nothing in this Act contained shall extend or be construed to extend so as to charge with the said rates or rents or any of them, His Majesty's Castle of Dublin, or any house within the circuit thereof, or any house or tenement provided for the residence of the Lord Lieutenant or Lord Deputy of Ireland, or of the Chief Secretary of the Lord Lieutenant or Lord Deputy, or of the under-secretaries in his office; but such castle, and all and every such house or tenement shall be supplied with pipe-water by the said Lord Mayor, sheriffs, commons, and citizens, in like manner, as the several dwelling-houses within the said city are supplied with pipe-water." Then comes the seventh section which is more important. "Provided also and be it enacted, that nothing herein contained shall extend or be construed to extend so as to charge with or subject any hospital, charity-school, or house provided for the reception or relief of poor persons to the payment of the said rates or rents, or any of them; but such hospital, charity-school, or house, shall be supplied with pipe-water by the said Lord Mayor, sheriffs, commons, and citizens in like manner as the several dwelling-houses within the said city are supplied with pipe-water." Then comes the power to levy the rates contained in section 11, which makes the rate a personal tax. Now, the sections I have read shew that the Legislature really dealt with the matter as if the effect of the previous provisions in that Act would have been to charge all these hospitals and the Castle of Dublin but for the proviso in those sections. That

shews that though the rate was not legally or technically a charge, yet, for the purposes of this legislation they proceeded to deal with it as if though not technically a charge, it was substantially so, because, if a person went to take a house, he would not be told with reference to the rate that there was no charge on the house, but that if he went in and occupied he would be charged. Anybody would consider the rate as a charge. The tenth section empowers the levying of the rates in this matter, empowering the Corporation to distrain in case of non-payment, thus shewing that the rate is a merely personal one. Then we have the 49 G. III., c. lxxx. (Irish) loc. and pers., making further provision for the supply of pipe-water in the city of Dublin. The first section empowers the Corporation to take rates from the owners of dwelling-houses in the city, calculated according to the amount of ministers' money payable on each dwelling-house. Then come sections 2 and 3, providing for houses not valued for ministers' money or in the workhouse books, shewing again that the Legislature adopted popular language, and treated a house as charged whether it was the house that was charged or the occupier in respect of the house. Section 3, for instance, enacts, that "in case there shall be any dwelling-house within the limits aforesaid that shall not be valued for ministers' money or workhouse money, then and in every such case, and until such a valuation be had and obtained, the said Lord Mayor, sheriffs, commons, and citizens, and their successors, are hereby empowered and authorised to appoint two persons for the purpose of valuing and ascertaining the annual rent or rents of every such dwelling-house and houses; and after such valuation made, it shall be lawful to and for the said Lord Mayor, &c., to rate, charge, and assess every such dwelling-house and houses with such rates as aforesaid in such and the like manner, and in such proportion as if such dwelling-house or houses had paid ministers' money, and to raise, levy, and recover the same from the owner or owners, occupier or occupiers of every such dwelling-house and houses, until such valuation for ministers' or workhouse money is had or obtained." Does not this shew that we are construing the language of the lease in terms as the Legislature dealt with the matter, speaking of the rate indifferently, as either being charged on the occupier in respect of the land or as an actual charge on the land. We are thus warranted in holding that this water-rate, if then existing, would have come within this proviso. What circumstances prevent the application of this here? It is said that this is a new rate, and therefore, not within the contemplation of the parties. It is therefore said that the word *chargeable* is not to have a prospective operation, and that if the rate was not charged on the premises at the date of the lease, the word *chargeable* was not to have any other meaning. It is not to be lost sight of that the premises belonged to the Crown, and if we must confine the operation of that proviso to the then existing charges on the premises, it would have no operation at all, because there was no tax to which these premises at the time would have been liable in the hands of the Crown. But independently of this, what are the words of the pro-

viseo? The words are "are to be," meaning, as I think that during the whole continuance of the term the occupiers are not to be charged. What effect would the word *chargeable* have otherwise? It occurred to me at one time that it might be contended that the word might be relied on as referring to taxes which were not then actually payable, but which by force of a law then in force might afterwards be so. But it seems to me on reflection that this cannot be, and that the words are applicable to the case of this tax, this being a tax of somewhat the same description as the ancient water-rate—with this difference that the parties will have to pay a great deal more.—charged on the parties in respect of their occupation, and enforceable by a merely personal remedy; of the same character as the then existing rate and tax, and therefore, I think, within the proviso which would embrace the old taxes. I need not say any more than that I concur in the judgment of the Court.

HAYES, J.—I am of opinion that the plaintiffs are not liable for the payment of the rate. I collect from the recitals in the lease that the plaintiffs were at its date in occupation, that they had found the rent they were bound to pay rather too much, and had proposed to hold at a smaller rent, and a new contract was entered into by which they engaged to pay a rent of £5,600 a year, and immediately after the reservation of the rent comes the clause in question. This clause was evidently introduced for the benefit of the tenants and to secure their exemption from certain burdens which it was foreseen they would otherwise be liable to. The clause evidently looks to the future. For what are they not to be liable? Any rates or taxes. If the clause had stopped there I think the tenants would have been exempt. There was a water-rate then. The Legislature had a supply of water always in view. I take it that it was plainly within the contemplation of the parties to make provision for this as well as other taxes in the city of Dublin, and that judging of the future from the past they might have calculated that the supply of water might be afterwards supplied under some new statute, and such is the new water-works Act. It is *in pari materia* with the old Acts, and the domestic water-rates are expressly enacted to be in lieu of the old water-rate. But it has been argued from the conclusion of the proviso that it was not intended to make the occupier pay taxes; and it is said that the water-rate is not a tax "charged or chargeable." But I think the parties did not intend to use those words in their strict sense. That is made very plain by the tenants' non-exemption from poor-rate. As an instance that the Legislature itself has used the terms interchangeably, I may allude to the water-rate Acts, which speak of houses being chargeable, and also of persons being chargeable, and to the 19 & 20 G. III., c. 13 (Irish). In addition to the cases cited at the bar I may refer to *The King v. The London Gas Light and Coal Company* (8 B. & Cr. 54). I am therefore of opinion that the parties intended to provide against the lessees paying taxes, save the tenant's proportion of poor-rate, and that judgment ought to be for the plaintiff.

FITZGERALD, J.—I concur in the rule to which the Court has arrived; and I should have contented myself

with only saying so much if it was not that I did not wish it to be supposed that the case is free from doubt or difficulty. I have considered it all through as a case of doubt, and I long hesitated before arriving at the result at which I have come. As it is possible that this case may be carried further I think it necessary to state the reasons for which I concur. The question arises on the construction of the proviso which has been stated in connection with the rate of 1861. No controversy appears to have arisen as to any other taxes. Now, amongst the local rates which existed in Dublin at the date of the lease was that known as pipe-water rate, payable to the corporation for water supply, but which was chargeable only on the occupiers of premises, and not in any sense charged or chargeable on the premises. But in the Water-works Act of 1861 the object is to get a supply of water from a more distant source, and for that purpose large powers are given to the corporation. The limits of the Act embrace, in addition to the city, large portions of the county of Wicklow; and powers are given to rate persons not previously rated. It was conceded that under the 54th and 55th sections of the Water-works Act of 1861 the plaintiffs became liable to be rated; and the question is not as to their original liability but as to their exemption by reason of the proviso in the lease. It was contended in the first instance on the part of the defendant that the provision applied only to rates and taxes which were technically capable of being charged on the demised premises, and that the water-rate was not in that sense a charge; and a great part of the argument in the case was on this point, whether "rates and taxes" included anything beyond what was a charge on the premises. I am of opinion that the defendant's view is not correct. The principal rates and taxes in the city of Dublin were—the grand jury cess, which, I may observe in passing, gives a meaning to the word *chargeable*; the police tax, the paving and lighting tax, and the borough-rate under the Municipal Corporation Act, together with the poor-rate and the water-rate. These were the principal rates at the time the lease was entered into. I have examined the Acts, and it is difficult to say that any of the rates was a charge on the premises; but it is quite clear that none of them was a charge upon property of the Crown. It is established that none of these taxes were in any respect a charge on Crown property; and all the cases on that point are cited and commented on in *Farquharson v. Richards* (4 Ir. C. L. R. 150); but all the rates were, or some of them were, chargeable on the occupiers of Crown property in respect of occupation. It seems to me therefore that we ought not to adopt a construction which would in effect defeat a portion of the proviso altogether. We should give a construction *ut res magis valeat quam pereat*. The proviso is applicable to taxes chargeable on occupiers in respect of occupation. I am fortified too by reference to the exception out of the proviso; for I have always understood that an exception marks the character of the thing out of which it is excepted, and poor-rate is not a charge on the land. The defendant therefore contended that the proviso exempted the tenant from rates then existing only or then capable of being charged. The plaintiffs on the other hand urged that the proviso embraced

new taxes, and also that the water-rate was not a new tax, but only in substitution for the water-rate; and they relied on *Brewster v. Kitchin*, as showing that this was not a new tax; but Lord Holt in that case was dealing with a tax which existed at the time of the covenant in that case. It not alone existed, but was leviable out of the same property from the same persons, in the same proportions and with the same right to deduct. In fact the tax then existed, though under a temporary Act, the same as at the time when the question arose. The identity of the tax too at the time of the lease with that afterwards will be seen more fully by reference to the report in 12th Modern; and I may observe that this is the best report of the case. There Lord Holt says "that these two sorts of taxes differ only in form; the nature of the tax is the same; the same things are taxed, and the same clauses of deduction are in each." So that shows the identity of the tax in every particular. It seems to me therefore that *Brewster v. Kitchin* is not an authority to the extent to which it has been sought to carry it, and that we must consider the water-rate of 1861 as a new rate, and affecting property not before charged or chargeable. The question then remains, whether on the true construction of the lease the tenant is exempted, it being a new rate. It was urged as a general rule that a covenant to pay taxes extends only to taxes existing and not to new taxes, and for this the note in 4th Bythewood, 418, was cited. And this is the question on which I have great difficulty. The note in Bythewood is based only on *Davenant v. Bishop of Salisbury* (2 Lev. 68; 1 Ventr. 223). In that case no decision was come to on the point, but there is a *dictum* of Lord Hale in these words, that it were hard to extend the covenant in that case to new charges, and we all knew how lately the kind of tax there came in. The judgment of the Court went on a different ground from the question that was argued, but Lord Holt makes use of those observations. So far the note in Jarman has no weight; but so far as it is an authority it seems to be encountered by *Giles v. Hooper* (Carth. 135). *Giles v. Hooper* is reported fully in Carthew; and I cannot ascertain whether it was referred to in *Brewster v. Kitchin*. It is a decision of the same court, but it does not appear if Lord Holt took part in the judgment. It is very short, and to some extent an answer to *Davenant v. The Bishop of Salisbury*. In that case there was "a lease for years rendering £80 per annum rent, free and clear from all manner of taxes, charges, and impositions whatsoever. And it was adjudged (*absente* Holt, Chief Justice) that the render made a covenant, and that the words above-mentioned extend to discharge the lessor from payment of all land taxes lately imposed by Act of Parliament, and long after the commencement of this lease; and that the lessee is bound to pay the whole rent without any manner of deduction for any old or new charge or imposition whatsoever." Now, is certainly an observation that that case is only to be found in Carthew, and in Carthew reported in that short way; but Carthew is a book of great authority and accuracy; and I find that Chief Justice Willes says "I own Carthew was a good and faithful reporter;" and Lord Kenyon says that he is "in ge-

neral a good reporter."* The true rule of interpretation is that which carries out the intention of the parties at the time the lease was made. It seems to me the intention here was that the party was to be kept free from all taxes which should be payable by the lessee in respect of occupation during the term, except poor-rate. I am to some extent fortified by the strong language of the proviso itself, which points to an exemption during the whole continuance of the demise. The prior recitals in the lease we are also at liberty to take into account, and they show the position of the parties. The lessees were in occupation at the time of the lease, and they had served a notice to surrender if they did not obtain better terms than those which they were holding under. In the report of *Brewster v. Kitchin*, in 1st Lord Raym. at p. 320, Lord Holt says "This covenant extends to all future Acts, for it is that Ellen and her heirs should be free, which is in fee; and her assigns of the rent might take advantage of it; for as the estate was in fee, so a covenant is co-extensive with the estate, and is in fee also; and therefore it is as strong as if it had been to be free from all taxes to be imposed by any Act whatever." So in this case future words are used. In that sense the passage I have quoted from Lord Holt to some extent fortifies the judgment of the Court. I should say also that *Brewster v. Kitchin* was adopted by Lord Mansfield in *Bradbury v. Wright* (Dou. 624). For these reasons I concur, repeating that I consider it a case of great difficulty upon the question of extending this covenant to new taxes, which I consider this water-rate to be. Of course it is only on the fourth and fifth questions that our judgment is given.

By consent of the parties the other three questions were withdrawn.

Court of Common Pleas.

[Reported by J. Field Johnston, Esq., Barrister-at-Law.]

LYSAGHT v. BENISON.—April 16.

Money had and received—Administrator.

A person who improperly disposes of the money of an intestate, and afterwards takes out administration, may maintain an action for money had and received to recover it.

THIS was an action for money had and received, brought to recover, amongst other things, a sum of £92 6s. 2d. due to Catherine Lysaght, deceased, on foot of her jointure charged upon the lands of her eldest son. The plaintiff, a younger son of Mrs. Lysaght, was receiver over the lands, and, subsequently to the death of his mother in December, 1839, in accordance with her expressed desire, paid over this sum of £92 6s. 2d. to Thomas Lysaght, a third son of Catherine Lysaght, whose executor was the present defendant. A property of the deceased lady, which was believed to be freehold, turning out to be leasehold, it became necessary to raise a personal represen-

Vide The King v. Heaven (2 T. R. at p. 776).

tative to her, and the plaintiff, in 1861, took out letters of administration, and in the character of administrator brought this action to recover the £92 6s. 2d. The jury found that Mrs. Lysaght intended an absolute gift of this sum to Thomas Lysaght, and that the plaintiff, James Lysaght, paid it to him. Against a conditional order to enter a verdict for the plaintiff for the amount in question pursuant to leave reserved,

Serjeant Armstrong (with him *Henry Fitzgibbon*) showed cause, and cited *Whitehall v. Squire* (1 Salk. 295). [*Monahan, C. J.*—Is it conceded that there was no binding gift by the mother?] So the judge directed the jury. [*Christian, J.*—Has *Whitehall v. Squire* been ever acted on?] It has not been overruled. [*Monahan, C. J.*—This lady left three next of kin, putting creditors out of the question. Any one of these might have been administrator. It has been held that an administrator is not estopped by what he has done before he became administrator, because he is a trustee for all the parties. Suppose a bill filed for an administration of the assets?] It might be well entertained, but the plaintiff himself is estopped. Here he has acted as *executor de son tort*. [*Christian, J.*—Could the other next of kin not go against the defendant?] No; against the plaintiff. "If another man takes the goods of the deceased, and sells or gives them to me, this shall charge him as executor of his own wrong, but not me."—*Williams on Executors*, 4th edn., p. 216; *Godolph. Pt. 2, c. 8, s. 1*; *Comyn's Digest Administrator, C. 2*; *Observations of Patteson, J., in Paull v. Simpson* (9 Q. B., 370).

Chatterton, Q. C., contra.—One of the most elementary distinctions is that between an executor and an administrator. In the case of the former, the acts relate back, but nothing is operative that an administrator does before he is clothed with that character by the Ecclesiastical Court. It does not appear that the plaintiff was ever *executor de son tort*. He had to state the assets in obtaining administration, and this sum was part of them. It appeared on the trial that there were unpaid creditors of Mrs. Lysaght, and next of kin, and these might hold the plaintiff responsible for this sum.—*Barefoot v. Barefoot* (*Palmer's Reports*, 411); *Middleton's case* (5 Rep. 28 b). The doctrine of relation, by which the letters of administration are held to relate back, exists only where the act done is for the benefit of the estate.—*Morgan v. Thomas* (8 Exchequer Rep., 302); *Whitehall v. Squire* is referred to in *Williams on Executors*, 5th ed. p. 355, and the principle of that decision stated to be that the plaintiff was a *particeps criminis*, and could not recover against the person with whom he colluded.—*Mountford v. Gibson* (4 East, 446). The decision in *Whitehall v. Squire*, as reported in *Carthaw* (p. 103), is put upon contract, and if that be the ground, it has been overruled again and again.—*Doe d. Harnby v. Glenn* (1 A. & E., 49). *Whitehall v. Squire* is overruled in *Lyons v. Muldarry* (*Hayes' Rep.* 530). Chief Baron Joy says, "We have felt and good sense with us." This case is in direct conflict with what has been said on the other side, that the plaintiff only can be sued.

Henry Fitzgibbon in reply.—The cases cited are

cases of *tort*. We are sued for money had and received. If James Lysaght, the plaintiff, had been sued for this sum, he could not have defended the action by saying that he had paid it to us.—*Welchman v. Sturgis* (13 Q. B., 552). Lord Ellenborough, in *Mountford v. Gibson* says that the decision in *Whitehall v. Squire* went upon this, that the plaintiff being a *particeps criminis* in the very act he complained of, should not be permitted to recover upon it against the person with whom he had colluded. So the present plaintiff is *particeps criminis*. [*Christian, J.*—The answer to that is, that you cannot charge anything upon James Lysaght as administrator, which James Lysaght did when he was not administrator.]

MONAHAN, C. J.—There is no question. The law is perfectly settled that the acts of a person before taking out administration are not binding when he becomes administrator in fact. As to *Whitehall v. Squire*, it is overruled in *Lyons v. Muldarry*. The latter case went upon the well-known principle that though the widow gave up the property, she was not bound by her act when she became administratrix. The verdict, therefore, in the present instance must be entered up for this sum. As the judge reserved the point, it is not a case for costs. The administrator will have his costs out of the assets.

Rule absolute.

Court of Exchequer.

[Reported by Oliver J. Burke, Esq., Barrister-at-Law.]

CHUTE v. BUSTED.

23 & 24 Vict., c. 154—*Landlord and Tenant Amendment Act*—*Retrospective operation of Act*—*Fee-farm grant*—*Covenant to keep demised premises in repair*.

The summons and plaint complained that by indenture of 1st March, 1826, and made between R. P. C., of the one part, and J. B., of the other, the said R. P. C. demised unto J. B. the mill and premises in indenture described, to hold to J. B., his heirs and assigns, for ever; and J. B., for himself, his heirs and assigns, covenanted with R. P. C., his heirs and assigns, that J. B., his heirs and assigns, would keep the premises and all improvements in good order, condition, and repair, and at the end or sooner determination of that demise should and would so yield up same to R. P. C., his heirs and assigns. Averment—that before the breaches of covenant therein after mentioned were committed, and before the passing of the Landlord and Tenant Act, the estate of R. P. C. became, was, and continued to be vested in the plaintiff, and one moiety of the estate of the said J. B. became, was, and continued to be duly vested in the defendant. Breach—that the defendant did not, during the continuance of said lease keep the premises in good order and repair, but that, on the contrary, while the plaintiff was such assignee, and before the passing of said Act the said mill became, and was, and from thence hi-

thereto continued to be, and was now burnt down, to the plaintiff's damage of £3,000. To this summons and plaint the defendant demurred, on the grounds, firstly, that the provisions of the Landlord and Tenant Act did not apply to fee-farm grants; secondly, assuming that they did so apply, yet that that application must have regard to grants in fee-farm made after the coming into operation of the statute, and not to those made previous thereto. Held (Pigot, C.B., abstaining from giving any opinion thereon), that fee-farm grants are within the operation of the Act.

Held also, (Pigot, C.B., dissentiente), that the Act had a retrospective operation, and that, therefore, the assignee of a grantor of a fee-farm grant can take advantage of covenants entered into between the original grantor and grantees of a grant made before the coming into operation of the 23 & 24 Vic., c. 154, "The Landlord and Tenant Law Amendment Act (Ireland), 1860." The demurrer was overruled accordingly.

THE summons and plaint complained that by a certain indenture, bearing date the 1st day of March, 1826, and made between Robert Pierce Chute, Esq., of the one part and John MacCarthy Baker of the other part, and under the hands and seals of said parties respectively the said R. Pierce Chute, for the considerations therein mentioned, demised unto the said John MacC. Baker all that and those the mill, dwelling-house, and piece of land surrounding the said mill and dwelling-house, being part of the lands of Tonereigh, in the said indenture described, together with all machinery in the said mill in manner therein described, to have and to hold the said demised premises with the rights, members, and appurtenances thereunto belonging or in anywise appertaining unto the said John MacC. Baker, his heirs and assigns for ever, subject to the rents, covenants, and conditions by and in the said indenture reserved and contained. And the said Jno. MacC. Baker (thereby amongst other things) for himself, his heirs, executors, administrators, and assigns, covenanted with the said Robert Pierce Chute, his heirs and assigns, that he, the said John MacC. Baker, thy, his heirs, executors, administrators, and assigns, should and would from time to time, and at all times thereafter during the continuance of the said demise, preserve, uphold, support, maintain, and keep the said demised premises, and all improvements made and to be made thereon, in good and sufficient order, repair, and condition, and at the end surrender or other sooner determination of that demise, should and would so leave and yield up the same unto the said R. Pierce Chute, his heirs, executors, administrators, and assigns. And the plaintiff avers that before the breaches of covenant hereinafter mentioned or any of them were committed, and before the passing of a certain Act passed in the 24th year of the reign of her present Majesty, entitled The Landlord and Tenant Amendment Act (Ireland), 1860, all the estate of the said R. Pierce Chute in the said indenture mentioned became and at the time of the committing of the said breaches, was and still continued to be duly vested in the plaintiff. And one moiety of all the estate and interest of the said John MacC. Baker in the premises had become, and was, and

continues to be duly vested in the defendant, yet the defendant, during the continuance of the said lease, and whilst he was such assignee as aforesaid, broke the said covenant in this,—that he did not, during the continuance of the said demise, and whilst he was such assignee as aforesaid, preserve, uphold, support, maintain, and keep the said moiety of the premises and the improvements made thereon in good and sufficient order, repair, and condition; but that on the contrary, whilst the plaintiff and defendant were such assignees as aforesaid, and during the said term, and before the passing of the before-mentioned Act, the entire of the said mill, dwelling-house, and premises became and were, and from thence hitherto continued to be and now are, burnt down, dilapidated, and destroyed to the damage in respect of his estate in the said moiety of £3,000. To the above plaint the defendant demurred, firstly, because the summons and plaint does not disclose any cause of action good in substance; because although it says that but one moiety of the estate and interest of John MacC. Baker in the premises therein mentioned became and continued to be vested in said defendant, John Busteed, yet it does not make the person in whom the other moiety of the estate and interest in said premises is vested a party defendant or show any cause why the other party should not be made a party defendant thereto. 2ndly, although it sufficiently appears by said summons and plaint that there is another person in existence jointly liable with said defendant, John Busteed, for the alleged breach of contract therein complained of, yet such other person is not named in or made a party to said proceedings. Thirdly, that said writ of summons and plaint which seeks damages for the alleged breach of contract as to the entire of the premises therein named is defective in not joining as a defendant the party in whom the remaining moiety of the interest in all the premises is vested. Fourthly, because no privity of contract is thereby shown between the plaintiff and the defendant, and because it does not thereby appear that the defendant is liable on the contracts or covenants entered into by John MacC. Baker in the summons and plaint named. The following were the points for argument:—1stly,—That no privity of contract is shown between the plaintiff and defendant; nor is it shown that the defendant is liable for the act of John MacC. Baker, the original lessee, in summons and plaint mentioned. 2ndly,—That it does not appear in said summons and plaint that plaintiff is entitled to sue in respect of the covenants entered into with Robert Pierce Chute, the original lessor.

B. Ferguson in support of the demurrer.—The plaintiff could not sue the defendants on a covenant for repair, inasmuch as there was no privity of contract between the plaintiff and defendant. The state of the common law before the 10th of Car. I., c. IV., Irish, is thus recited in that Act,—“For as much as by the common law of this realm no stranger to any covenant shall take advantage or benefit of the same by any means or ways in the law, but only such as are parties or privy hereunto.” By this Act the assignees of a reversioner were enabled to sue on a covenant relating to realty, it is therefore submitted that the grantor of a fee-farm grant or the assignees of such grantor are not included in said Act of 10 Car. I.,

Irish, as that Act only deals with the reversioners of leases and their assignees; and as no reversion remains in the grantor of a fee-farm grant, consequently the last mentioned Act has no reference whatever to fee-farm grantors or their assignees; and no privity being between the parties here no action can lie, and the rights of the parties remain as at common law.

Clarke, Q. C. and Jellett for the plaintiff.—The question to be considered is, whether the Landlord and Tenant Act has a retrospective effect or not? If it have, the action lies, and the demurrer must be overruled. The 1st, 3rd, and 12th sections of 23rd & 24th Victoria are the enabling sections. No reversion is now necessary to exist in the landlord to enable him to sue—by the first section, the word “landlord shall include the person for the time being entitled in possession to the estate or interest of the original landlord under any lease or other contract of tenancy, whether the interest of such landlord shall have been acquired by lawful assignment, devise, bequest, or act and operation of law, and whether he has a reversion or not”—by s. 3, “the relation of landlord and tenant shall be deemed to be founded on the express or implied contract of the parties, and not upon tenure and service and a reversion, shall not be necessary to such relation, which shall be deemed to exist in all cases in which there shall be an agreement by one party to hold land from or under another in consideration of any rent. The 12th section empowers the assignee of a grantor of fee-farm grants to have the benefits of covenants made by the grantor. “Every landlord of any lands holden under any lease or other contract of tenancy shall have the same action and remedy against the tenant; and the assignee of his estate or interest, or their respective heirs, executors, or administrators, in respect of the agreements contained or implied in such lease or contract as the original landlord might have had against the original tenant or his heir or personal representatives respectively; and the heir or personal representatives of such landlord on whom his estate or interest, under any such lease or contract, shall devolve or should have devolved, shall have the like action and remedy against the tenant and the assignee of his estate or interest and their respective heirs or personal representatives, for any damage done to the said estate or interest of such landlord by reason of the breach of any agreement contained or implied in the lease or other contract of tenancy in the lifetime of the landlord, as such landlord himself might have had.” These sections clearly authorize the bringing of this action.

Ferguson in reply.—The 23rd & 24th Vict. was passed after the making of the lease, and does not apply. The maxim, *Nova constitutiones futuris formam imponere debent non prateritis*, is the general rule governing the construction of statutes; and in order to hold that this grant could be brought under the Landlord and Tenant Act, the Court is called to give the Act a retrospective effect. In *Bac. Abr. Statute C.*, it is laid down as a general rule “that no statute is to have a retrospect beyond the time of its commencement.” In *Moore v. Durden* (2 Ex., 27), the same rule was followed: in that case an action was brought for a wager: the 18th section of the 8 & 9 Vict., c. 109 enacted that all wagering contracts

should be null and void, and that no action could be maintained for the recovery of any wager. The declaration bore date the 1st December, 1845; the race upon which the wager was made was run May, 1844, and the Act came into operation in Aug. 1844, and it was there held that the statute had not a retrospective operation.—*Gilmore v. Executor of Shooter* (2 Mod., 310); *Hutchcock v. May* (6 Ad. & E., 947); *Moore v. Philips* (7 M. & W., 536); *Thompson v. Locke* (3 C. B., 540).

May 27.—*FITZGERALD, B.*—The real question to be considered in this case is, whether the grantor and grantee of the lease of 1826 can be considered as the original landlord and tenant. It is clear that that lease contains an agreement to hold lands at a rent, but then it is contended that the Act has no relation to agreements before the 1st Jan., 1861. The third sect. of the Act declares that a reversion shall not be necessary to constitute the relationship between landlord and tenant, which relationship shall be deemed to subsist, where there shall be an agreement by one party to hold land from or under another in consideration of any rent. This section is sufficiently clear, but then it is contended that the Act has no relation to this agreement, the lease being made before the statute; in other words, that the Act has not a retrospective effect. Again, it is contended that even supposing the Act had a retrospective effect, yet that fee-farm grants are not within the provisions thereof, the statute of Quia Emptores being still in force, same being unrepealed, though a number of others are repealed by Schedule B. of the Act. I am, however, clearly of opinion that the Act has a retrospective effect, and consequently that the action lies. Before the Act of 1860 it is admitted that this action could not be maintained. The plaintiff contends that under and by the provisions of the 12th section the present action is warranted; and he relies upon the third section and the definition of the relation of landlord and tenant contained therein. The defendant's argument amounts to this: that except where express provision is made therefor the Act of 1860 has no operation with respect to agreements made prior to its passing;—that the relation between the parties to such agreements might be ascertained and can be ascertained only by the law as it was prior to the Act;—that a grant of land in fee at a rent is not within the true meaning of the Act, neither is an agreement by one party to hold land under another in fee paying a rent a contract of tenancy within the meaning of the Act;—that the Act of 1860 leaves unrepealed the statutes relating to fee-farm grants; and that the fifty-second section expressly distinguishes them from leases and contracts of tenancy. If the contention of the defendant be correct, it follows that the benefit of the Act of 1860 having no application to existing tenancies will be almost unavailable to the present generation; and the law of landlord and tenant will be further complicated by having two separate codes in operation at the same time. In many of the sections the Act clearly contemplates an express distinction between agreements made before and after the Act. The greater part of the Act makes no distinction, which, in my opinion, is almost irresistible evidence that in its general provisions the Act includes antecedent contracts,

The third section to my mind is not a mere definition of the relation of landlord and tenant for the interpretation of the Act, but a solemn statement of the mode by which from the 1st January, 1861, the relation of landlord and tenant should be understood. I am further of opinion that the Act does apply to grants in fee at a rent, and that the Act does not abolish tenure but imports into contracts in particular cases what before were the attributes of tenure. The fact of the 25th section of the Act of 1860 expressly excepting from its operations a particular class of fee-farm grants seems to me to show that other fee-farm grants were included under it. On the whole I am of opinion that the statute applies generally to contracts made before the Act; therefore that this demurrer should be overruled.

DEASY, B.—I agree with my brother Fitzgerald that this demurrer ought to be overruled. The 3rd and 12th sections apply to leases and contracts, and also to fee-farm grants, &c. I have no doubt that the Legislature meant that they should apply to all tenancies existing before the day the Act came into operation, namely, on the 1st January, 1861. The object of the Legislature was to codify and simplify the laws relating to landlord and tenant; and for that purpose the Act repeals entirely or partially thirty-nine statutes, beginning with the 15th Edw. 4, c. 1, (Irish) and ending with the 14 & 15 Vic. c. 57, and then re-enacts in one short Act several of the repealed enactments; and having introduced provisions and improvements suited to the requirements of the present times, the Legislature presents all the Landlord and Tenant Acts which were before scattered through the Irish and Imperial Statute Books in a comparatively small space and within the reach of every member of the community. If the argument addressed to the Court by the defendant's counsel prevail the consequence will be that the benefits intended to be conferred cannot be felt by the present generation of landlords and tenants; and that as to them the repealed enactments were to be still in force; and they must grope through the indexes of the statutes for the laws relating to their liabilities and rights. Out of the 105 sections of this Act 24 are expressly prospective; 6 are prospective and retrospective, and the remaining 75 are expressed in general terms, neither prospective nor retrospective. I think the 12th section has a retrospective effect and deals as the 7th section does with surrenders or interests existing on the 1st Jan., 1861; and in like manner as the 11th & 16th sections deal with future assignments; or as the 24th section deals with the landlord's proofs in an action against his tenant. In *Mercer v. O'Reilly* (7 Ir. Jur., N. S., 313), the Court of Common Pleas held that the 24th section was retrospective, and that the rights of landlord and tenant under lease antecedent to the Act were governed thereby; and this decision was unanimously upheld by the Court of Exchequer Chamber.

As to the second point, whether the plaintiff is entitled to sue in respect of the covenants entered into with the original lessor; in other words, can the assignee of a grantor of a fee-farm grant take advantage of the covenants entered into between the original grantor and grantee? The solution of this question de-

pends upon whether or not fee-farm grants are included within the meaning of the provisions of the Act. I have arrived at the conclusion that they are. By the 12th section the benefits of covenants and agreements of which the landlord might have taken advantage of are transferred to his assignees. And the first section defines the meaning of the expression landlord to be the person for the time being entitled in possession to the estate or interest of the original landlord under any lease or contract of tenancy, whether he has a reversion or not. Section 3 declares that the relation of landlord and tenant shall depend on contract and not upon tenure or service, and that a reversion shall not be necessary. The operation of those several sections is to abolish the old law, which deemed a reversion to be necessary to constitute the relationship of landlord and tenant; and the 52nd section gives the right to the landlord to bring an ejectment for non-payment of rent for lands held in fee-farm.

PIGOT, C. B. having read the summons and plaint, proceeded.—The covenant the plaintiff sues on is a continuing covenant; for although it was broken before the statute came into operation, yet, as the premises are continuing out of repair, the covenant is broken by the premises being out of repair during the term—*Saxson v. Rabin* (1 B. & Ald. 581). Two questions arise upon the Act of Parliament. First,—Does the 12th section apply to fee-farm grants? Secondly,—Does it apply to fee-farm grants made before the Act came into operation? In other words has the Act a retrospective operation? As to the first the expressions "landlord and tenant," and "contract of tenancy," in the 12th section, which depends upon the question whether a fee-farm grant does create the relationship of landlord and tenant under the 3rd section of the statute. The first of these questions is one of considerable doubt and difficulty; and I have given the arguments addressed to us with great ability the most serious consideration; yet I nevertheless refrain from pronouncing any opinion upon that portion of the case. Upon the second question I retain the same opinion which influenced my judgment in *M'Areavy v. Hannan* (13 I. C. L. R. 70). I am of opinion that such a change in the status of parties as that of creating between the grantor and grantee, or their representatives, the relationship of landlord and tenant, which relationship did not exist before the statute, could not, taking into consideration the different rights, duties, and liabilities, be effected without unequivocal expressions in the statute that such was the intention of the Legislature. The 12th section cannot bear the interpretation which the plaintiff seeks to give it without the aid of the 3rd section. I cannot see that it does contain such unequivocal indication; but it does contain words indicating that the Act was not to have a retrospective view—*novas constitutiones futuris formam imponere debent non prateritis*. Before the passing of this Act the defendant was not bound to rebuild the premises; and by the construction the plaintiff contends for after the Act came into operation, the burden of rebuilding the premises, which may involve an outlay of thousands of pounds, is cast upon him, and thus multiply ten fold his liabilities, which, when he became assignee of the premises, he was not clothed

with. I am of opinion that the defendant is entitled to judgment upon this demurrer.

GILLIGAN v. DENNING AND WHELAN.—Nov. 21.

Assault and battery—Plea of Justification—Arrest under renewal of civil bill decree—Replication.

Where the defence shows, by dates, that two years and upwards have elapsed between the granting of an original civil bill decree and the renewal thereof, and does not state that proof of notice of application for renewal was made in open Court, pursuant to the 142nd section of the Civil Bill Act, the Court will allow plaintiff to reply that two years have, in fact, elapsed, and that no proof of notice of application was given pursuant to the statute.

C. Molloy, on behalf of the plaintiff, applied for liberty to file replications to the first defences to the second and third counts of the summons and plaint, which were for assault and battery, and false imprisonment. The defence averred "that the plaintiff was indebted to the Governor and Company of the Bank of Ireland in the sum of £40; that he was duly served with civil bill process to appear before the chairman for the King's County, who, at the March sessions of 1860, pronounced his decree that the said Governor and company of the Bank of Ireland should recover the said sum and costs from the plaintiff; that within two years afterwards, and whilst the said sum was due and unpaid, to wit, at the October sessions of 1861, the said decree was duly renewed; and that afterwards, and within two years from the pronouncing of the said last-mentioned decree, that is to say, the renewal decree of Oct. 1861, and whilst the said sum was due and unpaid, the said renewal decree was, at the April sessions of 1863, by the then chairman for the said county duly renewed; that the sheriff, in pursuance of the said renewal decree and by virtue thereof, issued his warrant authorising certain persons named as bailiffs therein to execute the said decree; that the defendants, as the servants of the said Governor and Company of the Bank of Ireland, caused the plaintiff to be arrested and imprisoned, and that these were the grievances complained of." The requisites enjoined by the 142nd section of the Civil Bill Act had not been complied with. The proviso contained in that section declares that "it shall not be lawful for any assistant barrister to grant a renewal of any civil bill decree when two years shall have elapsed after such decree shall have been pronounced, unless upon proof made in open court that the party seeking such renewal had caused notice in writing, according to the form given in the statute, to be served upon the party against whom it was sought to renew such decree," &c. Under those circumstances counsel now applied for liberty to reply, That two years and upwards had elapsed between the pronouncing of the said original decree at the March sessions, 1860, in said defence mentioned and the granting of the renewal decree at the April sessions, 1863, in said defence mentioned, and that no proof was made in open court; that no notice in writing, according to the form 34 in the schedule to the statute in that behalf annexed, had been served upon the

plaintiff, against whom it was sought to renew such decree; and that no notice in writing nor any notice whatsoever was served upon the plaintiff.

Serjeant Sullivan and Pakenham Law, for the defendants, opposed the application, and contended that the replications were unnecessary. The defences showed that two years and upwards had elapsed from the pronouncing of the original decree, and, therefore, it is unnecessary to reply the lapse of two years. And if notice of the application to renew the decree was necessary (which under the circumstances he submitted was unnecessary), as the defences did not state that notice had been given; then the plaintiff ought to demur; that is the proper course.

Molloy replied.—The defences show by dates that two years and upwards have elapsed; but this is not sufficient for demurrer; the Court will take no notice of the dates. There should be a positive averment that the two years have in fact elapsed. By the 67th section of the Common Law Procedure Act, the defendants in their defences are not obliged to state that proof of notice of application to renew had been made in open court; the defences will be good without such averment even though such proof is essentially requisite in order that the chairman may have jurisdiction to renew decrees more than two years old. The replications are therefore necessary, otherwise the question between the parties regarding the legality of the renewal at the April sessions, 1863, cannot fairly be decided.

Liberty to file the replications granted.

Court of Probate.

[Reported by W. R. Miller, Esq., LL.D., Barrister-at-Law.]

GAMBLE v. ROBINSON AND OTHERS.—Dec. 14.

Practice—Issues on different wills.

Where several wills were propounded by different parties, which were each impeached on the ground of undue influence exercised by persons different and distinct as regarded each will, the Court ordered the issue to be confined at the trial to the validity of the will latest in date.

Dr. Townsend moved to fix the mode of trial in this case. He was for the defendant, Robinson, who relied on a will, the latest, in point of date, of those propounded. The plaintiff had alleged a will prior in date to that alleged by Robinson; and his plea impeached the latter will on the ground of undue influence exercised by certain persons on the mind of the deceased. Another defendant, one of the next of kin, had by his pleading impeached both of those wills on the ground also of undue influence; but the persons alleged to have exercised the influence in respect of each will were different.

Dr. Ball, Q.C., for the plaintiff, submitted that for the present the issue should be confined to the trial of the last will. If issues as to each will were sent to the jury great confusion must necessarily arise in the

minds of the jury, as the real question was one of undue influence; and the persons and occasions by whom and when it is said to have been used are wholly different and distinct, and wholly different considerations apply to each will. Besides, if the last will is upheld there will be no occasion to try any other issue. The 35th Rule, contentious, orders that a plaintiff and a defendant alleging different wills may, *subject to the permission of the judge*, adduce proof on the trial of the validity of each will. So that it is clearly in your lordship's discretion to send to or withhold from the jury the different issues.

Dr. Walsh, Q.C., for the next of kin, also asked for the issue to be limited to the consideration of the last will.

KEATINGE, J.—In this case I think it would be most embarrassing to the jury to have issues under their consideration at the same time as to the validity of each will; and I therefore now will direct the issue to be whether the last paper writing be the last will of the deceased.

Landed Estates Court.

[Reported by C. J. Manning, Esq.]

[BEFORE JUDGE HARGREAVE.]

IN THE MATTER OF THE ESTATE OF HENRY WILLIAM MASSY, OR OF GEORGE LATHAM BENNETT, OWNER;
EX PARTE HUGH FRANCIS MASSY, PETITIONER.

Devastavit by executor.

A testator bequeathed pecuniary legacies to his children, payable at 21 or marriage, charged primarily upon his personal property, but the will contained a clause charging the lands with so much of his debts and legacies as his personal estate should not be sufficient to pay. The clause was as follows:—"I hereby charge and encumber my estate with the payment of all such parts of my debts and legacies as my personal property shall not be sufficient to pay, but my will is, that my debts and legacies shall be in the first instance paid out of my personal estate as far as same will extend." The executor wasted the testator's personal estate, which became insufficient to pay the legacies. Held, that the real estate was answerable for the deficiency of the personal estate, and that such deficiency was proved where there was a failure to pay the legacies out of the assets.

Held further, that the mere not enforcing payment from the executor, was not to be regarded as laches. Held further, that there was no difference in principle between a trust term to raise the deficiency, and a charge of such deficiency in express terms.

THE facts of the case were as follows:—The Rev. William Massy, formerly of the town and county of Tipperary, deceased, died on or about the 14th November, 1833, having by his will bearing date the 23rd September, 1829, bequeathed to petitioner the sum of £2,769 4s. 7d., with interest at five per cent.,

on attaining the age of twenty-one years. And the testator devised all his estate and interest in the lands of Donaskeigh, in the county of Tipperary, to the trustees therein named, upon trust, for his eldest son by his second marriage, Henry William Massy, for life, with remainder to the first and other sons in tail, remainder to testator's son, Charles William Massy, for life, remainder to his issue in tail male, remainder to his son, Geoffrey William Massy (since deceased), remainder to his issue in tail male, with remainders over. And the testator charged and incumbered his estate of Donaskeigh with the payment of all such parts of his just debts and legacies as his personal property should not be sufficient to pay; but declared his will to be, that his debts and legacies should in the first instance be paid out of his personal estate as far as same should extend. And by a codicil, bearing date the 4th March, 1833, the testator revoked said bequest amongst others and bequeathed to year petitioner £4,000 in lieu thereof, which he thereby directed should be paid in manner and subject to the several limitations, remainders, and provisos in his said will, stating his will and desire only to be to increase said legacies. The Rev. William Massy had at the time of making his will such an estate or power over said lands of Donaskeigh and its subdenomination, Clonmain, as enabled him to charge the legacy; and at the time of his death he left sufficient personal estate to discharge all the legacies bequeathed by the will. Elizabeth Massy, one of the executors, duly proved on the 5th December, 1833, saving the rights of Henry William Massy, the other executor, who was then an infant. By indenture dated 10th July, 1834, and made between James Roe of the one part, and Elizabeth Massy, the executrix, and said Henry William Massy, the residuary legatee of said Rev. William Massy, then a minor, of the other part, after reciting that it was considered for the benefit of the said Henry William Massy that the residue of the personal estate should be invested in a purchase of the lands of Grantstown and Killoge, in the county of Tipperary, in consideration of £8,000 paid by said Elizabeth Massy as such executrix. James Roe conveyed Grantstown and Killoge to Elizabeth Massy, her heirs and assigns, for ever; and Elizabeth Massy declared that the conveyance was made to her in trust for Henry William, and that the consideration money was paid by her out of the personal estate of the testator. Henry William Massy having subsequently attained his age of twenty-one years, a duplicate probate was granted on the 11th February, 1837, to him jointly with Elizabeth. A great part of the assets of Rev. William Massy was wasted and misapplied by his said executors; and there was no portion thereof available for payment of legacies save the lands of Grantstown and Killoge, purchased with a portion of the personal estate. By deed, bearing date the 5th day of September, 1860, Henry William Massy conveyed Donaskeigh, Grantstown, and Killoge to George Latham Bennett upon trust, to sell and apply the produce thereof in payment of the several legacies bequeathed by the will. William Godfrey, the eldest son of Henry William Massy, claimed to be the next tenant in tail in remainder of Donaskeigh; but the parties next in remainder disputed the claims of William Godfrey, and

Charles Massy claims to be tenant for life in remainder after the death of Henry William, and Godfrey Lennox Eyre Massy, a minor (the eldest son of said Godfrey William Massy, deceased), claimed to be tenant in tail in remainder after the life estates. On the 24th day of January, 1861, one Thomas Hobbs Williams and Frances, his wife, filed their cause petition in the Court of Chancery, Ireland, to recover a certain legacy of £2,000 which was bequeathed to said Frances by the aforesaid will, and to seek to have same declared a charge in the fee of Donaskeigh. No receiver had been appointed, and Henry William Massy was still in receipt of the rents. No final order had been made in said cause petition matter, but it was manifest from the proceedings that there was no part of the personal estate of said Reverend William Massy forthcoming, save so far as Grantstown and Killoge, having been purchased with the personal estate, could be considered as such, but the several parties interested in the fee and inheritance of Donaskeigh insisted that the legacies given by the will were not charged on the fee and inheritance of Donaskeigh, but only on the life estate of Henry William Massy in Donaskeigh. The sum of £4,000 was due to petitioner for principal on foot of said legacy, together with at least 8 years' interest thereon, but as no account had for a number of years been settled on foot of such interest, the exact amount was unascertained. The petitioner was not the first incumbrancer on said lands on foot of said legacy, but he was also assignee of the jointure of Elizabeth Massy, on foot of which he was the first incumbrancer on said Donaskeigh. By a conditional order dated 6th February, 1863, the Court ordered the lands of Donaskeigh, known as Clonmaine and Grantstown and Killoge, County of Tipperary, to be sold for the purpose of discharging the incumbrances, unless cause shown, after service of the order on Henry William Massy and George Latham Bennett, and on the solicitor for Thomas Hobbs William and wife, and on Richard Ridgeway, Samuel Gerrard, and John Henry Chomley, incumbrancers, and on William Godfrey De Massy, Charles Massy, and on Godfrey Lennox Eyre Massy, an infant.

Sherlock, Q.C., (with him *Ferguson*), for the petitioner to make absolute the conditional order, notwithstanding cause shown by Godfrey Lennox Eyre Massy, eldest son of Louisa Countess of Seafield. The cause raised questions of law. 1st.—That on the construction of Wm. Massy's will, the lands were charged only with so much of debts and legacies as the personal estate at testator's death should be insufficient to pay: that Wm. Massy left ample personal estate at his death to pay debts and legacies, and that the subsequent wasting of the personal assets by Wm. Henry Massy could not create a charge which did not exist at testator's death. 2nd.—That the Statute of Limitations would operate as a bar, the testator having died in 1838, and no interest having been paid out of the rents. 3rd.—That lands called Grantstown were primarily liable. 4th.—That the arrears of jointure could be recovered only out of the life estate of Henry William Massy. As to the first point the words of the will are: "I hereby charge and incumber my estate of Donaskeigh, with the payment of all such parts of my debts and legacies,

as my personal property shall not be sufficient to pay, but my will is that my debts and legacies shall be in the first instance paid out of my personal estate as far as same will extend." Insufficiency may be at any time and not at death of testator. Here the legacy was not payable till 1849, and surely, if the assets were wasted by the executor before he could interfere, he is not to be prejudiced; and the testator did not confine it to any particular means of deficiency. As to the Statute of Limitations being a bar, the Rev. William Massy died in 1833, and the legacy of the petitioner was not payable till he attained twenty-one. The petitioner being born in 1828, did not attain age till 1849. When Henry William became of age he undertook the management of the property for the benefit of the petitioner, and made payments on account of the legacy and interest, and among other payments, was one in January, 1854, of £1,700 for the purchase of the petitioner's company in the 19th regiment. As to the jointure, the petitioner is a *bona fide* purchaser of the jointure of Elizabeth Massy, and entitled to be paid same during her life out of the rents of the lands, and if necessary, by a sale, and same should not be applied to recoup any sum that might be due by Elizabeth to the assets of the Rev. William Massy. The conditional order should not therefore be discharged, but made absolute. Cited *Marsh v. Evans* (1 P. Wms. 668); *Humble v. Humble* (2 Jurist, 696); *Howard v. Chaffers* (9 Jurist, N. S. 767); *Scott v. Clements* (8 Ir. Ch., p. 1.)

Burroughs, Q.C., contra, (*Shekleton* with him).—The question is as to the period at which the sufficiency or the deficiency of the personal assets of Rev. Wm. Massy is to be ascertained. We contend that such period is the time of death, when it is an admitted fact, there was enough to pay debts and legacies, and leave a surplus, and that being so, there is no charge, there being no deficiency. *Hepworth v. Hill* (8 Jur. 962, and 30 Beavan 47). [More accurately reported in Jurist however.] In the case cited on the other side in P. Wms. it was merely a question of priority between legatees. *Humble v. Humble*, and *Howard v. Chaffers* are distinguishable from the present case. The questions in those cases was between legatees and creditors of devisee, in default, he being executor; and the lands were devised to trustees in trust to raise the deficiency. In the present case it is only a charge. See Sugden V. & P., 662, last edition.

JUDGE HARGREAVE.—The petition in this matter is filed by one of the legatees under the will of the Rev. William Massy to raise his legacy by a sale of the testator's real estate (Donaskeigh, county Tipperary), and of certain property of Grantstown, in which a part of his personal assets was invested. Cause is shown against a sale of the testator's real estate (Donaskeigh) by Godfrey Lennox Eyre Massy, an infant, (by his next friend,) who takes an estate in remainder, under the limitations in the will. The testator bequeathed large pecuniary legacies to several of his children (of whom petitioner is one), payable at twenty-one, or marriage, charged primarily on his personal estate; and the will contained a clause, charging the lands with so much of his debts and legacies as his personal

estate should not be sufficient to pay, such debts to be paid in the first instance out of the personal estate, as far as it would extend. The testator, by a codicil, varied the amount of the legacies, making the petitioner's £4,000; and he appointed his wife, and his son William Henry Massey, his executors. The widow proved the will in the first instance; and when William Henry Massey came of age it was proved by him. It is an admitted fact that at the testator's decease there was sufficient personal assets to have paid or provided for all the legacies; and a supposed surplus of £8,000 was laid out in the purchase of land for the benefit of William Henry Massey, the residuary legatee. The purchase-deed stated that the purchase money was part of the assets. This estate is now available, if at all, to a very small extent, as it has been mortgaged by William Henry Massey in favour of persons whose demands have been established by the decree of the Court of Chancery to be prior to those of the legatees. No other part of the personal assets is now available, they having been wasted by William Henry Massey, who is not in a position to answer the devastavit. The petitioner's demand became payable in the year 1849, and William Henry Massey has made some payments on account. No evidence is given as to the times at which the executor wasted the assets, except so far as such waste was effected by the mortgages, of the purchased estate, which took place in and since 1858. It appears probable that the other assets were made away with very many years before. It is under these circumstances that the personal estate of the testator is now insufficient for payment of the legacies; and the question is whether the charge on the real estate has taken effect by reason of such insufficiency. There are authorities which establish beyond a doubt that the trusts of a term created, by the testator, for the purpose of raising so much of his legacies as his personal estate should be insufficient to pay, arise, and take effect; notwithstanding that the deficiency is created solely by the devastavit of the executor. The cases of *Humble v. Humble* (2 Jur., O. S.); and *Howard v. Chaffer* (9 Jur., N. S.), establish this proposition. It was contended on the part of the minor that those decisions would not have been made if it had not been for the circumstance that the defaulting executors were also the devisees of the realty. On examination of the cases it will be observed that this was not strictly the case; but even if it had been, it would have afforded no ground for the decisions. For in such cases the devastavit would have been a personal debt simply, and could not have been in those suits made a charge on the lands. The charge was given because the trusts of the term had taken effect; and for that reason it was held that the charge of the legacies was prior even to the mortgages created by the devisee, who took subject to the trust of the terms. It was suggested that a different view was taken by the Master of the Rolls in *Hepworth v. Hill* (30 Beav. 476, and 8 Eng. Jur. 962). I have carefully examined that case, and I think that the facts raised no question of the nature of the present one. There the residuary devisee and legatee received the real and personal estate, one pecuniary legacy not being provided for. It was on his death that a question arose between his real and personal representatives as to whether his

real or his personal estate was to bear the legacy under the former testator's will; and what was held was that such part of the legatee's personal assets as were personal assets of his testator were to be first applied; and that the residue was to be paid not out of the legatee's personal assets, but out of the testator's real estate remaining unsold. It was sufficient in that case to ascertain, as the fact was that the personal assets of the first testator were at his decease insufficient to pay the legacy, for that fact was sufficient to authorise the sale. I have also looked at *Scott v. Clements* (8 Ir. Ch. Rep. 1), but the facts of that case have no similarity to the present one. The principle, therefore, is established that deficiency is conclusively proved when there is a failure to pay the legacy out of the assets; but I felt some doubt whether the petitioner might not be liable to the imputation of laches in not requiring payment in or soon after 1849, when he attained age. On consideration I have no doubt that the mere not enforcing payment from the executor is not for this purpose to be regarded as laches. The case might be different if there had been an appropriation of assets by the executor to pay this legacy, and the appropriated funds left in the executor's hands. This would have been a relinquishment of the security provided by the will for the personal security of the executor. The primary duty of securing the due administration of the personal assets devolves under the will upon the parties interested in the real estate, which is the secondary fund or surety for this payment; and I must hold the real estate responsible for the actual deficiency of the personal estate, which, it must be observed, is caused by the act of the testator himself when he entrusted his assets to William Henry Massey. No question of laches was raised in *Humble v. Humble*, though the facts suggested it more strongly than they do in this case. I have only to add, that there is no difference in principle between a trust term to raise the deficiency and a charge of such deficiency in express terms. The former plan saves the necessity of applying to a court of equity for a sale, but does nothing more. If there was no demand vested in the petitioner except the arrears of the jointure, which are not very large, the Court would not proceed to a sale, but would hold over the conditional order, so as to give the parties showing cause an opportunity of having the arrears paid off out of the rents by means of a receiver.

Cause shown insufficient, and disallowed. Petitioner's costs out of the fund. The next friend of the minors to be at liberty to apply for his costs on the settlement of the final schedule of incumbrances.

Revision Court.

Reported by John Norwood, Esq., Barrister-at-Law.

[*Coram*, VEREKER (Lord Mayor) and CHATTERTON, Q.C., and MORRIS, Q.C., his Assessors].

In re SMYLY AND OTHERS—June 2, July 3.

Franchise—Right by grandbirth to Freeman's Franchise—Prescriptive Corporate Usage.

Held—That a person is entitled to be admitted to the

Freeman's Franchise in the city of Dublin, in right of his grandfather, either paternal or maternal, pursuant to the custom established in the Corporation by prescription.

THESE were claims to be admitted freemen of the city of Dublin by right of grandbirth.

The facts and circumstances of the case, which was not argued by the Counsel for the parties opposed to the claims, appear sufficiently from the judgments.

M'Donogh, Q. C., and Brereton, Q. C., appeared for the claimants.

Serjeant Armstrong, Hemphill, Q. C., and F. W. Brady, Q. C., appeared contra.

The following authorities were cited by *M'Donogh, Q. C.*—*Doe v. Bevis* (7 C. B. 456); *The King v. Hoyle* (6 T. R. 430); *Hill v. Smith* (10 East. 476); *King v. Jolliffe* (2 B. & Cr. 59); *Scales v. Keye* (11 Ad. & Ell. 823); *Biddulph v. Ather* (2 Wils. 23); *The Queen v. Powell* (5 E. & Bl. 377); *The Mayor of Hull v. Horner* (Cowp. 102); *Griffith v. Matthews* (5 T. R. 296); *Rogers v. Brooks* (1 T. R. 431); *Todd's Johnson's Dict., sub voc., "Son,"* st. 2 & 3 Wm. 4, c. 88, sec. 9.

VERKER (Lord Mayor)—In this case I regret extremely that we have not had an opportunity of hearing either Serjeant Armstrong or Mr. Hemphill; however I think under the circumstances we have no option in the matter. As it is important the public should be informed on the subject, I beg to state distinctly how this day came to be fixed upon. Before I had the honor of being elected to the office of Lord Mayor, the admission of freemen by right of grandbirth was a subject of discussion by the Corporation, and a matter of some public importance and notoriety. I promised that as soon as I filled the civic chair I would take an early opportunity of appointing two assessors in whom the public would have the fullest confidence, and that I would be guided by them in the decision that I arrived at. I also stated my anxiety that the matter should be so argued as to be settled for ever, as I consider it unseemly that such a question should be constantly under discussion. Accordingly from the time I was Lord Mayor I did my best to consult the convenience of the parties, and to appoint a day that might be suitable to every one for the hearing of this case. I selected as my assessors two gentlemen differing in politics and in religion, but in one respect equal, viz., that they both command the respect of their fellow citizens—namely, Mr. Chatterton, Q. C., and Mr. Morris, Q. C.; and from all I have heard both from the Conservative and the Liberal party, I flatter myself that my selection has met with universal approbation. As soon as the question was mooted I directed the Conservative and the Liberal agents to confer together, and fix on a convenient day for the argument of it. The 2nd of June was fixed upon, and the question then came on to be argued. At something after three o'clock on that day, Mr. M'Donogh having closed his case, I sent down to Serjeant Armstrong, and we pressed upon him to proceed. Mr. Henry refused to do so. I had an object in pressing on the case, as I had to leave on public business for London the following day. Serjeant Armstrong not being able to attend, we were reluctantly obliged to adjourn the Court; and I then stated publicly

both to the Liberal and the Conservative agents that I would proceed again on such a day as they might fix. I said that my convenience was not to be consulted at all, but that they should consult with the counsel and assessors, and fix the earliest day after my return from London that they possibly could. Of course Serjeant Armstrong was the party whose convenience should have been mainly consulted, as I had heard Mr. M'Donogh, but I had not heard him. The Liberal agent, whose duty it was to have consulted with Serjeant Armstrong and to have fixed a day, never fixed a day at all; and so the matter remained until the 30th of June, I believe, when the Conservative agent was obliged to fix an early day in order to hear the case, because we are all aware, as I have already stated, that unless the roll is signed by these freemen before the 20th of this month, they stand disfranchised till the 10th of December, 1864; and I will say that if by my negligence or default, or want of firmness, a large body of my fellow-citizens should be so dealt with that the rights they claimed should not be adjudicated on for so long, I should be guilty of a gross neglect of my public duty. Mr. Henry has pressed upon us that this day was most inconvenient; but Mr. Morris has stated that four Nisi Prius courts were sitting from the 12th of June until yesterday; and, therefore, there was no day since the 12th of June, which would have been so convenient to Serjeant Armstrong—so far as we could have been able to judge without being behind the scenes—as either to-day or to-morrow. Serjeant Armstrong has refused, however to argue the question to-day, and so has Mr. Hemphill, and I wish particularly it should be known that I have offered to these gentlemen the option of taking any one of four different courses in the matter. In this case Mr. M'Donogh claims for certain parties the franchise in question upon the ground of immemorial usage. There is no particular charter or document relied on, but we all know that ancient prescription presumes the existence either of a charter or some other legal commencement of the right. The first case relied on in support of ancient prescription is that of the "Allens," but I would give very little weight to that as a precedent. The second case is that of "Plunket Plunket," who it appears, was admitted *Quia est filius Gulielmi Stowell*. I believe there was some doubt at one time, whether Plunket Plunket Stowell was not the name. He was a very young man when he signed the roll as "Plunket Plunket," and though it is possible that he might have assumed the name of "Stowell," it is still possible that he might have been the maternal grandson of William Stowell. If it appeared that the Corporation from time to time had been in the habit of admitting maternal grandsons to the franchise in question, then the presumption would be that he was a maternal grandson. If such had not been the case then the inference would be that he assumed the name of "Stowell" for the sake of fortune or for some other consideration. Mr. M'Donogh has referred to the memorandum on the fly-leaf of the Corporation Freeman's book which bears date from 1774 to 1820, which is "Freemen to be entered in this book from the roll of oaths and Quaker's roll. No freeman to be entered if he is not sworn." That

certainly would appear to stamp that roll with authenticity. The next case cited is *Jones's case*—that of Richard Jones, who presented a petition in 1770, praying to be admitted as a freeman, “being the son of Richard Jones who was free born, and the grandson of John Jones, who was also free born.” Mr. Chatterton has pointed out that that was a very important case. The petitioner was the son of a freeman and he was also the grandson of a freeman. He was not born at the time his father was free, and therefore he must have claimed in the right of grandbirth. In 1790 we have the case of “Dawson.” We have also the son of Gilbert Austin, but I do not attribute much weight to that. And immediately following that we have the case of Henry Brabazon who was admitted as the grandson of Christopher Young, which was clearly a case of maternal grandbirth. We have then the case of Edward Hendrick, grandson of Charles Hendrick, and another case of Hona, who were admitted by grandbirth. Then we have the case of John Usher in the Acts of Assembly of 1796. I am there furnished with a long list of grandchildren admitted from time to time, beginning in 1796, in which 158 cases are admitted by grandbirth, and a large proportion of them admitted by maternal grandbirth. Samuel Burrowes was admitted as grandson of Samuel Burrowes. He was also a grandson. And so in other cases. I shall not trouble the Court with going over them all, but we have in all 185 cases in which grandsons have been admitted spreading over a vast number of years, and such persons were admitted both paternally and maternally. Mr. J. J. B. stated in his evidence that he was a member of the Corporation and that in 1824 he filled the office of Marshal of Dublin. He stated how completely he was acquainted with the usage of the admission of freemen and that the grandsons of freemen were always admitted. He states that his three sons were admitted in right of grandbirth, and that, in fact, he never heard the right questioned. Sir J. K. J. gave evidence nearly to the same effect, and so did Mr. W. C. E., who states that the Corporation had a veto and that they would admit by especial grace. Mr. W. C. E. told us that if they were “good men and true” they would be admitted. It is therefore proved that the Corporation formerly had the power of refusing to admit, and also that they used to admit by grace especial, and in the exercise of which they were not very scrupulous, showed that they had no occasion, in conferring the freedom of the city on anyone whom they considered entitled to it, to resort to a pretended custom of admission by right of grandbirth, if the right had not already existed. We now come to the Reformed Corporation in 1841, and it is somewhat curious that there is a book for the admission of freemen, containing separate columns, one column being “In what right admitted,” and the other heads are “sons, grandsons, marriage, and service.” That is very important because it occurs immediately after the old Corporation was abolished, and while the practice was in every one’s memory, it was very unlikely that at such a time so great an innovation could have been made without some expression of dissatisfaction, or at least of enquiry. Mr. G. W. M. states in his evidence to-day that he was admitted as a grandson by Mr. Daniel O’Connell, and

that Mr. O’Connell had stated that he had previously considered the question and admitted the applicants. Mr. O’Connell at that time admitted a great number of Liberals who had been previously excluded by the old Corporation. It appears that from 1841 down to the present day, large numbers have been admitted by grandbirth. In 1841 the admissions were 418; in 1842, 562; in 1843, 33; 1844, 23; 1845, 65; 1846, 64; 1847, 69; 1848, 2; 1849, 15; 1850, none; 1851, 22; 1852, none; 1853, none; 1854, none; 1855, 14; 1856, 24; 1857, 32; 1858, 65; 1859, 135; 1860, none; and in 1861 there were 270 admitted. So that with the exception of four years, since the year 1841, a large number of freemen were admitted in this right, the numbers varying from 2 to 418. This being the fact of the case it appears, according to my opinion, that ever since the day when Mr. Jones was admitted by maternal grandbirth, in 1770, the usage has obtained in the Corporation to admit freemen by grandbirth. There has been a usage proved down to the present day from 1670, unquestioned, and there is no evidence to disprove it. Therefore we must presume the lawful origin of it. I must conclude with the words of Lord Stowell in the case of *Hume v. Powell*, who says “When we find a very ancient usage, we are to presume anything that will support it. If we listen to ingenious legal objections, or to astute remarks, or enter into minute inquiries into evidence, the general result will be that the older the usage the less will we be able to support it; and instead of antiquity being a protection, an old usage would be more difficult to defend than a modern one.” I think the vast number of cases, distinctly and unequivocally proved, conclusive, in my mind, in favour of the usage. I regret extremely that the case has not been fully argued by the Liberal party. I regret exceedingly that the agent of that party did not feel it necessary to instruct his counsel to apply to fix a day at an earlier date for the hearing of the case. In the absence of those parties all I can say is that the law appears to me to be so clear that in the evidence submitted to me, and until the usage has been clearly disproved, I am bound to conclude that the usage has existed from time immemorial, that it had a legal origin, and that we are bound to continue the practice.

CHATTERTON, Q.C.—In this case I consider it part of my duty to state my views on the subject which has been discussed before us, and to say that I fully concur in the propriety of the course adopted by my Lord Mayor, and in the conclusions arrived at in point of fact by him. I regret very much that we have been deprived of the assistance we should have derived from having the case fully argued by counsel in opposition to the claimants, and, undoubtedly, the absence of that argument must, necessarily, detract from the weight of the decision we are now pronouncing. However, that does not, perhaps, so strongly affect the case, as it would have done if the question were, now, for the first time discussed. The case has been already the subject of discussion on more occasions than one, and the case, as discussed, has been authentically reported, and we have thus been enabled to learn the arguments used at both sides on those occasions, and the facts relied on as bearing on the question. I

need scarcely say that I have fully read and considered these arguments, and I shall now state shortly the reasons which have influenced my mind in concurring in the decision in point of law at which the Lord Mayor, under our advice, has arrived. In the first place this right is not defined by any charter extant, and we are, therefore, left to ascertain the nature of it by evidence of usage. From the course adopted by opponents of the claims, we have not been furnished with any evidence on their part, and we have, therefore, to act solely on the evidence adduced on the part of the claimants. But it must be remembered that in the latter lies the *onus* of proof; they are bound, affirmatively to support their claims, and it must, therefore, be more on the defect of proof on their part than their opponents must rely, than on any positive counter-proof to be adduced by themselves. Besides, we have been enabled, by the reported cases on this subject, to learn what evidence was, on former occasions, brought forward against similar claims, and though of course we could not act now on any such evidence, yet it is satisfactory, to my mind at least, to feel, as I do, that if it was now again put forward, it would not alter the view I have taken. We have had additional evidence laid before us in proof of the usage relied on, to that which satisfied the minds of the learned persons who have already decided this question; and it is plain that the Conservatives (who were intimately acquainted with the usages of the Corporation) would have made some substantial objection to a practice which was so detrimental to their party interests, had they considered Mr. O'Connell's decision contrary to law. I shall divide the time respecting which evidence has been laid before us into three periods, take them in inverse chronological order, and begin with the most recent:—The first of these periods I shall advert to is from 1841, the date of the Reform of the Corporation, to 1861; the second is from 1796 to 1841; and the third period is from the commencement of the rolls of freemen, so far as we can get them, up to the year 1797. As to the first, I must confess that if we were now called upon to decide only on what occurred during it, I should feel it extremely difficult to come to any conclusion adverse to the right claimed. I find among the first acts of the Reformed Corporation, at a time, too, when it was presided over by a lawyer of great eminence, a book prepared as a Register of Freemen, and in the heading of one of the columns of that book, describing the nature of the right of admission the word "grandson" is used, thus, distinctly, recognising that relation as entitling the party to admission. The same form of register has even since been used. Although it cannot be said that during the whole of this period there has been a uniform practice, or during some mayoralties there have not been admissions in the right of grandbirth; yet, in far the greater number of these years such admissions have taken place, and the right of grandsons has been allowed by chief magistrates of opposite politics. The evidence of Mr. G. W. M. to-day, to my mind, has been very satisfactory, for I was not before aware that so eminent a lawyer as Mr. O'Connell had considered this question. It appears that shortly before Mr. G. W. M. had claimed as the grandson of a freeman an objection to such claims had been made, and that on the objection

being made in his case Mr. O'Connell stated that he had examined into the right, and had come to the conclusion that the right was clear, and he, formally, decided that the objection ought not to prevail, and that Mr. G. W. M. and others had a right to be admitted. We are not, however, less dependent on what has been the usage from 1841, for then we go back to the preceding period we find that from 1796 to 1841, there is no manner of doubt or question that the grandsons of freemen, both maternal and paternal, were uniformly admitted to the freedom of the city; this in itself affords ample evidence to the mind of a lawyer, that such a right then existed. The origin of this usage so established has not been in any way accounted for, and must, therefore, in point of law, be attributed to a lawful origin, and from it alone we should be bound to preserve the existence of this franchise as of right, though the proof of that origin is no longer capable of positive proof. But I go back to the third and remotest period anterior to 1797, and there too I find evidence of the existence of this right. I find in the years 1770, 1771, 1790, and in 1796, that persons were admitted to the freedom solely in the right of their grandfathers. I find that in 1796 a gentleman named Usher was admitted to the freedom of the city in the right of grandbirth. I find another gentleman admitted in 1790. Mr. Wauchob was admitted also in the right of grandbirth. The *Case of Dawson* in 1790 is also a case in favour of admission by grandbirth, for there is no mention made of the father, and so is the *Case of Mr. Jones*. To understand the bearing of these instances it must be borne in mind that no right of birth entitles anyone to the freedom of the city, unless the claimant were born after the admission to the freedom of the person through whom he claimed. Many of the instances relied on by the claimants were admissions to the freedom of persons whose fathers were also freemen, but not admitted till after the birth of the sons who thus derived no right from their fathers, and were admitted in right of their grandfathers—paternal and maternal. I shall not advert more in detail to these instances. The earliest reliable case on record so far as the rolls have been preserved is that of "Plunket Plunket," in the year 1705, as to which my mind has been satisfied by the evidence produced before us, that he was admitted as the grandson of a freeman. The arguments which appear to have been previously used against these claims go very much on the use of the word "*Filius*" and the letter "B." I have no evidence whatever before me shewing that Mr. Plunket's name was anything but Plunket Plunket, and I therefore come to the conclusion that his case is a clear case of grandbirth. The only reason adduced against that was that the letter "B" for birth was in the book. I should rather think that the word "*filius*" was not used in its proper Latin signification. I would rather be prepared to say that the word "*filius*" there means "birth" in its wider sense, namely, that of "descent," and thus, though inaccurately applied to cases of sons and grandsons alike, but I do not think it necessary to rely upon that. As to the letter "B" which stands for "birth," I think the usage clearly establishes that it was applied indiscriminately to sons and grandsons, and that birth

or birthright is not confined to sonship. There is no such word as "grandbirth" in the English language, that I could discover, and I cannot find any word more appropriate to express a right of descent than "birthright." I therefore think that "B" is used to signify birth, but it also means ancestorship, which would give or confer the right. I have not the slightest doubt that the letter "B" was used indiscriminately to signify the right of admission by birth and grandbirth. On these grounds I am of opinion that the decision pronounced by my Lord Mayor, and in which I fully concur, is the correct view of the case, and I have no hesitation in advising that the parties claiming this franchise as grandsons of freemen ought to be admitted their freedom.

MORRIS, Q.C.—I have no hesitation, as a barrister, in advising the Lord Mayor that the persons claiming the franchise here in right of grandbirth ought to be admitted on the evidence we have heard. I regret, extremely that I have not heard the case of the parties opposing this claim, because up to the time that they abandoned it, my mind was perfectly open and free, to have heard other evidence, and to have dwelt upon it, if it was worthy of attention. I cannot go the full length with my learned friend, Mr. Chatterton, in saying that it would be impossible to meet the case which had been presented by the claimants. Down to the year 1790, in my mind, there is no satisfactory evidence of persons claiming as grandchildren. With respect to the three cases which have been presented previous to that, I confess I cannot say they were established to my mind. These are the cases of the Allens, Plunket Plunket, and Walcott. The Allens appeared to have been admitted in 1688, which was a very troublesome period in our history. All the family appear to have been admitted to the freedom of the city, and I conceive that was a favour to that particular family. With respect to the case of Plunket Plunket who is alleged to have been the grandson of William Stowell, because he is described in the freeman's book, "*quia est filius Gulielmi Stowell*." In the ordinary conception of the term, "filius" means son. It has been said that poets have used it in a wider sense, but I think it ought to be interpreted according to its legitimate meaning. Walcott was stated to be admitted because he was the grandson of John Minchin, but he is entered on the list as John Minchin Walcott. With regard to the case of Jones, who was the son and grandson of freemen, an inference and an argument may be drawn from the conjecture that he was not born when his father became free; but I do not think that satisfactory. From the year 1790 down to 1850, the latter being the first year from the preceding of these dates in which grandsons were refused admission to the freedom—a period of sixty years—there appears to have been a steady usage *de anno in annum* establishing this particular franchise; and it appears to me to be wholly unnecessary for the claimants to rely upon the old cases which have been brought forward in the discussion, when they have an unexplained and unambiguous usage during the sixty years from 1790 down to 1850. From 1796 down to 1841 grandsons were admitted to the number of 160 odd, and in my mind that is the strongest proof of usage. Half the prescriptive property of the kingdom is not held under

better title than that usage affords, and perhaps could not be so well proved. In 1841 we had a change in the Corporation, at a time when party spirit ran very high—a time at which the right was not likely to pass unquestioned or uninvestigated. Mr. O'Connell, who was then Lord Mayor, investigated the question and decided it; and on that decision he admitted no less than 562 persons who claimed, as grandsons, the freedom of the city. With three or four years intermission there have been admissions down from 1841. I do not attribute much importance to admission since the year 1850, because the question during that period I consider to have been a *lis mota*. We have been referred to many authorities by Mr. Macdonough, but it is really a matter that does not require any cases to show that such a right, with a usage of 60 years, must be held to have had a legal origin. The *onus* has shifted from the parties alleging the franchise to the other side, who were bound to show the usage had an illegal or improper origin. One case referred to is that known as *Griffith's case* (6th Ir. Jur.). Alderman Carroll was then Lord Mayor. He was assisted by Mr. Devitt, as assessor; and that gentleman advised the Lord Mayor not to admit freemen in right of grandbirth. The case was not argued on the side of the claimant by counsel. Mr. Devitt said, in the course of a very fair judgment, that there was no evidence given of any custom or usage, and accordingly judgment was given against the application; but had the evidence been given before Mr. Devitt that has been adduced here, I have no doubt that that gentleman's decision would have been the same as we are now advising the Lord Mayor to give. In *Abbott's case* the Court of Exchequer Chamber admitted this right. We have had the case argued only on one side; and seeing a usage of 60 years proved, and having no evidence to the contrary, I see no course for the Lord Mayor but to grant the claim. With regard to the application made to-day, it appears that the parties appeared before the Lord Mayor on the 2nd June, in the present year. The Lord Mayor was obliged to go to London on public business; that brought us to the last week of Trinity Term; and I must say that from the 12th of June up to the present day, the inconvenience was as great as it is to-day. Certainly, the inconvenience is not greater to-day than it would have been any day since the 12th of June. In my mind it would have been more inconvenient then, because there were a greater number of courts sitting. The Lord Mayor has done everything he possibly could do to convenience the parties opposing the franchise, and nothing now remains for us but to decide the case on the evidence before us. On these grounds I quite concur, substantially, with the decision made by the Lord Mayor.

CHATTERTON, Q.C., in reply to an observation made by Morris, Q.C., said he did not mean to assert that it would be impossible to displace the case made on the part of the claimants. All he intended to convey was that, judging from the arguments which took place in the cases formerly decided on this question, he did not think the present case so completely in the dark as it would have been if those cases had not been discussed. He did not for a moment presume to say what his opinion would have been if the case had been fully argued on the other side.

Court of Queen's Bench.

[Reported by William Woodcock, Esq., Barrister-at-law.]

McCLINTOCK v. LANGAN.—June 2, 1863.

Practice—Exhibiting interrogatories.

The Court will not permit a plaintiff to file interrogatories to discover the defendant's case: the right is limited to the discovery of matters bearing on the case of the plaintiff himself.

THIS was a motion on behalf of the plaintiff for liberty to exhibit interrogatories to the defendant. The action was brought to recover £118 Os. 9d., one half year's rent, due for certain lands of Micknans-town, in the County of Meath, held by defendant from plaintiff. The defendant had pleaded payment, stating in his indorsement of particulars the payment to have been made in one sum by defendant to the plaintiff's sub-agent on the 11th December, 1862, the rent claimed having accrued due on the 1st November, 1862. The interrogatories which it was proposed to exhibit were as follows:—"1. How long have you been tenant to the plaintiff for the lands of Micknans-town mentioned in the pleadings in this cause? 2. Who has, during the period of your tenancy, or any portion of it, acted as the plaintiff's agent over the same lands? 3. Have you, during the period of your tenancy, been in the habit of paying your rent for the said lands to such agent, and if you have paid your said rent at any time or times to any other person or persons, state the name or names of such person or persons? 4. Have you ever paid your rent to any person or persons other than such agent on any occasion save under threat of distress, or when the person or persons to whom you made such payment or payments had a warrant to distrain for such rent? 5. If the answer to the last interrogatory be in the affirmative, state the particular occasions upon which such payments were made by you, with their respective dates, and the name or names of the person or persons to whom such payments were made. 6. What is the name of the person to whom you, by your defence, and the particulars indorsed thereon, allege that you paid the half year's rent due to the plaintiff the 1st day of November, 1862? 7. What was the house or place where such alleged payment was made, and was there any person present at the time of the alleged payment except yourself, and the person to whom such payment was made? 8. Have you heard that the person to whom you allege you made such payment has since died, and if so, when and from whom did you first hear of his death? 9. Did you, at or about the time and place of making such payment, see or meet any other person or persons, and if so, who was or were the person or persons whom you so saw or met? 10. If such payment was made in any house or building, in what manner did you get access to such house or building, and by whom were you admitted to the same? 11. What was the name and description of the person who so gave you admission? 12. In what particular description of moneys did you make the alleged payment of £118 Os. 9d.? and in answering this interrogatory give the particulars of the way in which the same was made up. 13. Where did

you get the several bank notes or bills which were comprised in the said payment, and at what time or times, and from whom? 14. Did you, shortly before making the said payment, come to Dublin from the country, and if so, upon what day, and by what mode of conveyance? 15. Did any other person or persons travel to Dublin by the same conveyance on the same day, and if you know or can remember their names, state them in detail. 16. Did you get a receipt for said payment, and if so, by whom was same signed? 17. Have you in your possession or power any further or other receipts for rent signed by the same person who signed said lastly mentioned receipt? and if so, state the dates of such receipts. 18. Was it in consequence of any written or verbal communication received by you that you came to Dublin to make the alleged payment of a half-year's rent due the 1st November, 1862, and if so, state the particulars of such communication, by whom and how made, and if by a letter, is said letter now in your possession or power, and if not, state what has become of it?" From the affidavits used upon the motion, it appeared that defendant relied upon a payment by him alleged to have been made to one John Connor, deceased, to whom he said he had paid previous gales of rent, and who, he also alleged, was in the employment of Mr. Rynd, the plaintiff's agent, and that defendant had offered to plaintiff and her agent every assistance to recover against Connor's assets the sum which defendant positively averred he had paid him. The plaintiff, in the affidavit to support the motion, disputed both the fact of payment to Connor, and its validity, if made, as she altogether denied Connor's authority to receive the rents. The defendant submitted that all the information sought to be obtained by the 1st, 2nd, 3rd, 4th, 5th, 16th and 17th interrogatories, was well known to the plaintiff, or her agent, Mr. Rynd; that the 6th, 7th, 9th, 10th, 11th, and 12th interrogatories related solely to the evidence in support of defendant's case, which he was advised he was not bound to disclose; that the 13th, 14th, and 15th, were impertinent, and that all were obviously sought to be exhibited for the purpose of enabling the plaintiff and her advisers to decide whether it was most expedient to continue this suit against the defendant, or to sue the representatives of John Connor.

Serjeant Armstrong (with him *Dames*) in support of the motion.

Sidney, Q.C., and *Devitt*, for the defendant, argued that some of these interrogatories were for the purpose of obtaining a discovery of defendant's case, that others were absurd, and that, if any of them were improper, the motion should be refused, and cited *Whately v. Crowter* (5 Ell. & Bl. 709); *Robson v. Crawley* (2 H. & Norm. 766); *Moore v. Roberts* (3 Jur., N. S., 1221); *Tupling v. Ward* (7 Jur., N. S., 314); *Blyth v. L'Estrange* (3 F. & F. 154); *Crookes v. Morrison* (5 Ell. & Bl. 984). There was no case of interrogatories being admitted to prove a negative.

Dames in reply.—The interrogatories in this case are not more absurd than those which were allowed in *Zychlinski v. Makby* (10 C. B., N. S., 838); and in *Rees v. Hutchins* (10 C. B., 829). In *Bayley v.*

Griffiths (81st L. J., N. S., Exch., 477), the Court allowed interrogatories to be administered, which would have the effect of obtaining a discovery of the defendant's case.

LERNOR, G. J.—We shall abide by the rule laid down by Lord Campbell in *Whately v. Crowter*, and which Vice-Chancellor Wigram confirms as the rule which was held by Courts of Equity—namely, that “the right of a plaintiff in equity to the benefit of the defendant's oath is limited to a discovery of such material facts as relate to the plaintiff's case, and does not extend to a discovery of the manner in which the defendant's case is to be established, or to evidence which relates exclusively to his case.” Lord Campbell has stated, and we have followed him in our decisions here, that the interrogatories must be confined to matters within the knowledge of the defendant, which it would be important for the plaintiff to obtain a discovery of with a view to his own case. It is said in this case that Lord Redesdale would have carried the rule farther, but certainly it has not been carried further by the Common Law Judges in England than Vice-Chancellor Wigram states, and the Courts in Ireland have treated the matter in the same way. Now, we think if we were to adopt what is contended for here, we should open an enormous field, and there would be no limit to the extent to which matters might be carried, if we once pass the limits which have been laid down in England.

O'BRIEN, J.—The fallacy of the plaintiff's argument appears to be in the construction which they put upon the term, “the plaintiff's case.” I mean by it the evidence to be given at the trial to establish it substantively, and we find that the rule laid down by the judges in England goes to that. It would be very ill-advised, unless we saw the Court was clearly wrong, not to follow the decisions of the Court of Queen's Bench in England—the unanimous decision of the Court on two occasions—that the relief of the party by interrogatories must be confined to interrogatories to establish his own case, and consequently, in the case of *Edwards v. Wakefield*, in 6th Ell. & Bl., 462, they refused liberty to exhibit interrogatories, because they did not come within that description. Well, we are told there was a decision of the Court of Exchequer in England, apparently adopting a different principle, and certainly those two cases that were cited do shew that the Court of Exchequer were at that time of opinion that the 51st section of the English Common Law Procedure Act had a more extended application. We were referred to two cases in the Common Pleas, neither of which, I think, applied here. The cases were not relied on, and Erle, J., it will be found, in the case in 5th Ell. & Bl., in his opinion, went beyond the other members of the Court in limiting the right to file interrogatories. Some of the interrogatories here, I may add, are very objectionable. They are nothing but an attempt to cross-examine.

HAYES, J.—I concur in the wisdom of limiting the right to exhibit interrogatories to cases in which a bill would lie in equity for a discovery; and with respect to what has been a good deal discussed, what is the case of the one party or the case of the other, probably a convenient test would be what is properly

the case of one party or the other at the commencement of the trial, and not what may become so afterwards in the course of the trial by reason of the evidence of some other party. If we apply that, we shall see that everything relating to the payment of rent is the case of the defendant, who relies on the payment, and not that of the plaintiff, who insists on his right.

FITZGERALD, J.—The plaintiff has already got in the case all that he is entitled to according to the rule which has been adopted. The rule taken from Vice-Chancellor Wigram's book on Discovery, is stated in 5th Ell. & Bl. The right of the plaintiff is limited to the discovery of such material facts as relate to plaintiff's case, and does not extend to the discovery of other matters. It is then added that Lord Redesdale had laid down the rule somewhat more largely. Taking the rule in its largest signification, the plaintiff has got that. He knows that the defendant's case is payment, and he knows that it is not only payment, but payment on a particular date, the 11th of December, to a person named Connor; so that on every branch of the rule he has all that he is entitled to, but his interrogatories go further, and he could only have them if he could establish a right to cross-examine before he knows the evidence which the defendant will give.

Motion refused with costs.

THE QUEEN AT THE PROSECUTION OF JOHN LITTLE, Esq., MAYOR OF BELFAST, v. JOHN REA.—JUNE 8, 9.

Criminal information—Plea of justification to counts for words spoken—Setting aside plea on motion—St. 6 & 7 Vict. c. 96.

The Court refused to set aside on motion a plea of justification pleaded to counts of a criminal information for words spoken of and to a person acting magisterially, leaving the party to demur if he thought fit.

THIS was a motion on behalf of the prosecutor to have the special plea filed by the defendant to counts 1 to 13 of the criminal information taken off the file. The case was one of a criminal information. The information contained nineteen counts. The first eight counts were for words spoken to and of the prosecutor in the execution of his office of Mayor of Belfast while presiding at a meeting of the town council, and with intent to bring the prosecutor into contempt in the execution of his office, and to bring his office into contempt; the ninth, tenth, eleventh, and twelfth for words spoken with the same intent of the prosecutor while acting in the execution of the duties of his office; the thirteenth, fourteenth, fifteenth, and sixteenth for words spoken of the prosecutor while presiding as mayor, with intent to insult him in the execution of the duties of his office, and to provoke him to a breach of the peace; and the seventeenth, eighteenth, and nineteenth for composing and publishing a libel of the prosecutor as mayor, and of and concerning him in the execution of the duties of his

office. The traverser pleaded, 1st,—To the whole information "not guilty." 2nd,—To counts 1 to 13 a justification, that the words spoken were true, that it was for the public benefit that they should be spoken, and that it was the duty of the traverser, as a town councillor of Belfast, to speak them. 3rd,—To the eighteenth, nineteenth, and twentieth counts,* that the matters composed and published were true, that it was for the public benefit that they should be composed and published, and that it was the duty of the traverser as such town councillor to compose and publish them.

Joy, Q.C. (with him *Brewster, Q.C., Harrison, Q.C., and Bruce*), for the prosecutor.—The pleas which we complain of are bad. Lord Campbell's Act, st. 6 & 7 Vic. c. 96, does not apply in this case. [*Hayes, J.*—Is there any jurisdiction in this Court to set aside on motion pleas as embarrassing, or false, or sham in criminal cases? It was considered a bold measure to give that power in civil matters; and I do not remember any case of setting aside or striking out pleas in criminal cases]. There can be no difficulty as to jurisdiction if you consider this plea an abuse. Then, too, the traverser is an attorney, an officer of the court. Suppose, before the statute of Anne giving liberty to plead double in civil cases, a party had taken on himself in a civil case to plead double, would not the Court have set the second plea aside? Then these pleas are badly pleaded. The Act of Parliament requires a plea of justification in a criminal case to be pleaded exactly as in civil cases—*Hayes Crim. Law, 754; st 6 & 7 Viet. c. 96, s 6; Balmanno v. Thompson* (8 Sc. 34). In mandamus cases, if an improper plea is filed, a motion may be made to take it off the file—*Tapping on Mandamus, 386.*

M'Donogh, Q.C., and M'Mahon for the traverser.—The analogy of defences in civil cases does not apply. They are the subject of specific rules; and before those rules were made even sham pleas would not have been taken off the file—*Smith v. Backwell* (4 Bingh. 512); *Merrington v. Beckett* (2 B & Cr. 81); *La Forest v. Langan* (4 Dowl. 642); *Hourigan v. O'Grady* (13 Ir. Law Rep. 230). *Hayes's Cr. Law, p. 754*, has no bearing on this point. The cases cited in *Tapping on Mandamus* are in our favour. If the plea is defective the prosecutor should demur—1st Chitty, Cr. Law, 477, 2nd edition; *The King v. Sutton* (1st Wms. Sand. 273). The application is not warranted by authority, nor sanctioned by principle or reason. The counts of the information to which the plea is pleaded are bad—*Archbold Cr. Law, 10th edition, c. 13; The Queen v. Langley* (6 Mod. 125); *The King v. The Duke of Marlborough* (New Sessions Cases, 195, s.c. 5 Q. B. 958); *Ex parte Chapman* (4 Ad. & Ell. 773). If they demur to our plea we can fall back on their bad counts. Lord Campbell's Act does apply to cases of oral slander—*Bayley v. Laurence* (11 Ad. & Ell. 921); *Nixon v. Hardy* (8 Ir. C. L. Rep. 452); st. 32 G. 3, c. 60.

Brewster, Q.C., in reply.—Before the statute 6 & 7 Vic. c. 96, no one could plead a justification to an

information of this kind at all; and since the statute there is no precedent of a plea having been pleaded that the words charged as spoken were true. That being so a statute was passed; and if that statute applied to the case of words spoken, a question might arise whether in this case they were entitled to plead such a plea; and that involves two considerations; 1st, is this an information for words spoken? and 2ndly, if it is, is that a case within the statute? I say that this is an information for obstructing a magistrate in the execution of his duty. [*Lefroy, C.J.*—Let it be ever so clear that the statute does not apply, are we to decide that upon a summary motion of this kind, there being no appeal from our decision, or should not the question be brought on by demurrer? *O'Brien, J.*—If the case is so clear that the plea is bad, you will get judgment on demurrer.]

Motion refused, but without costs.

Court of Common Pleas.

[Reported by J. Field Johnston, Esq., Barrister-at-Law.]

ETRE V. M'DOWELL.—April 17, 18.

Exceptions—Bill of exchange—Evidence—Acceptance per pro—Authority of agent of joint stock company to accept—Misdirection—Fraud.

The plaintiff sued the official manager of the Tipperary Joint Stock Bank upon a bill of exchange accepted "per pro the Tipperary Joint Stock Bank, William Kelly, manager." One of the defences being a traverse of the acceptance, William Kelly was asked at the trial by the counsel for the plaintiff if it was part of his business as manager to accept bills of exchange for the said bank. Held, upon exceptions, that the question was admissible.

A book which was produced at the trial was deposed to by William Kelly as being one of the books of the bank, and contained amongst others the following entry:—"1853. I beg to inform you that Mr. William Kelly has been appointed manager here, and has been empowered to sign all documents and endorse all bills on account of this bank. I enclose specimen of his signature." Service of a notice upon the defendant's attorney to produce the original of a circular letter, of which this entry was a copy, was admitted, and the entry tendered in evidence by the plaintiff's counsel. The judge admitted the entry. Held, that the entry was inadmissible.

The plaintiff having proved the fact of the acceptance of the bill, and having given in evidence the entry and a letter authorizing William Kelly to accept the bill from James Sadleir, who was deposed to by William Kelly as being the sole acting director of the bank; and William Kelly having deposed that he was himself at the time of accepting said bill manager of the bank, and that it was part of his business as such manager to accept bills for the bank; and that he considered he had authority to accept bills, and that he did accept bills, and the fact of incorporation, by one of whose clauses the power to

authorize the acceptance of bills was reserved to the court of directors, while by another of them it was provided that three directors should be necessary to constitute a court, not being in evidence at this stage of the trial, Held that the judge was right in refusing, at the close of the plaintiff's case, to direct a verdict for the defendant.

The defendant's counsel proposed to ask the manager of the Provincial Bank whether this bill of exchange was, in the ordinary course of business, a bill that a bank, according to banking usages, would accept for an inland customer. The judge rejected the evidence. Held that the question was admissible.

The defendant's counsel proposed to ask the same witness would a bill accepted in the way this bill was accepted, according to the course of trade and bankers, put a party upon inquiry as to the authority for acceptance. The judge rejected the evidence. Held that the question was admissible.

The defendant's counsel proposed to ask the same witness whether authority to indorse was authority to accept. The judge rejected the evidence. Held that the question was inadmissible.

The judge told the jury that if they believed that William Kelly, as the manager of the bank, signed the bill by direction of James Sadleir, and that James Sadleir was at the time director of the bank, they should find for the plaintiff. Held that this was a misdirection.

Held that the words "per pro" upon the face of the bill of exchange imposed upon the plaintiff the onus of inquiry into the authority by which it was accepted.

Held that knowledge of fraud attending the acceptance of the bill upon the part of the plaintiff's attorneys, who, in this particular transaction, did not act as his attorneys, would be no evidence to support a plea that the bill was accepted through fraud, and that the plaintiff had notice of the fraud when the bill was indorsed to himself.

This case came before the Court on bill of exceptions. The summons and plaint complained that the defendant has been duly appointed and is the official manager of the company called the Tipperary Joint Stock Bank, under and pursuant to the Joint Stock Companies Winding-up Acts, one thousand eight hundred and forty-eight, and one thousand eight hundred and forty-nine, and that one John Sadleir, on the twenty-sixth day of November, in the year of our Lord one thousand eight hundred and fifty-five, by his bill of exchange, now over due, directed to the said company, required the said company to pay to the order of the said John Sadleir seventeen thousand pounds six months after date, and the said company accepted the said bill; and the said John Sadleir endorsed the said bill to the plaintiff, of all which the said company had due notice, but did not pay, nor has any person paid the said bill, and the same is still unpaid, and due to the plaintiff, and

there is now due to the plaintiff for principal and interest on foot of the said bill the sum of twenty-two thousand and eighty-six pounds and seven pence, the particulars of which are endorsed hereon. The defendant pleaded, 1st, that the said bank did not accept the said bill of exchange, and 2ndly, that the said bank was induced to accept the said bill through the fraud of the said John Sadleir, and that the plaintiff had notice of the said fraud when the said bill was first indorsed to himself. At the trial at the Trinity after-sittings, before Keogh, J., the plaintiff produced and examined as a witness one William Kelly to prove the fact of the acceptance of the bill of exchange in the writ of summons and plaint in this action mentioned, and of which, and of the acceptance thereof, the following is a copy:—
 "£17,000. London, 26th November, 1855, Six months after date pay to my order seventeen thousand pounds, sterling, value received.—JOHN SADLEIR. To the Tipperary Joint Stock Bank, Clonmel." "Accepted payable at the London and County Bank, London. Per pro the Tipperary Joint Stock Bank.—William Kelly, Manager. (Endorsed) John Sadleir." The said bill and acceptance marked A was, by consent of the parties in this cause, read as part of the bill of exceptions, and the said William Kelly deposed that James Sadleir acted as director of the Tipperary Joint Stock Bank in and previous to May, 1855; that no other person acted as director; and he, the said James Sadleir, so acted from thence until the bank suspended payment in February, 1856; that the name and handwriting in the acceptance of the said bill of exchange was his, William Kelly's, name and handwriting; that at the time he accepted said bill he, the said William Kelly, was manager of the said bank; and thereupon the counsel for the plaintiff proposed to ask was it part of the said witness's business as such manager to accept bills of exchange for the said bank; whereupon the counsel for the defendant interposed, and insisted that the said question was not admissible to prove the authority of the said witness to accept bills for the said bank; but the said judge held that the said evidence so offered was admissible in law; whereupon the said question was put to the said witness, who answered the same in the affirmative, and deposed that it was part of his business as manager as aforesaid to accept bills of exchange for the said bank; and to this the defendant took his first exception. And the said William Kelly further deposed that he accepted the said bill of exchange in pursuance of a letter in writing from said James Sadleir to said witness, bearing date the 24th day of November, 1855, and which letter is in the words and figures following:—

"My dear Sir,—If you get a bill from J. Sadleir to accept, for £17,000 or so, do so, and return it by early post on Monday, if possible. It is better have it payable at London and County Bank, I think. I remain yours,

"J. SADLEIR,

"London, 24th Nov., 1855."

This letter, marked with the letter B, was, by consent, made part of the bill of exceptions. And the said William Kelly further deposed that a certain

book which was produced at the said trial was one of the books of the said bank, kept at the office of the said bank, at Clonmel, and containing, amongst others, an entry in the words and figures following:—"1853. I beg to inform you that Mr. William Kelly has been appointed manager here, and has been empowered to sign all documents and endorse all bills on account of this bank. I enclose specimen of his signature." It was admitted on both sides that notice to produce the original of a circular letter, of which said entry was a copy, was duly served on defendant's attorney in this action, before the trial, and said entry was tendered in evidence by the counsel for the plaintiff, which evidence the defendant objected to. The judge admitted the evidence to be received accordingly, and to this the defendant took his second exception. And the said William Kelly further deposed that the printed words in the acceptance of the said bill of exchange—that is to say, the words "Per pro Tipperary Joint Stock Bank," were stamped with the stamp of the said bank. And thereupon the said William Kelly was cross-examined by the counsel for the defendant, and deposed that he, William Kelly, was appointed in the month of March, 1853; that he knew certain bank books produced to him; that there was nothing further in the books than the extract read authorizing him to accept bills; that he, witness, saw the said circular letter, of which the entry aforesaid was a copy, on the day on which same was issued; that witness could not say when he saw the copy of said circular written in red ink in one of the bank books produced to witness; that witness could not say he saw said entry in red ink in the years 1855, 1856, 1857, or 1858; that witness could not say whether or not he ever signed his name on a blank stamp as acceptor of a bill; that he could not say whether or not his acceptance of the bill sued on was written on a blank stamp; that the drawer may not have signed it at the time; that he (witness) would not swear that it was not altogether blank; that he thought it was not; that when the said letter of the 24th November, 1855, was written, said James Sadleir was in London, and the witness was in Clonmel; that he (witness) believed that the bill was not drawn by John Sadleir at the time when the bill was accepted; that witness's authority was from the said James Sadleir to send it to the said John Sadleir; that he (witness) could not find any authority, signed by three directors, to him, to sign bills; that witness never knew of three directors of said bank; that he (witness) was nominated by James Sadleir as manager, at £200 a year; that he (witness) considered he had authority to accept bills; that he accepted bills for the said Tipperary Bank; that John Sadleir owed £200,000 to the said bank when the said bank stopped payment; that his liabilities to the said bank, at the date of the said bill, were over £200,000; that witness knew Messrs. Morrogh and Kennedy; that the said Morrogh and Kennedy were the solicitors of the said bank, and understood its affairs perfectly; that Mr. M'Donnell was the book-keeper at said Morrogh and Kennedy's, and the books showing the state of the said John Sadleir's account with the said bank were at their office; that the said Morrogh and Kennedy were the attorneys for the plaintiff, and for the

said John Sadleir also; that said James Sadleir was the managing man; that he (witness) knew that the bill was an accommodation bill; that a bill was discounted in the Tipperary Bank for £21,000, purporting to be signed by the plaintiff, and due 5th May, 1855, and that a credit was sent up to Morrogh and Kennedy for the amount; that seven cheques produced were signed by John Sadleir; that the body of some of them was in the handwriting of said Morrogh, and others in handwriting of said M'Donnell; that witness, in some instances, sent the money first and got the cheques afterwards. In the course of the cross-examination of the said William Kelly, the deed of settlement of the said bank was produced by the defendant, and admitted by the counsel for the plaintiff; and a copy of the said deed of settlement, marked C, was, by consent of the parties in the cause, to be read as portion of the bill of exceptions. At the close of the said William Kelly's evidence, the plaintiff's counsel read, in evidence, the said bill of exchange and the acceptance thereof, the letter of the said James Sadleir to the said William Kelly, bearing date the 24th day of November, 1855, and the entry aforesaid in the bank book aforesaid, which said entry was initialled by the respective attorneys for plaintiff and defendant, which said documents were, by consent of the parties, incorporated therewith, and then closed his case. Whereupon the counsel for the defendant called upon and required the learned judge at Nisi Prius to direct a verdict for the defendant on the grounds that an acceptance of the said bill by the said bank was not proved; but the learned judge refused to do so, and ruled that there was evidence in support of the issue on which the jury might find that the said William Kelly had authority to accept bills for the said bank; to which ruling the defendant took his third exception. The defendant thereupon proceeded to give evidence in support of the issues raised upon the defences, and produced and examined as a witness James M'Donnell, who deposed that he knew Messrs. Morrogh and Kennedy; that said Morrogh and Kennedy carried on business as solicitors; that witness had no connection with them for the last two years; witness had been in the employment of said Morrogh and Kennedy, but previously was in the employment of John Sadleir, and was in John Sadleir's employment in the month of March, 1854, and was in such employment until 1856, and entered into the employment of Morrogh and Kennedy in April, 1856, and continued in such employment for two subsequent years; that witness had a private office in Morrogh and Kennedy's house; that said Morrogh and Kennedy had access to it; that a book, produced to witness, was kept by him at the said office of Morrogh and Kennedy, when he (witness) was in said John Sadleir's employment, and that said Morrogh and Kennedy had access to said book; witness proved seven cheques to be signed by John Sadleir, and that they were all filled by said witness. The system was that a letter would come from the Tipperary Bank, and he (Mr. Morrogh) would hand it to witness, and that he (witness) would fill up the cheques; that then he would hand them to Mr. Morrogh, and that was the course of dealing. That the said Tipperary Bank ceased sending accounts on the 28th February, 1856,

and that on that day John Sadleir owed £150,000 to said bank. The defendant produced and examined as a witness Robert Murray, manager of the Provincial Bank, to whom the said bill of exchange in the writ of summons and plaint in this action mentioned was handed, and he was asked whether it was in the ordinary course of business a bill that a bank, according to banking usages, would accept for an inland customer, to which the counsel for the plaintiff objected, and the defendant's counsel insisting upon the admissibility of such evidence, the learned judge refused to admit such evidence, and decided that same was not admissible, to which ruling of the learned judge the defendant took his fourth exception. The counsel for the defendant proposed to ask said Robert Murray would a bill so accepted, according to the course of trade and bankers, put a party upon enquiry as to the authority for acceptance, to which question counsel for the plaintiff objected, and counsel for the defendant insisting upon the admissibility of such evidence, the learned judge, at *Nisi Prius*, refused to admit such evidence, and ruled that same was not admissible; to which ruling of the learned judge the defendant took his fifth exception. The counsel for the defendant further proposed to ask said witness whether authority to endorse was authority to accept, to which plaintiff's counsel objected, and counsel for the defendant insisting on the admissibility of such evidence, the learned judge refused to admit same, and ruled that said evidence was not admissible, to which ruling of the learned judge the defendant took his sixth exception. The defendant gave and read in evidence the deed of incorporation of the Tipperary Joint Stock Banking Company, bearing date the 5th day of July, 1842, containing, amongst others, the following provisions, that is to say, Clause 43, which is in the words and figures following:—"43. That three directors shall be necessary to constitute an ordinary and five to constitute a special Court of Directors." And Clause 92, which is in the words and figures following:—"92. That the Court of Directors shall make all such regulations and rules, and give to the secretary or other person or persons in the employment of the society all such powers not inconsistent with any of the provisions contained in these presents with regard to the drawing, endorsing, or accepting of bills, the signing of receipts, and the lending or otherwise disposing of the funds or property of the society, and all such other powers generally in regard to the funds or property of the society, and the management of the business thereof as the Court of Directors shall in their discretion think proper, subject, however, to the control of a general meeting." And defendant further gave in evidence several cheques signed by John Sadleir. There was then read in evidence a letter of the said John Sadleir, bearing date the 28th November, 1855, which is in the words and figures following:—

"28th November, '55.

"London.

"Dear Sir,—The bill of 26th instant for £17,000, and accepted by the Tipperary Bank, is drawn by me, and endorsed by me, and sent to Mr. Eyre. Yours,

"J. SADLEIR."

There was also read in evidence a written agree-

ment, bearing date the 13th day of May, 1855, and certain deeds bearing date respectively the 1st day of August, 1855, and the 18th day of March, 1854. Said agreement and said two last-mentioned deeds, and a printed copy of said deed of incorporation, and endorsed by the registrar of the learned judge, were, by consent of the parties, incorporated therewith, to which original documents defendant craved leave to refer on the argument of these exceptions; and thereupon, and after it was admitted on both sides that it did not appear, upon full search in the books, that there had been any Court of Directors acting at all, the defendant closed his case. Upon the close of defendant's case, the counsel for the plaintiff called upon and required the learned judge to direct the jury to find for the plaintiff on all the issues; and counsel for defendant asked the learned judge to submit the question of authority to accept to the jury, to which counsel for the plaintiff objected; and the learned judge told the jury that if they believed that the said William Kelly, as the manager of the said Tipperary Bank, signed the said bill of exchange in the writ of summons and plaint in this action mentioned, by direction of the said James Sadleir, and that the said James Sadleir was at the time director of the bank, they should find for the plaintiff on the first issue. To which direction of the learned judge the defendant took his seventh exception. Counsel for the defendant called upon the learned judge to leave as a question for the consideration of the jury that the bill sued on was accepted in fraud of the said banking company, and that the said plaintiff, through his solicitors, Messrs. Leonard Morregh and James Barron Kennedy, had knowledge of all the circumstances connected with the acceptance of the said bill, and the relations, and the state of the account between the said John Sadleir and said banking company, from which the jury might infer that the acceptance of the said bill was fraudulent, and procured by fraud, but his lordship refused to leave said question to the jury, and directed the jury that there was no evidence of fraud in the acceptance of said bill, and that the jury should find for the plaintiff on the several issues alleging fraud and knowledge of the fraud by the plaintiff, to which direction of the learned judge the defendant took his eighth exception.

DEFENDANT'S POINTS ON ARGUMENT OF EXCEPTIONS.

1st. That the evidence of William Kelly, that it was part of his business as manager to accept bills of exchange for the bank, was not legally admissible, inasmuch as the authority of said William Kelly should be proved by some act of the directors of said banking company. 2nd. That the copy of a circular letter, contained in the bank book was not admissible, inasmuch as no evidence was given that such circular had been communicated to bankers or traders, or in any other way published, and inasmuch as, even if legal evidence of the issue of said circular had been given, said circular furnished no evidence of authority to said William Kelly to accept bills for said banking company. 3rd. That the learned Judge should, at the close of the plaintiff's case, have directed the jury that there was no evidence of authority in William Kelly to accept for the bank the bill sued on, and

should have directed a verdict for the defendant, inasmuch as the circular letter necessarily excluded any authority in William Kelly to accept, and further, inasmuch as it appeared, in point of fact, that no Court of Directors had ever been held, and that, under the deed of incorporation of said banking company, which was given in evidence by the plaintiff, such an authority could only be conferred by a Court of Directors, and said William Kelly never was, in fact, duly authorised to accept bills for said banking company, and that the form of acceptance of the bill sued on "*Per pro* the Tipperary Joint Stock Bank" would put an indorsee on inquiry as to the authority of the person assuming to accept for the company. 4th. That the evidence as to the usage of trade and custom of bankers as to accepting inland bills of exchange was legal evidence, and the learned judge was in error in refusing to admit such evidence, inasmuch as it was a material subject of inquiry, whether the bill sued on was of such a character as to put an indorsee on inquiry as to its validity, and the authority of the parties to said bill; and for the same reason, that the fifth and sixth exceptions should be allowed. 5th. That the learned judge was in error in his direction to the jury, on the question of the authority of William Kelly to accept for the said bank, forasmuch as the question of authority should have been left to the jury generally; and that the learned judge misdirected the jury as to what facts were conclusive evidence of authority, and misdirected the jury as to the evidence, which would establish such facts. 6th. That the learned judge was in error in ruling that there was no evidence of fraud in the acceptance of said bill, or of knowledge thereof in the plaintiff, inasmuch as it appeared that such bill was so accepted at a time when the drawer thereof was indebted to the said bank in a sum of about £150,000, and said bill appears, from the letters of the said John Sadleir, to have been accepted in blank, and to have been so accepted by William Kelly, by direction of James Sadleir, and was accepted without consideration, and that the above facts were known to the plaintiff, through his solicitors, Messrs. Morrough and Kennedy, who were at the same time solicitors for the said plaintiff and the said banking company.

McKenna (with whom was *Whiteside, Q.C.*), in support of the exceptions.—The words "*per pro*" are sufficient to put a person on inquiry in order to see if the acceptor has authority to accept—*Attwood v. Munnings* (7 B. & C. 283); *Alexander v. Mackenzie* (6 C. B. 766); *Stagg v. Elliott* (12 C. B., N. S. 373). Express authority is out of the case. Subsequent ratification is out of the case. There remains only the question of an authority to be implied from the nature of the proceedings. This implied authority is a protection given to the public in a case where a partner is seen transacting the business of a firm. "Every member of an ordinary partnership is its general agent for the transaction of its business in the ordinary way; what is necessary to carry on the partnership in the ordinary way is made the test of authority where no actual authority or ratification can be proved."—1 *Lindley on Partnership*, pp. 192, 193. This is applicable on the supposition that James Sadleir was a director, and accepted this bill.

There is no implied authority in a member of a joint stock company to accept bills of exchange on the part of the directors or of the company—*Bramah v. Roberts* (3 Bing. N. C. 963). [*Monahan, C.J.*—The substantial question here is, if James Sadleir, by his office as director, had authority in law to authorize William Kelly to accept an accommodation bill. You are embarrassing yourself by raising a question of implied authority.]—*Brown v. Byers* (16 M. & W. 252); *Kirk v. Bell* (16 Q. B. 290). Whether as a director or sole director James Sadleir is not in a higher position than a servant or clerk for the purpose of pledging the credit of the company. [*Monahan, C.J.*—Is there anything in *Kirk v. Bell* from which it can be inferred that if the number of directors had been less than three, there would be a stop put to the ordinary business?] The plaintiff has given no evidence that what was done in this case was ordinary business. Evidence by us to disprove the existence of the usage contended for was rejected. *Patteson, J.*, speaking of what was done in *Kirk v. Bell*, says "It is hard to say what is extraordinary business if this is not"—*Balfour v. Ernest* (5 C. B., N. S., 601); *Ernest v. Nicholls* (6 Ho. of Lords, N. S., 401). Accepting bills is not the ordinary business of a bank which is not a bank of issue. To establish a liability on the part of the bank, James Sadleir, as director or sole director must be shown to have had authority. That he had not direct authority appears from the provisions of the deed of settlement. Therefore it should be shown that for carrying on the ordinary business of the bank the existence of this authority was necessary. As to the defence of fraud, we could do no more than give *indicia* of fraud. [*Monahan, C.J.*—Is there any authority for this,—that if a private person discounts a bill without the intervention of an attorney, that because the person who is his attorney in other transactions knows the bill to be a fraudulent bill, that this bill will bind the client?]

Serjeant Armstrong and *J. B. Murphy contra.*—As to the first exception the objection was, that the question was not admissible to prove authority. The evidence was not offered in that way, it was to prove the employment of the witness. The words "was it part of his business to accept?" &c. were not meant for a cover under which an argument of authority might be addressed to the jury. [*Monahan, C.J.*—"Are you the person who generally accepts bills for the bank?" might be admissible as a question of a fact to go to the jury.] [*Christian, J.*—The objection seems to me to be that this was asking the witness to answer what it was the province of the jury to answer. It was asking him to put his own construction upon the terms of his own authority.] [*Monahan, C.J.*—This exception is very odd in form; a counsel has no right to except if a question for any purpose be legal. The time to except would be when the judge was making a wrong use of the answer.] The exception is also unsustainable—for this reason, that the judge did not put the case to the jury upon this, but upon the authority given by James Sadleir. As to the second exception, the entry in the book was primary evidence of two things; first, that William Kelly did fill a certain office; and secondly, of the fact that a circular was sent. It is at least a duplicate original.

It comes out of the letter-box of the establishment. [Ball, J.—This which you call a duplicate original is not signed. The circular was.] That goes to the weight, not to the admissibility of the evidence. [Monahan, C.J.—We have it in evidence that this was not used in any way by the judge.] [Christian, J.—I do not think either of the first two exceptions material, because the judge directed the jury upon other grounds.] As to the third exception, there was plainly some evidence for the plaintiff to go to the jury. The deed of incorporation was not then in evidence. As to the fourth exception, the defendant's question was not a general question upon mercantile usage. [Monahan, C.J.—The question means, is this such a bill as a bank would in the course of their ordinary business accept?] The question was put with reference to a particular instrument. It was an attempt to ask what might have been a proper question for the jury if there was proper evidence. This is an ordinary bill. [Christian, J.—It is a very material question if this was an ordinary bill. The usage might be different in different banks. The question appears to me to assume that there is a general usage in all the banks.] [Monahan, C.J.—How could Mr. Murray, if telling the truth, avoid saying yea or nay; there is or is not a usage?] [Christian, J.—The likelihood is, that he would have given what was the usage of the Provincial Bank.] [Monahan, C.J.—Then his answer would have been rejected.] [Christian, J.—The danger was that he would have given an answer of what was the usage in the Provincial Bank, which would be mistaken for a general answer, and therefore his attention should have been drawn particularly to the question.] The evidence was not admissible at all to control the contract. The question is a novelty. As to the fifth exception—[Monahan, C.J.—The rule must be substantially the same as upon the fourth.] The seventh exception is the main one. It appears from it that the defendant did not ask the judge to put distinct issues to the jury. This matter was within the scope of the transactions for which the bank was formed; and one of the proprietors being allowed to act as the directory, and having authorized Kelly to accept this bill, the jury were bound to find for the plaintiff—*Thompson v. Bell* (10 Exch. Rep. 10); *Forbes v. Marshall* (11 Exch. Rep. 166); *Royal British Bank v. Turquand* (6 El. & Bl. 327); *Gordon v. Sea Fire Life Assurance Society* (1 H. & N. 599). Independently of the deed of settlement the nature of the business of bankers is a part of the law merchant, and is to be judicially noticed by the Court—per Lord Campbell in *Bank of Australasia v. Breillat* (6 Moore's P. C. Cases, 173); *Brandao v. Barnett* (12 Clk. & Fin. 787). The 92nd clause of the deed is a dead letter as between the bank and the public. Persons dealing with the bank were not bound to see whether the provisions of the deed were complied with on the occasion. This bill is not accepted by procuration within the meaning of the cases which have been referred to. The words mean "as I here testify," [Monahan, C.J.—They mean "I, W. K. am authorised by the bank to accept for them and subscribe my name."] [Christian, J.—It shows that Kelly had a special and limited authority, and was notice to the public.] Kelly put

his name there that he might be responsible to the bank if he put it improperly. [Monahan, C.J.—Is not this the ordinary form of acceptance *per pro*?] [Christian, J.—It is the exact form in *Stagg v. Elliott*.] There is an estoppel *in pais* here on the bank to prevent them from denying that they authorized this bill to be accepted. They place Kelly out. They place the stamp with these words in his control. [Monahan, C.J.—There is no evidence that there ever was another bill so accepted.] There is no evidence necessary to show that it is a part of the ordinary business of banks to accept bills. It might as well be sought to be proved it is part of the ordinary business of an insurance office to insure lives. [Ball, J.—It is very unusual for a bank to accept a six months' bill for a customer.] [Christian, J.—It is unusual for a bank to accept an accommodation bill for a customer for £300,000; and this might as well be for £300,000 as for £17,000.] [Monahan, C.J.—If by the constitution of this bank John Sadleir or James Sadleir had power to bind it by accepting this bill, that may be proved, but we cannot assume that this is the ordinary business of a bank.] It was never doubted that a bank might accept as well as indorse. [Monahan, C.J.—There was no evidence that there ever was a court of directors established.] It was admitted on both sides that there was no court of directors acting. If three directors be a quorum, and two happen to die, it would be hard to make out that the whole business of a bank should be stopped. The ordinary business of life requires that it should not. How else could the survivors meet to elect a substitute? The amount of £17,000 ought not to startle one when it is considered what sums are negotiated in London. [Christian, J.—This was £17,000 coming at the heel of £150,000.] If some innocent party is to suffer, in what fault is Mr. Eyre? [Monahan, C.J.—You consider, leaving out of view that this was an accommodation bill, that if John Sadleir had brought an action upon it the acceptance could not be traversed?] It could not. [Monahan, C.J.—Where is the evidence that this man generally accepted bills?] He deposed that he considered he had authority to accept bills, and that he did accept bills for the bank. There the defendant's counsel leave him, and ask him nothing about accommodation bills. The acceptance of bills was necessary to the existence of this bank. Somebody must have accepted them. The bank was in operation, and holding itself out to the public for transacting business. [Christian, J.—The question is, if we can predicate here that James Sadleir had authority to accept accommodation bills, he being allowed to act as sole managing director.] There is no distinction between accommodation bills and others. [Monahan, C.J., referred to *Alexander v. McKenzie*.] The plaintiff is not in a worse position than if James Sadleir had himself accepted. It was the ordinary business of the bank to accept bills and to accept accommodation bills. The acceptance of a partner binds his co-partner, though it be done in breach of an agreement between them.

Whiteside, Q.C., in reply.—This case has never been tried. The deed is the sole protection for the shareholders of a joint stock company. All persons must take notice of the deed and the provisions of the

Act. If they do not choose to acquaint themselves with the powers of the directors it is their own fault; and if they give credit to any unauthorized persons, they must be contented to look to them only, and not to the company at large."—*Ernest v. Nicholls* (6 Ho. of Lords Cases, N.S. 419); *Balfour v. Ernest* (5 C.B. N.S., 601). A distinction must be made between a member of a common mercantile partnership and a shareholder in a joint stock company. No one will contend that a joint stock company would be liable on a bill of exchange drawn, accepted, or indorsed by any one shareholder—*Barnes v. Pennell* (2 Ho. of L. N.S., 528). There was no power to change the court of three directors into one director. An authority to indorse is not a power to accept, according to *Attwood v. Munnings*. [*Monahan, C.J.*—What is the meaning of "sign all documents" in the circular?] Ordinary documents as letters of credit. It was not part of James Sadleir's business as director to write the letter he did. John Sadleir could not have recovered on this bill irrespectively of its being an accommodation bill—*Dickinson v. Valpy* (10 B. & C. 128). This was not a bank to cash bills; but even if it were, it is not ordinary mercantile usage to cash a bill for six months for this amount. As regards the exceptions taken to the rejection of evidence, we had evidence that there was no such usage as was contended for.—*Selwyn's Nisi Prius*, p. 359.

Cur. adv. vult.

May 31.—*MONAHAN, C.J.*, stated the defences and the issues upon them.—The plaintiff proved by Mr. Kelly the fact of the acceptance of the bill. The first exception arose upon a question put to William Kelly. The plaintiff's counsel proposed to ask if it was part of his business to accept bills for the bank. The defendant objected, but the judge held the question admissible, and the defendant excepted. The objection was that it was asking the witness whether in point of law he had authority to accept. It seems to us that this is not the meaning of the question, but that it means, "Was it part of the ordinary business you discharged as manager?" The counsel had no right to assume that the evidence was given to prove authority. If an answer is given which is admissible for any purpose, it cannot be objected to. If the judge makes a wrong use of the answer, that would be ground of objection to his charge for misdirection. We have no doubt but that this was a mode of proving the fact, not of proving authority. An entry is part of the next exception. [*His Lordship read the entry.*] The question was if this should be admitted as evidence. There was no statement except what was on the margin that the circular letter of which this entry was a copy was sent at all. It is at most only a copy of what would be evidence against the bank. We think this exception should be allowed. [*His Lordship read the third exception and the evidence of William Kelly.*] The question is, bearing in mind that the deed was not in evidence at the time, would the judge have been justified in non-suiting the plaintiff? James Sadleir appears to have been transacting the whole business of the bank. No body but one manager and one director appears to have been transacting its business. We think that

the judge could not have acceded to this and directed the jury: and that this exception should be overruled. The next exception is to the refusal to admit the evidence of Robert Murray. He described himself to be manager of the Provincial Bank, and he was asked if this was in the ordinary course of business a bill that a bank, according to banking usages, would accept for an inland customer. When a witness is asked if a bill is such a bill as a bank would accept, it seems he has some knowledge on the subject. The question assumes that there is a banking usage, and that Mr. Murray is a competent witness to depose to it. Is it for this objectionable? No: If the usage does not exist, the witness would answer. "I know of no such usage." Is it objectionable in substance? We think not. We have ruled that there was a *prima facie* case to go to the jury, and we think this evidence was for the purpose of rebutting it. The defendant might show by and by that Kelly's authority was limited to the ordinary course of accepting bills according to banking usage, and if he should show that Kelly had a limited authority this evidence of Murray by and by might be material, and any evidence which by and by might be material is legitimate. As to the next exception we thought that the defendant was asking Murray a question of law. As we understand it now, it is not this, but it is asking him what is the practice in fact; and if his answer differed from what turned out to be the law of the land, that might be to be considered afterwards. But treating this as a question of a matter of fact like the other question, was this a bill a bank would accept in the ordinary way, we think it was allowable. I come to the next exception. The defendant proposed to ask whether authority to indorse was authority to accept. This was asking Mr. Murray a question of law, and we think it ought not to have been put. The ruling on this point should have come from the judge, not from the witness. The judge was right in rejecting this evidence, and we overrule this exception. I come to the next exception. Two clauses of the deed of incorporation are set out. By the 43rd clause "three directors shall be necessary to constitute an ordinary, and five to constitute a special court of directors." It did not appear from the books that any director ever acted at all. The plaintiff's counsel asked for a direction upon all the issues; and the defendant's counsel required the judge to leave to the jury the question of authority,—i. e. whether, under all the circumstances, Kelly had the authority to accept the bill in question—with such suggestions as to the law of evidence as might appear to the judge to be right. The judge told the jury that if they believed that Kelly as manager of the bank signed the bill by direction of James Sadleir, and that James Sadleir was a director at the time, the acceptance was binding on the bank. This direction has been attempted to be supported upon the ground that if a partner accept a bill and a stranger get it he can recover upon it, and has nothing to do with the fact that the one partner accepted in breach of an agreement with his co-partner. This assumes that by the constitution of this bank James Sadleir had such an authority. We cannot accede to this. Although Eyre be a third party, and a *bona fide* holder for value, without any know-

ledge of what existed between John Sadleir and James Sadleir, this bill upon the face of it purported to be accepted by procuration. I might make a great display of cases upon the law of procuration, but I need not do so. All the law is contained in the case of *Stagg v. Elliott* (12 C. B., N. S. 373). That case was tried before Chief Justice Erle, when it appeared that Stagg was a linen-draper, and that the bill sued on had been indorsed to him. He was a *bona fide* holder. It was proved that the son had accepted numerous bills in this form for the father, and proof was given of ample authority to accept. A question arose upon fraud which the jury negatived. The evidence proved that the son's authority was limited to accepting bills in the ordinary course of business, and if that had been a bill for an account over-due, there is no doubt but that the father would have been bound. The Chief Justice held the plaintiff entitled to recover, but it being admitted that the son had a limited and special authority, the question arose if "*per pro*" did not put a stranger in the same position as if he was conversant with all the relations between the father and son. The Chief Justice said: "I am of opinion that my brother Shée is entitled to have his rule made absolute. It seems to me that an acceptance in this form is one which the party *discounting* it takes at his own peril, as is stated in Smith's Mercantile Law, 5th ed., 264. The cases of *Attwood v. Munnings* and *Alexander v. M'Kenzie* are distinct authorities for this position. *Grant v. Norway* (10 C. B. 665) is strong to the same effect. (I may here remark that *Grant v. Norway* is an authority upon this case of *Eyre v. M'Dougell*, because it resembles it.) Where the bill, upon the face of it, purports to be accepted '*per procuration*,' that is a notice to all the world that the person who accepted it has but a limited authority, and whoever takes it does so at his own peril." Mr. Justice Byles says what expands the judgment of Chief Justice Erle. The *onus* was thrown upon Mr. Eyre here to inquire into the authority. The deed expressly provided that the board of directors should be the persons to appoint by whom bills were to be accepted, and it is a conceded fact that Kelly had no authority so given. We have no evidence that such a board existed. What then is the law of bills accepted by agents of banks and joint stock companies? I shall take the same course with this question as I have done just now with the law of procuration, and refer only to the case of *Ernest v. Nicholls* (6 House of Lords, N. S. 401); [His Lordship stated the facts of *Ernest v. Nicholls*.] Lord Wensleydale gives the judgment more succinctly than the Chancellor. He says, "The principles of law upon which the liability of joint stock companies is to be decided, as far as is necessary for the decision of this case, are very clear and perfectly settled, though not always in practice steadily kept in view. The law in ordinary partnerships, so far as relates to the powers of one partner to bind the others, is a branch of the law of principal and agent. Each member of a *complete* partnership is liable for himself, and, as agent for the rest, binds them, upon all contracts made in the course of the ordinary scope of the partnership business. The want of due attention to this rule in applying it to future conditional partner-

ship and to other associations, such as that of provisional committees, has been productive of frightful loss of property in our own time, until ultimately corrected by the decisions of the Courts below and of this House. It is obvious that the law as to ordinary partnerships would be inapplicable to a company consisting of a great number of individuals contributing small sums to the common stock, in which case to allow each one to bind the other by any contract which he thought fit to enter into, even within the scope of the partnership business, would soon lead to the utter ruin of the contributors. On the other hand, the Crown would not be likely to give them a charter which would leave the corporate property as the only fund to satisfy the creditors. The Legislature then devised the plan of incorporating these companies in a manner unknown to the common law, &c.," and the substance of what he says is this, that a contract *prima facie*, unless it be entered into according to the deed, is not binding on the company. And the deed in this instance requiring three directors to constitute a court, the contract would not be binding unless the authority was given according to the deed. Therefore, the judge was wrong in giving the jury a direction that James Sadleir had authority. But we are not at all saying that at the next trial there may not, as a matter of fact, be evidence to show an authority to accept this bill, because it seems that this bank have altogether abandoned their deed. There is no evidence of a board existing or transacting business. We think from the evidence given and from the evidence which was sought to be given it may not be impossible to show that by common consent of all the shareholders the deed has been abandoned and thrown to the winds, and an authority of some kind given to James Sadleir in a way which, under some circumstances, will be binding on the company. Suppose that this was a bank carrying on business in the ordinary way, and that a customer handed the manager £100, and asked for a bill on London for that amount, a jury might come to the conclusion that he had authority to draw a bill of that kind, and if London did not honor it, the bank would be liable to be sued on it. I do not think it judicious or material to go more into a supposed case of authority. There is a great deal of evidence that this was an accommodation bill. We are not speculating as to whether the plaintiff may not be sometime able to show a jury an authority which will bind the bank. This is the main exception which we think should be allowed. By the 8th exception the defendant contends there was evidence that this bill was obtained by fraud, *i. e.*, I suppose, by the fraud of John Sadleir, I do not stop to inquire if there was fraud as between John Sadleir and James Sadleir. It seems that James Sadleir had notice of all. But the fact came out clearly in evidence that the parties who had been the plaintiff's attorneys were not his attorneys in this matter, and we do not bind the plaintiff with the knowledge of his attorneys. The 1st, 3rd, 6th, and 8th exceptions are overruled, and the 2nd, 4th, 5th, and 7th allowed.

Venire de novo.

HALL v. BURTON.—June 6.

Pleading—Title to easement.

The 81st section of the Common Law Procedure Act, 1853, has not altered the rule that a plea which justifies an Act complained of under an easement must set out the particular title upon which the defendant relies.

M'Kenna, for the plaintiff, applied to set aside the third defence as embarrassing. The action was trespass for stopping up a flue; and the plea stated that the "defendant was in possession of a messuage, with the appurtenances, known as 93 Lower Mount-street, and the plaintiff was possessed of the house known as No. 94 in the said street; and that there was a flue in the wall between them; and that the defendant was entitled to maintain his flue and to stop up any opening therein, and to use it for carrying away any smoke from the plaintiff's flue; and that the plaintiff wrongfully made an opening in the wall by which the smoke escaped; and that all things occurred to entitle the defendant to stop up the opening which is the opening complained of." This defence does not show on what facts the defendant relies to found the easement claimed; and it does not appear that such exists of necessity. The defendant claims to have a flue without an opening in it. The particular title under which the defendant claims should be set out—*Gale on Easements, 546.*

Palles, contra—Under the old system what is here pleaded would be sufficient to support an action by the defendant against the plaintiff. There was the old distinction in *Saunders* that more certainty was required in the plea than in the declaration; but the 81st section of the Common Law Procedure Act, 1853, has taken that away. The Act has taken away all these objections for want of certainty, subject to a discretion in the Court. Such a declaration could not be set aside as embarrassing. The only other ways to plead would be to set out the fee or to show a title in us, carrying the easement with it. [*Monahan, C. J.*—The plaintiff wants to know how you are going to show the easement.] [*Christian, J.*—According to *Gale on Easements*, the easement should be specially pleaded whether put forward by a plaintiff or relied on by a defendant.] [*Monahan, C. J.*—That would give the judge and the parties knowledge of what was going to be tried. There is no doubt but that before the Common Law Procedure Act this plea would have been bad. You should show that that Act, whose object is certainty, makes it good.] [*Christian, J.*—Is not the plea embarrassing when it leaves the plaintiff entirely ignorant of what he is to meet?] Had the action been brought by us, what is in this plea would have been in a summons and plaint; and then there must have been a plea which would have raised this question, and such a plaint could not be set aside. [*Monahan, C. J.*—It is very possible, if so, that they could compel particulars from you.] By the old rule the assignee of a reversion should have always shown his title; and the Court has held that the Common Law Procedure Act altered that.

MONAHAN, C. J.—We do not think that Mr. Pal-

les has shown us any authority for departing from what should have been the plea before the passing of the Common Law Procedure Act.

Leave was given to the defendant to amend his plea without prejudice to the notice of trial.

Rule accordingly.

CUMMING v. BELL.—June 12.

[*CORAM BALL, KEOGH, AND CHRISTIAN, JJ.*]

Demurrer—Set off—Principal and agent—Jus Tertii.

To an action for not accounting the defendant, an auctioneer, pleaded that, "as to the sum of £16 3s., portion of the said sum of £ , that goods to the amount of £16 3s. were purchased from him by J. S.; that the said J. S. is a solvent person, and resident in Armagh; and that the said goods were by the custom of Armagh delivered to him without being paid for; and that the plaintiff was indebted to the said J. S. in the sum of £16 3s. for money paid, and for work and labor; and that the said J. S. refused to pay to the defendant the said sum of £16 3s. although requested to do so, of all which the plaintiff had notice." Held, a bad plea upon demurrer.

Fraser (with him *Armstrong, Serjeant*), for the plaintiff, demurred to a plea of the defendant. The action was brought against an auctioneer for not accounting, and the defendant pleaded that he did account in manner thereafter mentioned. The plea set out certain payments, and added, "as to the sum of £16 3s., portion of the said sum of £ , the defendant says that goods to the amount of £16 3s. were purchased from him by J. S.; that the said J. S. is a solvent person and resident in Armagh; and that the said goods were by the custom of Armagh delivered to him without being paid for; and that the plaintiff was indebted to the said J. S. in the sum of £16 3s. for money paid and for work and labor; and that the said J. S. refused to pay to the defendant the said sum of £16 3s. although requested to do so, of all which the plaintiff had notice." This plea neither traverses nor confesses and avoids. It amounts in substance to a confession of the breach of contract, but alleges no sufficient excuse. A set-off of debts due by the plaintiff to a third person is no answer to an action by a principal against his agent. In *Brown v. Staton* (2 Chitty's Rep., 353), which was an action against an auctioneer for not accounting, Bayley, J., says, "It cannot be contended that an agent has duly accounted unless he pays over the full price."—*Selwyn's Nisi Prius*, p. 111. [*Ball, J.*—The defendant was not employed to settle an account between Stanley and the plaintiff.]

Harrison, Q.C., and *Hamill, contra*.—The evidence in *Brown v. Staton* disclosed a custom that the auctioneer should not deliver the goods till paid for. "This right of agents (to maintain actions upon contracts made on behalf of their principals) is subordinate to and controllable by their principals; and in favor of the other contracting parties, this right is also modified so as not to work any injustice or wrong to

them—Story on Agency, sec. 402. It would be a wrong that Bell should see Stanley take away the goods and have himself to pay for them, and have no remedy against Stanley—*Atkyns v. Amber* (2 Esp. R. 493). [Ball, J.—How do you distinguish this case from the one in Chitty's Reports?] There the auctioneer did wrong in delivering the goods without being paid for them contrary to the custom. Here the custom was otherwise. The summons and plaint does not by implication or averment state that any money came into the hands of Bell which he has not paid over. Accounting does not necessarily mean payment of money. In the case in Chitty it meant cash, because the defendant got the goods upon the terms of selling them for cash. He was in this dilemma, that he had either received the money or had sold the goods without being paid when he ought not. "If the purchaser has a set-off against the principal, and has bought in reference to that claim, he may set off the claim in a suit brought by the agent with the same effect as if it were brought by the principal."—Storey on Agency, sec. 404. *Coppin v. Walker* (7 Taunton's Rep. 237); *Coppin v. Craig* (7 Taunton's Rep. 243). The question resolves itself into whether Bell can enforce payment against Stanley—*Holmes v. Tatton* (5 El. & Bl. 63) shows that if Bell were to sue Stanley, the set-off which the latter has against Cumming would be a defence to the action—*Jarvis v. Chapple* (2 Chitty's Rep. 387); *Varden v. Parker* (2 Espinasse, 710). This is a proper accounting, and will prevent circuity of action.

Armstrong, Serjt. in reply.—It is important to consider exactly what this defence is. It is neither more nor less than set-off. The statement of the custom of Armagh is introductory; and if the defence stopped with that and did not state that Cumming owed the money to Stanley, it would be bad. Therefore this is a set-off and nothing more. [Christian, J.—There is no averment that the plaintiff employed the defendant with reference to the alleged custom. The value of these customs is, that they enter into the contract.] The defence is pleaded to a count for unliquidated damages, and is therefore inadmissible.—*Thorpe v. Thorpe* (3 B. & Ad. 580). Wherever there is a set-off it must be of mutual debts—Addison on Contracts, 989. Accounting is paying over the money. This case cannot be distinguished from *Brown v. Staton*, which defines the duty of accounting.

BALL, J.—The demurrer must be allowed. Apart from other grounds, the want of notice is in itself sufficient.

CHRISTIAN, J.—If there be a right of set-off against the plaintiff I think it would be going a good way to show that the auctioneer had sufficiently accounted to show that he had no means of doing so but by commencing an action in which he must have failed. But the custom is not laid here as anything which formed a part of the contract. The allegation is simply this: that after the contract was entered into in the ordinary way, implying the duty to sell for cash and cash only, the defendant delivered the goods. As against the plaintiff, who knew nothing of this custom, the defendant acted illegally; and it was owing to his acting illegally that this arose. The case is indistinguishable from *Brown v. Staton*.

Judgment for the plaintiff.

CUNNINGHAM, APPELLANT; WITHERS, RESPONDENT.

QUIN, APPELLANT; MURRAY, RESPONDENT.—Nov. 23.

Cases stated by the magistrates of the Metropolitan Police Court—Construction of 17 & 18 Vict., c. 89—Tippling on unlicensed premises.

The 3rd & 4th sections of the 17 & 18 Vic., c. 89, apply exclusively to where there is no licence at all. Therefore, where A. B. was convicted under the 4th section by the magistrates of the Metropolitan Police Court, of having been found to be tippling on unlicensed premises, and O. D., the owner of the premises was convicted under the 3rd section of having sold and kept for sale beer not being duly licensed, and it appeared that the premises in question were licensed, but not licensed for the sale of beer to be consumed on the premises, such convictions were quashed.

THESE were cases stated by the Justices of the Metropolitan Police Court for the opinion of the Court of Common Pleas, pursuant to 20 & 21 Vict., c. 43. By the former it appeared that Cunningham was charged by a certain complaint with having been found tippling beer, to wit, porter, and with having the appearance of having been tippling between the hours of one and two, a.m., on the 4th of June, 1863, on Quin's premises, such premises not being licensed, contrary to the 4th section of 17 & 18 Vict., c. 89. The latter stated that Quin was charged by a certain complaint with having sold, and kept, and exposed for sale, beer, not being duly licensed to sell the same, contrary to the 3rd section of 17 & 18 Vic., c. 89. The facts were conceded. It appeared that Quin had a licence to sell beer, and it was contended that he was duly licensed. The magistrates convicted and fined both the parties, under the 4th and 3rd sections respectively.

Dowse, Q.C., for the appellants contended that their counsel had the right to begin, and cited *Reg. v. Brophy* (9 Ir. C. L. Rep., App. xi.), in which Lefroy, C. J., said that the junior counsel for the appellant should open the argument.

Serjeant Sullivan, for the respondent, cited a case in England in which Bramwell, B., held that where there was a conviction the respondent should begin, because the *onus* was upon him.

For the present, the appellant's counsel was allowed to begin.

Dowse, Q.C. (with him *J. A. Curran*)—The 17 & 18 Vict., c. 89, is aimed at unlicensed houses, and if a house be licensed for any purpose, it is inapplicable. It is another question whether the owner is not liable to the revenue under another Act. By an unlicensed house, I mean one in which the party sets up and sells without having any licence at all. Under the 2nd sect. of the 6 Geo. IV., c. 81, every person who shall sell strong beer, only in casks containing not less than 4½ gallons, or in not less than two dozen reputed quart bottles at one time, to be consumed elsewhere than on the premises, may obtain a licence, and every person duly authorized by justices of the peace to keep an inn, &c., may obtain a licence to sell beer by retail, to be consumed on the premises. The penalty under the 26th section of that Act for selling beer by

retail to be consumed on the premises without a licence, is £50. By the 1st section of the 26 & 27 Vic., c. 33, any person who shall have taken out the former of these licences, may, upon payment of a guinea additional, take out an additional licence to sell beer in any less quantity, but not to be consumed on the premises. It would be unjust that if a stranger goes into a house, and sees before him bottles of beer and porter, and purchases one of them, he should be taken to the station-house, and subjected to a penalty, because a party sells a quantity he is not allowed by his licence to sell, and may be liable to the revenue. If he goes in where there is no licence, he is a purchaser with notice, and must pay for it; but if this conviction were good, it would follow that if a party go into a large shop such as Kinahan's, and take a corkscrew out of his pocket, and open a bottle, not only is he liable to be fined two shillings and sixpence, but all the wine, spirits, beer, &c., and all the bottles on the premises, are liable to be confiscated. The reason why these latter are ever to be confiscated is, because it is presumed the party has the beer there to sell it without a licence. It is usual in England to put up over the door of the house, "Licensed to be drunk on the premises;" but there is not a house in Dublin where that is put up. "Retail" is a comparative term; it means to sell in small quantities. What one man would consider selling by retail, another would not. It cannot be said in this instance that beer was "sold without a licence, or kept for sale without a licence." With regard to Quin the question is, if a man who has a licence to sell a bottle of beer to be drunk out of the premises, and who allows it to be drunk on the premises is liable to a penalty. [Christian, J.—Your argument is that not an excess of the licence, but the total absence of a licence, is what is meant in this Act?] Yes.

Serjeant Sullivan and Waters, contra.—There may be some distinction between the two convictions. Any ambiguity in the 3rd section of the 17 & 18 Vict., c. 89, is cured by the 4th section. The construction contended for is unreasonable. There were two classes of licences in Ireland, a wholesale licence and a retail licence. All the provisions of 6 & 7 Will. 4, c. 38, relating to retail licences, refer to what is to be drunk on the premises. A retail licence means a licence to sell for consumption on the premises in opposition to a grocer's licence. The 25th section of 6 Geo. 4, c. 81, requires the words "licensed to sell by retail" to be put upon the public-houses, and these words are upon the public-houses in Dublin. The Acts previous to the 6 & 7 Wm. 4, c. 38, were found insufficient to check a growing evil in large towns. Many men got a grocer's licence, which the Revenue think they cannot refuse to any one, and this was found to be a cover for selling by retail. The words "duly licensed" in the 3rd sect. of the 17 & 18 Vict., c. 89, mean "duly licensed in that behalf." The words "or had been illegally consumed," refer to unlawful consumption on the premises. "On such unlicensed premises," in the 4th section, mean premises unlicensed for sale by retail. If an extensive grocer sells for consumption on the premises, everything in his concern is liable to be seized. The effect of dis-affirming this conviction will be to do

away with the necessity of getting a retail licence. [Monahan, C. J.—There is no doubt but that in one of these cases the man has made himself liable under another Act to a much larger penalty. No doubt, the vendor does not go scot free, no matter what construction we put upon this statute. The question is, does a man who tipples in a licensed house, incur a penalty merely because there is a violation of that licence, or is the Act only applicable to where there is no licence at all?] To hold it so, would be to make it nugatory. [Monahan, C. J.—It will not make it utterly nugatory, since there is still a large class of cases to which it is applicable, viz., those in which there is no licence.] It will render it nugatory as to illegal offences. [Monahan, C. J.—That is begging the question.] The word "duly" would be superfluous if the Act applied only to unlicensed houses. The 4th section takes a distinction between "retailed" and "sold without a licence." So in the schedule to the 6 Geo. 4, c. 81, retailing and selling with a licence are put under different heads. "Licensed" is a generic term, and includes different species of licensing.

Curran in reply.—The schedule to the 6 Geo. 4, c. 81, and the 3 & 4 Wm. 4, c. 68, explain what "retail" means. To "retail," means to sell in small quantities, independently of consumption on the premises or elsewhere. [Monahan, C. J.—The ordinary meaning of retailing is selling to a purchaser who is not going to sell over again.] "Duly licensed" means licensed to sell a particular thing. A person might be licensed to sell spirits, and not beer.

Cur. adv. vult.

Nov. 25.—MONAHAN, C. J.—These cases are both prepared by the Justices of the Metropolitan Police, pursuant to the 20 & 21 Vict., c. 43. In one of them the proceeding is taken against the owner of the house, who had a licence to sell beer, but not to sell beer to be consumed on the premises, and he was convicted upon the allegation that he did sell to be consumed on the premises. In the other the person was convicted of tippling, and the magistrates held that the 17 & 18 Vict., c. 89, applied to these cases, and they have convicted the one under the one section, and the other under the other. There is no dispute as to the facts, and the only question is, whether the magistrates have come to a proper conclusion. The 17 & 18 Vict., c. 89, is entitled "An Act to amend the Laws for the better Prevention of the Sale of Spirits by unlicensed Persons, and for the Suppression of illicit Distillation in Ireland," and it refers to the 2 & 3 Vict., c. 79, to amend which it was passed. Accordingly, it recites that certain of the provisions of that Act were temporary, and it is expedient to make further provision, and it is enacted that this Act shall commence from the 24th of August, 1854, and from that day so much of the said Act as shall not have expired shall be repealed. In other words, it is a repeal of the Act. All parts temporary fall to the ground, and all parts not temporary are expressly repealed. It is not immaterial to refer to the Act which it purports to substitute or amend. But that Act (2 & 3 Vict., c. 79) is a substitution of an Act of 6 & 7 Wm. 4, c.

38, which it is material to look at. The 18th section enacts that if any person not licensed to sell beer, &c., to be consumed on the premises shall do so, he shall be liable to a penalty. Then comes the 19th section, which imposes a penalty on unlicensed persons selling beer. Here the legislation is perfectly clear and unambiguous. But then comes the 2 & 3 Vic., c. 79. What alteration does it make in the previous Act? It is entitled "An Act for the better Prevention of the Sale of Spirits by unlicensed Persons in Ireland." It then enacts that it shall be lawful for two or more justices, upon being satisfied that there is reasonable ground for suspecting that spirits are sold or kept for sale in any house or place not licensed for the sale thereof, or by some person not having a licence to sell spirits in or at such house or place, to grant a warrant, &c. It is plain that this section applies only to granting a warrant where whiskey is sold in an unlicensed house. But it does not apply to where a person not licensed to sell for consumption on the premises, does sell for consumption on the premises. Then comes the 2nd section, which enacts that if any person not being duly licensed to sell beer, cider, or spirits, shall keep for sale any beer, cider, or spirits, he shall, for every such offence, in addition to any other penalty to which he is liable, forfeit a sum not exceeding two pounds. So far as that goes, it applies to unlicensed houses generally and to every kind of spirits in an unlicensed house. But if there were any doubt, it is removed by the 3rd section, in which the old law is in terms repealed: because it says so much of the said Act of 6 & 7 W. 4, as imposes a penalty on any person not licensed to sell beer, cider, or spirits to be consumed on the premises shall be, and the same is hereby repealed. Be it right or be it wrong, the object of the Legislature was to take away the penalty which previously existed. There may be other sections of other Acts which I do not enter into. Then comes the 4th section. [His Lordship read the 4th section.] It is as plain as noon-day that this applies only to where the house is altogether unlicensed; and whether licensed or unlicensed, if it have over the door a sign or notice importing that the owner or occupier is licensed to sell spirits, a person going in is not liable, though the owner may be. Then comes the 17 & 18 Vic. c. 89 to amend the laws for the better prevention of the sale of spirits by unlicensed persons, and for the suppression of illicit distillation in Ireland. The 2nd section enacts that it shall be lawful for any one or more justice or justices of the peace, upon being satisfied that there is reasonable ground for suspecting that spirits are sold, kept for sale, or exposed for sale in any house or place not licensed for the sale thereof, or by some person not having a licence to sell spirits in or at such house or place (i.e., though the house be a licensed one, if any person not having a licence sells in the house), to grant a warrant authorizing the officer of police to enter such house at all times to search for spirits; and if any spirits shall be found in such house, exceeding one gallon, without a permit or other legal authority, or any spirits in any quantity whatsoever the full duty whereon shall not have been duly paid, shall be found in such house, to seize such spirits, together with the

vessels in which the same are contained; and such warrant shall continue in force for one month; and the person (i.e., the person on whose premises the same shall be found) shall, on conviction, be liable, for the first offence, to a fine not exceeding five pounds, nor less than two pounds; and for the second and every subsequent offence, to a fine not exceeding ten pounds, nor less than five pounds. And all such spirits and the vessels containing the same shall be forfeited. Now the argument is, that this which imposes the small penalty is to apply to where such a consequence would follow as that the whole of a man's property should be forfeited. Of course I do not mean to say that if the Legislature will unequivocally make such an enactment, it is not the duty of the Court to carry it out; but no Court should give such a construction to an Act with a pecuniary fine so small. Therefore we have no doubt that this applies only to where there is no licence at all. Then comes the 3rd section, the whole of which applies to where there is no licence at all. Then comes the 4th section, in which are the words "has good reason to believe that wine, spirits, beer, &c., are retailed or sold without a licence, or kept for sale without licence;—and if any person shall be found to be drinking or tippling, or having the appearance of having been recently drinking or tippling, on such unlicensed premises," &c. Taking these together, without the other provisions, which are, however, in accordance with what I have read, we doubt not that this applies altogether to where there is no licence.

Convictions quashed.

Curran, for the appellants, applied that costs might be given to them against the parties, and read the 6th section of the 20 & 21 Vic. c. 13.

Costs were not given.

BERNETT v. SCOTT.—Nov. 3.

Application to expunge statement from the judgment-roll—Costs—Common Law Procedure Act, 1856, section 97.

In making up the judgment-roll the Master caused the following statement to be inserted:—"Also, though there is no certificate of the judge who tried the case, yet, as the Court in banc by an order, dated the 30th day of May, 1862, declared that though both parties resided within the jurisdiction of the Civil Bill Court of the Queen's County, where the cause of action arose, yet that it was a fit and proper case to be tried in this Court; therefore it is considered that the said plaintiff do recover against the said defendant the said sum of £210s. with 6d. for his expenses and costs; also the sum of," &c. The Court, upon motion by the plaintiff, ordered this statement to be expunged.

THE facts and circumstances and previous orders made in this case have been already reported in 7 Ir. Jur., N. S., 299; and 8 Ir. Jur., N. S., 206. After the last order so made by the Court, in pursuance of a previous agreement, a consent was on the 3rd day of

June, 1863, entered into, which was made a rule of Court on the 9th of June, for the purpose of amending the judgment which had been entered in this case. By that order of the 9th of June it was directed that the judgment should be amended by setting out in full the pleadings and proceedings, and by the officer giving the proper award of judgment as to each of the counts. A month after the judgment was accordingly amended by the Master, who, after the award of the sum of £2 10s. damages, inserted the following award as to costs:—"And also though there is no certificate of the judge who tried the case, yet as the Court is bound by an order dated the 30th day of May, 1862, declared that though both parties resided within the jurisdiction of the Civil Bill Court of the Queen's County, where the cause of action arose, yet that it was a fit and proper case to be tried in this Court; therefore it is considered that the said plaintiff do recover against the said defendant the said sum of £2 10s., with 6d. for his expenses and costs; also the sum of £ adjudged the said plaintiff by the Court here by way of increase, according to the statute." Affidavits were filed on both sides which were not opened.

Ball, Q. C., moved that the judgment-roll be amended either by expunging therefrom the statement thereon made as to the order made by the Court on the 30th May, 1862, which has been already reported, or by setting out a detailed statement of the circumstances under which that order of the Court was made, viz., the agreement entered into by the parties at the Maryborough Assizes, and the subsequent findings of the three jurors to whom the issues had been referred in pursuance of that consent. [*Monahan, C. J.*—It was a portion of the reference that the arbitrators should fill up the issue paper as a verdict of a jury.] Yes, but the Court treated the case as if there had been no trial. The judgment does not state that there was not a trial, but that there was, and sets forth a statement of the order of the 30th May, 1862. We ask that either this statement be expunged or that the whole proceedings be set out. There is to be error. If the record stands as it is it will appear that both parties resided in the same Civil Bill jurisdiction where the cause of action arose, and that there is no certificate. [*Monahan, C. J.*—There ought not to be anything on the record to show where the parties resided.] I want this statement as to your Lordship's order out of the judgment, or else that the whole proceedings appear. [*Monahan, C. J.*—What authority is there for putting this interlocutory order on the record at all?] I assume that it has been done under the 97th section. The direction is, the party shall not recover costs unless the judge shall certify, or the Court on motion make an order to the like effect. If that order is to appear, all the proceedings which gave rise to that order ought to appear. We are content to have the whole truth on the record or else to have this expunged.

Macdonogh, Q. C., and *Martin*, contra.—We are here to maintain Master Burke's judgment. This case is now in a curious position. In order to obtain costs they assert on the record the contrary of what they alleged had occurred on the previous motion. Formerly they argued there was no trial; now in the

judgment it appears there was a trial. We called on them by notice to amend the judgment then entered, and to set out all the orders and proceedings. An order was made on consent. Consent:—"That the judgment entered in this case be amended by setting out in full the pleadings and proceedings, and by the officer giving a proper award of judgment." And the consent was made a rule of Court. That order was never set aside. [*Monahan, C. J.*—How could they have made up the judgment otherwise?] We contend that to warrant the award of costs *de incrementis*, either a certificate from the judge who tried the case or the order of this Court in May last should be stated. See observations of Parke, B., *Sherwin v. Swinshall* (12 M. & W. 786).—"All the difficulty arises from the section; there must be some reason—there must be a suggestion which would be traversable, unless," &c. The fact must be stated, and the order inserted, to warrant the giving of the costs.—8th ed. Chitty's Forms, 244. [*Monahan, C. J.*—In this country, where the judges are in the habit of certifying giving costs, was there ever an instance where such a certificate was placed on the judgment roll? My impression is, that over and over again I have signed postea in such cases, and the certificate is always on the back of the record, but I never heard that it was introduced into the judgment-roll.] It would not be right that a decision should proceed on one ground, and that to shield that decision from appeal, another ground should appear. It must be put on the roll in some shape. [*Monahan, C. J.*—The question is, if the interlocutory order we made is properly the subject of appeal.] This order ought to be left on the record. The attorney is to bring in the pleadings not the officer. Section 184 gives specific directions. On seeing these pleadings and proceedings, the officer is to give the proper award of judgment. Here he finds both parties stated to be residents in, and the cause of action to have arisen in, the Queen's County. He would, therefore, be bound to enter up judgment for the fifty shillings only, and to give no award of any costs. It is this order alone which, in the absence of any certificate on the Nisi Prius Record, justifies him in awarding costs of increase, and prevents this judgment from being erroneous. Moreover, by the consent entered into by the parties on the 9th of June last, the plaintiff is estopped from now bringing forward this motion. [*Christian, J.*—You are standing in your own light by resisting this motion of the opposite party. *Monahan, C. J.*—The only question is, if we are to put this interlocutory order on the record.] So far as the second branch of the motion is concerned we are quite willing to have all the facts and orders stated in detail: it is the first part alone we oppose. [*Monahan, C. J.*—This is probably the first case where the opinion of the Court of Error will have been sought on this question. *Christian, J.*—If you would ascertain what is the way in England.] The uniform practice in England, as appears from the books of practice, is to put the certificate on the record. It is most unreasonable to permit the plaintiff to contend on one motion there was no trial, and now to admit there has been one. This judgment is made up by agreement in pursuance of this order; and the parties should not be allowed to get out of their consent.

Palles in reply.—The statement of the order ought to be expunged, and that will include taking out the statement of the residence of the parties. I abide by the consent of 1863, but what is it? Not to stick into a judgment a whole lot of things subsequent in point of date. How can they amend a judgment of 1862, by setting out things which took place after the judgment of 1862? This only means the proceedings prior to that date. The consent states "it is hereby agreed that the judgment be amended by the officer in such way as to give the defendant the benefit of the findings found in his favor." That did not authorize change in the subsequent things. The order of May, 1862, thus brought in, does not show where the cause of action arose, or where the parties resided. The statement in the summons and plaint of the residence is not conclusive as to the fact. *Wolsely v. Worthington* (13 Ir. Ch. Rep., 341,) arose upon a Judgment Act. It was decided that the title is no part of the record. [*Christian, J.*—Assume an argument against you is correct—that the certificate or order ought to appear on the record to warrant the officer—where is the difficulty that if a judgment be made up in 1862 erroneously giving full costs—where is the difficulty of amending that judgment, bringing it down to a later date, and setting everything right?] That would interfere with the rights of the parties. A judgment of one date might be a very different thing from one of another date. [*Christian, J.*—I do not see the obstacle, there being an erroneous judgment. You would lose your priority by taking an erroneous judgment.] Before it was determined that I had no right to costs, there should have been a decision that the parties resided in the same Civil Bill Jurisdiction, and there was no such decision. The officer cannot judicially determine where the parties reside. He is a mere ministerial officer. The 243rd section merely relates to taxation. 1. The judgment must be entered as a valid judgment of the day it is entered up. If the Court are to alter the judgment because of a thing which occurred afterwards, no judgment will ever be such that it will be certain that nothing which may be done afterwards can alter it. 2. The Legislature never contemplated this matter should be decided otherwise than by the Court, and we are entitled to have these matters expunged. The order of the 4th of May, 1863, runs—"that it be referred to the officer to ascertain if the action was brought to try a right to property more extensive than the sum sued for, pursuant to the 243rd section of the Common Law Procedure Act, 1853." [*Monahan, C. J.*—I entertained no doubt but that the matter was more extensive, but I thought it right in *terminis* to refer it to the Master.]

Cur. adv. vult.

Nov. 25.—*MONAHAN, C. J.*—This is an application to strike out a portion of the record, on the ground that it should not have been on it. The motion is in the alternative, that we should amend the judgment by expunging all mention of our order of the 30th May, 1862, or by stating the facts as they occurred. There were two trials: the first was abortive. On the second a consent was entered into, the object of which was, to refer the matter to three jurors, who should

take with them the issue paper, and should fill it up as if it was a verdict, and the postea was to be filled up in the usual way. After a considerable time they made an award. We sent back the matter to them, directing them to fill up the issues. They did so, and filled them up under the advice of Serjeant Sullivan. Ultimately, the damages assessed were £2 10s. It is unnecessary to state that two only of the arbitrators concurred, because two were to bind the third. An application was made to tax the plaintiff's costs, and the defendant resisted it on the ground that he came under the provisions of the 97th section of the Common Law Procedure Act, 1856, that both parties resided within the same Civil Bill Jurisdiction, and the cause arose within it, and the damages were under £5. The case came before the Court on motion, and the majority of the Court were of opinion that on the true construction of the Act the plaintiff was entitled to his costs; that where, as here, there was not a trial in fact, that the case came within the proviso of the 97th section. At all events, we declared that the costs were to be taxed. There was another motion on the question whether they should be full or half costs. In making up the judgment, there is the statement that though the parties were in the same jurisdiction, and the cause arose within it, yet the Court thought it right to award full costs. The object, of course, is to take the opinion of the Court of Exchequer Chamber as to our order. The application is to strike that out, or to give the reasons why it was so. It is unnecessary to consider the alternative of the motion. (His Lordship read the 97th section.) If this reservation was not there, this case would be *prima facie* under the statute of Gloucester; the party would have been entitled to costs. If the defendant thought he was not liable, his duty was to put a suggestion on the record that the parties resided within the same jurisdiction, and that would have been traversable by a jury of the same venue where the action was tried. But in order to prevent the expense of that, the Legislature enacted that it should not be necessary to enter any suggestion. We have come to the conclusion that the true meaning is, that if any question arises either as to the fact of the residence, or the cause of action, it is for the Court to determine, and is not a thing to be put on the record. For my own part, I should have preferred it could be there, that our opinion, since we differed, might be the subject of another Court. The order will be entered up in the ordinary way, and this must be struck out. As to the costs of this motion, both parties are to blame for the way this is. Let the parties abide their own costs respectively.

Rule accordingly.

Court of Exchequer.

[Reported by Oliver J. Burke, Esq., Barrister-at-Law.]

SILCO v. LANGRISH AND GORDANICH—Nov. 7.

Demurrer to summons and plaint—Action against a surety.

A summons and plaint complained that the defendants undertook and agreed by a written

agreement if the plaintiff would deliver a quantity of corn to M., and in consideration of their so doing would pay to the plaintiff the sum of £44 17s. 7d.; and the plaintiff did deliver said corn to M., yet the said defendants have not, nor has any other person on their behalf, paid the same to the said plaintiff. On demurrer thereto it was held that this was an action against a surety, and that the plaintiff should have averred that the principal had not performed the condition, though required thereto, and that the demurrer should be allowed accordingly.

THE summons and plaint complained that Edward Langeri and Gabriel Gordanich, the defendants, were indebted to the plaintiff in the sum of £44 17s. 7d., for that the defendants, by their written letters bearing date respectively the 1st July, 1862, and 4th August, same year, signed by the defendants, undertook and agreed that if the plaintiff would deliver a quantity of corn then in the possession of the plaintiff to Messrs. Murtagh, Brothers, & Company, in consideration of the plaintiff so doing that they, the defendants, would pay to said plaintiff the amount of his charges attending said corn due to said plaintiff by one George Martola; and the plaintiff accordingly did afterwards deliver said corn to said Murtagh, Brothers, & Company, yet the said defendants have not, nor has any person on their behalf, paid the same to said plaintiff. To this summons and plaint the defendants demurred on the grounds following:—That same professed to be founded on an alleged guarantee or undertaking of the defendants to answer for the debt of a third party; but it was nowhere stated in said count or paragraph to whom the guarantee or undertaking was given; nor was it anywhere stated or alleged in said plaint that the defendants gave any such guarantee or undertaking to the plaintiff; nor that the defendants entered into any guarantee, agreement, undertaking, or contract with the plaintiff; nor was it stated or alleged in said plaint that any charges were in fact due from said George Martola to the plaintiff; nor that the said George Martola was in fact indebted to the plaintiff for any such charges; nor that the said George Martola was ever required or requested by the plaintiff to pay him any such charges; nor that the plaintiff ever gave the defendant any notice that he accepted the said alleged guarantee or undertaking; nor that he ever gave them notice of said alleged delivery of said corn to said Murtagh, Brothers, & Company, in accordance with or in pursuance of defendant's said alleged guarantee or undertaking at all; nor is it stated or alleged in said count or paragraph that the plaintiff ever required from defendants payment by them to him of any charges alleged to be due to the plaintiff by said George Martola on foot of or attending said corn in said guarantee or undertaking in said plaint mentioned.

O'Reardon for demurrer.—This is an action against a surety. The plaint must aver that the principal has not performed the condition—*Batesby v. Brooksbeck* (Cro. Jac. 500); *Wise v. Wakefield* (8 Dowl. 377); *vid.* also 1 Chitty on Pleading, 337, edition 1844, and the cases therein collected, note (3).

Morris, Q.C.—This is not an action on a guarantee

but on a regular promise. The plaint is, no doubt, inartistically drawn, and was not signed by counsel, yet it appears sufficiently clear upon the face thereof what the action is for. The Common Law Procedure Act does away with such technicalities as are sought to be relied on in support of this demurrer. The 81st section enacts that every summons and plaint and defence or other pleading which shall with reasonable clearness and distinctness state all such matter of fact as are necessary to ground the action shall be sufficient; and it shall not be necessary that such matter shall be stated in any technical language or manner.

FITZGERALD, B.—This is an action against a surety. The plaint should have averred that application was made to Murtagh, Brothers, and Company for payment of the corn delivered to them, and that, though application was so made to them, yet that the said Murtagh, Brothers, and Company neglected to pay said sum. The omission is fatal. The demurrer must be allowed.

LAWLOR v. WHEELER.—Nov. 17, 1863.

Pleading—Contributory negligence—Application to set plea aside.

The summons and plaint complained that the defendant was possessed of a certain horse and carriage, which horse and carriage was under the care and government of a servant of the defendant; and defendant, by his said servant, so carelessly, negligently, and unskilfully managed and drove the said horse and carriage in a public street and highway that by and through the carelessness, negligence, and want of skill of the defendant by his said servant the said horse and carriage were forced and driven against the plaintiff, whereby the plaintiff was thrown down and wounded, and was for a large time sick and permanently disabled. The 3rd defence thereto "That plaintiff might, by the exercise of ordinary care, have avoided the consequence of the carelessness, negligence, and want of skill of defendant's servant; and that the plaintiff did not exercise such ordinary care; and that by reason of such want of ordinary care the plaintiff contributed to the occurrence of the injury in summons and plaint complained of" was ordered to be amended by inserting the word "directly" before the word "contributed."

THIS was an application that the third defence to the summons and plaint might be set aside as embarrassing. The plaint complained that the defendant was possessed of a certain horse and carriage, which said horse and carriage were under the care and government of a servant of the defendant; and the defendant, by his said servant, so carelessly, negligently, and unskilfully managed and drove the said horse and carriage in a public street and highway that by and through the carelessness, negligence, and want of skill of the defendant, by his said servant, the said horse and carriage were forced and driven against the plaintiff, whereby the plaintiff was thrown down and wounded, and was for a long time sick and perma-

nently disabled, and required medical attendance to the plaintiff's damage of, &c. To this summons and plaint the defendant took defence as follows:—"The said defendant, E. Wheeler, appears and takes defence to the action of said John Lawlor, and says that he denies that the defendant's servant was guilty of any carelessness, negligence, or want of skill as in summons and plaint is alleged; and for a further defence the defendant saith that the alleged injuries in summons and plaint mentioned were caused by the negligence of the plaintiff and not otherwise." The third defence, which it was sought to set aside, was as follows: "And for a further defence the defendant saith, that the plaintiff might, by the exercise of ordinary care, have avoided the consequences of the carelessness, negligence, and want of skill of defendant's servant; and the plaintiff did not exercise such ordinary care; and that by reason of such want of ordinary care the plaintiff contributed to the occurrence of the injuries in summons and plaint complained of, and therefore he defends the action.

Palles now moved to set aside the last defence on the grounds that same did not allege that but for the plaintiff's negligence the accident would not have happened; nor that the plaintiff directly or materially contributed by his negligence to the occurring of such accident; nor that the defendant's servant could not have avoided the effects of plaintiff's negligence—*Scott v. Dublin and Wicklow Railway Company* (11 Ir. Com. Law, 377); *Tuff v. Warman* (3 C. B. 1); *Vaughan v. Cork and Youghal Railway Company* (12 I. C. L. 301).

Devitt.—This plea is in accordance with the latest cases. In *Witherby v. Regent's Canal Co.* (12 Scott's C.B., N.S., 2), it was held that no action will lie for the consequence of a negligent act when the party complaining has by his own want of due care been in any degree contributory to the misfortune.

The Court ordered the plea to be amended by inserting the word "directly" before the word "contributed;" the costs to be costs in the cause.

POPE v. COATES.

Maintenance—*Motion to set aside summons and plaint*—*Non averment of termination of action.*

Where the first count of the summons and plaint complained that defendant unlawfully, maliciously, and without reasonable or probable cause, and without having any interest in the suit thereafter mentioned, did advise, procure, instigate, and stir up one J. B., then being a pauper, to commence and prosecute an action for slander in the Court of Queen's Bench, against the plaintiff, in which action the now plaintiff did appear and defend the same, and the now plaintiff further saith, that by and through such advice, procurement, instigation, and stirring up as aforesaid, the said J.B. did in fact, without reasonable and probable cause, commence and prosecute the said action for slander, and that such proceedings were thenceforth had, &c. The third count complained that the defendant wrongfully, unlawfully, vexatiously, and mali-

ciously, and without having any interest in said thereafter-mentioned action, caused to be commenced and prosecuted in the Queen's Bench an action of slander against the said plaintiff by the said J. B., in which action the now plaintiff did appear and defend the same, by reason whereof, &c.; Held that the counts should be set aside, inasmuch as there was no averment of the termination of the action of slander, before the bringing of the present action, or that same was brought without reasonable or probable cause.

THIS was an application that the first count of the summons and plaint in this action, dated the 31st October, 1863, be set aside or amended upon the grounds that although it purports to be an action against the defendant for instigating one James Belford, a pauper, to bring an action of slander against the plaintiff; yet it does not appear that the said action of slander, therein stated, was at an end and determined before the commencement of this suit, or that the costs therein alleged to be unpaid were the costs payable under the order of the 6th August, 1863, in said count stated, or any costs to which the now plaintiff was legally entitled, or that the plaintiff by reason of the matter in said count stated has sustained any legal damage. And also that the third count of the summons and plaint be set aside or amended upon the ground that it was not therein stated that the said now defendant or the said James Belford brought the said action of slander without reasonable or probable cause, or that the suit was determined, and because the said count was calculated to embarrass the defendant. The said first count is as follows:—"The defendant is summoned to answer the complaint of John Pope, who complains that the defendant unlawfully, maliciously, and without reasonable and probable cause, and without having any interest in the suit next hereinafter mentioned, did advise, procure, instigate, and stir up one James Belford, then being a pauper and in indigent circumstances, to commence and prosecute an action for slander in the Court of Our Lady the Queen, before the Queen herself, at the Four Courts, Dublin, against the plaintiff, in which action the now plaintiff did appear and defend the same; and the now plaintiff further saith that by and through such advice, procurement, instigation, and stirring up as aforesaid, the said James Belford did in fact, without reasonable and probable cause, commence and prosecute the said action for slander; and that such proceedings were thenceforth had that afterwards, to wit, on the 6th day of August, 1863, it was ordered by the said Court that upon payment of the now plaintiff's costs to be taxed by one of the Masters, said action should be discontinued, the said James Belford thereby undertaking to pay the said costs when so taxed, and consenting that if they were not paid within four days after taxation, the now plaintiff should be at liberty to mark judgment of *non pros*, whereby, and by reason of such last-mentioned action, and of such advice, procurement, instigation, and stirring up as aforesaid, he the said now plaintiff was put to great trouble and vexation in and about the defence of the said action, and the costs thereof, and in relation thereto; and

the said James Belford, by reason of his poverty and indigence, is, and has hitherto been, unable to pay to the now plaintiff the said costs incurred by him in and about the defence of the said action, or any part thereof, and the same remains wholly unpaid and unsatisfied to the now plaintiff. The second count complained of maintenance of an action. The third count was that the defendant wrongfully, unlawfully, vexatiously, and maliciously, and without having any interest in said hereinafter-mentioned action, caused to be commenced and prosecuted in the said Court of our Lady the Queen, before the Queen herself, at the Four Courts, Dublin, an action of slander against the said plaintiff by the said James Belford, in which action the now plaintiff did appear, and defend the same, by reason of the committing of which last-mentioned grievance, the now plaintiff has been greatly injured, prejudiced, and aggrieved, and has been put to and incurred, and has been obliged to pay, divers large sums of money, amounting, to wit, to £50, in and about the defence of the said action, which moneys have become and are wholly lost to the plaintiff.

Hemphill, Q. C., (with him *Tandy*) in support of the motion.—The counts should contain all the ingredients of counts for malicious prosecution, and, therefore, they should have stated that the suit had determined. The counts were faulty, in not stating that James Belford brought the action for slander without reasonable and probable cause. Both these objections were taken to the declaration in the case of *Flight v. Leman* (4 Q. B., 888), and argued on special demurrer, and judgment was had for the defendant.

Purcell, contra.—The question should have been raised by demurrer, and not by motion, as in the present case. The cause of action is sufficiently stated; the 87th section of the Common Law Procedure Act has done away with such technicalities.

Fitzgerald, B.—It is not asserted that the action maintained was brought without reasonable or probable cause. There should be also an averment of the termination of the action for slander, before the bringing of the present action, in strict analogy with actions for malicious prosecution. Set aside the counts.

Court of Admiralty.

[Reported by William G. Chamney, Esq. Barrister-at-Law.]

THE FORTUNA.

Petition to draw money—Bottomry—Deficient funds—Priority—Costs.

Where freight has been bona fide advanced anterior to the period when a bottomry bond was executed, the bond does not attach on that freight, and the Court will order it to be refunded; but the costs of exchange and insurance on such an advance cannot be charged against the consignee. In making such an order the Court will give the petitioners their costs out of the funds if it appear that all parties have acted properly.

THE petition in this inter-ventional suit was filed by Sampson, Mitchell & Co., of New Broad-street, in the

city of London, merchants, to obtain an order that the Court would hold them entitled to a sum of £79 15s. 1d., which, as owners of the cargo loaded in the *Fortuna* of Riga, at Riga, they had advanced out of freight, and which sum the consignee of the cargo in Londonderry, had, in ignorance of such prepayment, subsequently paid into Court, under its order.

Dr. Elrington for the petitioners.—As this was a *bona fide* advance before any contemplation of bottomry, it could not be subject to the creditor in the bottomry suit; and as the consignee, who was also the bottomry creditor, had, by paying it into Court, admitted his liability, he could not complain if it were now paid out to his clients, who were entitled to be recouped their advance. He cited *The John* (7 Notes of Cases, 61), and *The Standard* (Swaby, A. R., 267).

Dr. Townsend, contra.—The Court was called on to adjust the rights of parties not before it. The petitioners should seek their remedy in a Court of law, and directly against the master—whose accountable note they held for it—or against the owner of the ship. There was nothing before the Court to rebut the presumption but that, in the dealings between the owners of the cargo, and the consignee of it, the sum in question was part of the consideration, and, if so, the petitioners were clearly disentitled to seek it back. This money, being freight, became liable to the bottomry creditor, when the fund realized by the sale of the ship turned out deficient, as in the present case. He cited *The Douthorpe*, (2 Wm. Rob. 73).

JUDGE KELLY.—The case put forward by the petitioners, and admitted at the hearing, is simply the not uncommon one of freighters, who at the port of loading, by stipulation, advanced money to the ship-owner on account of freight, and now, as the ship arrived safely at her port of discharge, seek to be repaid that advance by a deduction in her favour out of the full freight, paid into Court, in the course of a suit on foot of a bottomry bond, which bound ship, freight, and cargo. The question was raised, had they a right to appear in these proceedings; but as the facts pleaded and admitted at the bar show that they have a direct interest in the funds in Court, and may be injured by the effects of the decree in the suit which has been instituted against them, they, in the judgment of the Court, have an undoubted right to appear and be heard in the matter of this petition. The ordinary practice in all cases of freight advanced being that the advances so made should be deducted in favour of the freighter, when the consignee is called upon to pay the freight in full, the respondents here seek to interrupt that practice, alleging that the entire of the freight, including the advance, is liable to them under their decree as the bottomry creditors, the fund arising from the sale of the ship having proved deficient, and their bond being secured on ship, freight, and cargo. No doubt that, generally, such a bond does attach upon the entire freight, and render it liable; but the authorities referred to in argument on this case at the bar, and adopted by the Court—namely, *The John* (7 Notes of Cases, 61), and a still stronger one, *The Standard* (Swaby, A. R., 267), have well settled that where freight has been *bona fide* advanced anterior to the period when a bottomry bond was taken the bond does not attach on that freight. Such is

the case of these petitioners, their advance having been on the 3rd of December, and the bond in question not having been given until April following. Now, on examining the receipt given by the master for the advance, the Court can entertain no doubt but that the money was given—not as an advance on loan on the credit of the freight, but as part of the freight itself. Satisfied, then, that the advance was made in good faith, and long anterior to the execution of the bond, and when, from the relative position of the several parties, the latter could not have been in contemplation of any of them, the Court must consider as exempt from its general liability so much of the full freight now in the registry as had been advanced and is claimed by the petitioners, and hold that the bottomry creditors, as such, have no claim whatever upon it—yet as bottomry creditors alone do these respondents assert their claim. Another view of the question is presented, that having been consignees of the cargo also, and in that character paid in the full freight, the respondents are to be considered as having paid in too much, and are therefore entitled to claim the overplus. The Court cannot understand how this latter ground can be maintained, seeing that these respondents have admitted that they owe it to the legal creditor, and that by the course of law, and the practice of merchants, that creditor is the freighter who made the advance, and who is the petitioner before the Court. Upon what ground, then, can the respondents, who have no claim in law and still less in equity, to attach this portion of the freight, resist the claim of the petitioners to it? The Court hazarding a conjecture that by possibility the money in question might have been a matter of arrangement between these parties, when the respondents became the purchasers of the cargo from the petitioners, offered the respondents the opportunity of explanation upon this point; but as they declined to avail themselves of that offer, it is natural to conclude that no such arrangement existed. Here, then, is a certain sum of money in the registry of the Court, to be dealt with strictly, *in usum jus habentis*, and which, correctly speaking, cannot be made the subject of interpleader, as, upon admitted facts, one of the parties only has the right to claim it. It has been suggested to let the former take his remedy against the latter in a court of common law; but where, as in the present case, this Court has a clear jurisdiction over the subject matter, and the proper parties are before it, it would be a dereliction of duty to yield to that suggestion. The prayer of this petition, then, must be granted to the extent of a sum £75 6s. 10d. being the calculated amount of the advances made by the petitioners: but the further sum of £4 8s. 3d. being for exchange and insurances on that advance cannot be charged against the consignee, and is refused. Now, as to costs, the practice of a court of equity, when it appears that all parties have acted properly, is to charge the fund with the costs. Now this Court cannot blame the respondents for appearing in this case, as they had other interests besides their own to protect. The petitioners, therefore, are to have their costs out of the fund.

Proctor for the petitioner—Mr. Lea.

For the respondents—Mr. Hamerton, Q.P.

THE DUNA.

Sale under Court—Liability of purchaser—Motion to discharge purchaser—Alleged misrepresentation—Costs.

If a party purchase a ship at a sale directed under a decree of the Court of Admiralty, he will not be held to his purchase, if it appear that he was misled by the advertisements or conditions of sale to buy a vessel unsuited for his purposes; but if, on investigation of all the facts, the Court should be satisfied that he had full information from another reliable quarter, prior to the confirmation of the sale, it will hold him bound to complete his purchase.

THIS was a motion arising out of a collision suit. The application was that the purchaser, Mr. Joseph Farrell, of Newry, be discharged from his purchase, on the grounds of misrepresentation in the description of the vessel sold under the decree in the cause. The affidavit of the purchaser stated that, requiring for the Mediterranean trade a vessel well found in other respects, but most especially coppered, he saw an advertisement, stating that the "Duna," a Russian vessel was to be sold in Newry on the 5th of July, by the Marshal of the High Court of Admiralty of Ireland, under a decree of that Court, the vessel, amongst other things, being particularly stated to be coppered; that accordingly, on the faith of that advertisement, a bidding, to the amount of £720, was made for him at the auction, but being outbid, and the sale opened in the registry of the Court in Dublin; he subsequently bid the higher sum of £924 on the 20th of July, and on the 25th of that month was declared the purchaser, and the sale confirmed by the order of the Court. Subsequently, on the 27th, having gone to Newry from his residence at Dundalk, to inspect the vessel for the first time, he discovered that she was not coppered; that not being so, she was unsuitable for the purpose for which he had purchased her, and as he had made that purchase on the faith of the advertised description of her by the Marshal of the Court, he now sought to be discharged from that purchase. The motion was resisted on the part of the petitioners in the cause, who had obtained the decree for the payment of which the proceeds of the sale of the vessel was the only fund. The affidavit of the Marshal stated that the fact of the vessel not being coppered, but copper-fastened only, was discovered immediately before the sale, and that he made it known publicly to all who attended; that this was notice sufficient; and that he gave a special description to the purchaser, which was a correct one; that the defect was patent, and it was the duty of the bidders to have used due precaution at the time, so as to satisfy themselves that the vessel was actually as described; that the purchaser here was bound by the order confirming the sale, and was too late with his motion.

Dr. Gibbon, for the purchaser, cited *Sug. on Vendors and Purchasers*, pp. 277, 343, 380, 352 (11th edition); *Flight v. Booth* (1 Bing., N. C., 370); *Bolworth v. Hassell* (4 Camp., 140); and *Jones v. Edney* (3 Camp., 285).

Dr. Ebrington opposed the motion for the promonays in the collision suit.

JUDGE KELLY.—The case made on the affidavit of

the petitioner is this, that being engaged in a certain trade which required particularly that the vessels employed in it should be coppered, as otherwise they would be unsuitable, he on the faith of certain advertised particulars of this Russian schooner—amongst them that most necessary one that she was coppered—bid for her and purchased her at the sale directed under the decree of this Court; and that in two days after the confirmation of the sale he for the first time discovered that she was not coppered. This, if proved on the affidavits, would be just such a case as would give a purchaser a right to say that he ought not to be bound by his bidding, as he could not get from the Court the property offered for sale in the state in which it was represented to be. These were the words used by Sir Michael O'Loughlin in *Bessonnet v. Robins* (1st San. and Sc. 142). It was quite true, as sworn, that the advertised particulars contained a misstatement upon a most material point; so material, that according to his affidavit this gentleman would not otherwise have been a bidder at all, still less a purchaser. And if upon the faith and credit of those advertised particulars altogether, and alone, he had been induced to put himself into that position, it would have been the duty of the Court, on the authorities referred to, and on every principle of justice, to have relieved him from it, the Court being of opinion that it was of importance to its suitors that sales under its decrees should be conducted in the fairest manner. But a consideration of the other allegations in proof of the case presented it under a different aspect. A letter of Mr. Farrell's, dated the 5th of July, addressed to the Marshal of the Court, was put in evidence. It was to be observed that that was the evening of the day on which the auction had been held, at which he was outbid, and therefore at that time he was perfectly free from any dealings with the vessel. In that letter, reminding the Marshal of his promise to comply with his (Farrell's) request to send him full particulars of the vessel, he begs of him in doing so to say what chance he (Farrell) might have of being the purchaser. To that letter the Marshal replied on the following day (the 6th), answering as to the other parts of his letter, but as to the particulars of the vessel, saying, in clear words, that she was, amongst her other qualities and appurtenances, stout, well built, and copper-fastened to the bents. Here, then, was traced into the hands of this party—who, it appeared, in nineteen days after, on his own motion, was declared the purchaser—a solemn document, obtained, upon his own request, when he was free and untrammelled in the matter, from the responsible officer of the Court, by whose acts the Court would consider itself to be bound, a full particular of the subject matter of the sale, in which the vessel was described, not, as in the earlier advertisement, coppered, but copper-fastened to the bents. Now, however vague to the uninitiated in such matters these phrases might appear, to the class who purchase ships they presented no ambiguity, but shewed a very substantial distinction; still more must they have been clear in their distinctiveness to Mr. Farrell, whose sworn case was, that none but a vessel which was coppered would suit him. In his affidavit he gave no explanation upon this subject, and was totally silent as to the letter altogether. He

asked the Court to believe that he had no other information than that which the printed advertisement afforded. It was sworn, and not denied, that he got that letter, and got it under the circumstances stated. How, then, could the Court give credit to his allegation that he became the purchaser on the faith and credit of the printed advertisement which contained the misstatement, when, for so many days before, he became such, he was in possession, and at his own request, from the person best qualified to give it—that person too representing the Court in the transaction—of a full and accurate description in all respects of the vessel? His own affidavit, which contained and made his case, supplied no answer to this question, and could supply none, for it suppressed the fact and all allusion to it altogether. Under all such circumstances the Court was satisfied that no grounds for a release had been established on the part of the purchaser, who, upon evidence not attempted to be contradicted by him or on his part, had been proved to have been in possession, from the authorised and responsible quarter, of a full and accurate description of that property, which after the lapse of many days he then deliberately purchased. The motion must be refused, the costs to be costs in the cause.

Proctor for the purchaser—Mr. Wm. Richardson.

Proctor for the promovent—Mr. John T. Hamerton.

Court of Appeal in Chancery.

[Reported by Edmund T. Bewley, Esq., Barrister-at-Law.]

[BEFORE THE LORD CHANCELLOR AND THE LORD JUSTICE OF APPEAL.]

IN THE MATTER OF THE ESTATE OF ROBERT KING PIERS, OWNER; EX PARTE HENRY BROWN, PETITIONER.—
June 18, 19.

Fines and Recoveries Act, 4 & 5 Will. 4, c. 92, sec. 36, 68—*Conflict of disentailing deeds*—Priority of enrolment.

A., a tenant in tail, executed a disentailing deed, which was enrolled within the six months allowed by the Fines and Recoveries Act, but not in the lifetime of A. B., who was entitled to an estate tail in remainder expectant on A.'s estate tail, after A.'s death executed a disentailing deed to a purchaser for value, which deed was duly enrolled before the enrolment of the prior deed of A. Held, that the enrolment of the deed executed by A. was valid although not made in A.'s lifetime.

Held—that the priority and validity of A.'s disentailing assurance were not affected by the prior enrolment of B.'s disentailing deed.

Held—that the 66th section of the Fines and Recoveries Act (Ireland) does not contemplate the enrolment of a deed executed by an owner in fee, nor the disposition of lands otherwise than by a tenant in tail by virtue of the Act.

In the year 1815 John Nunn Richards, being seised in fee-simple of the lands of Torduff, in the county of

Wexford, by articles of agreement, dated the 2nd of March, 1815, made in contemplation of the marriage of his son, William Nunn Richards, with Caroline Molony, agreed to put the lands in settlement upon certain trusts, and to certain uses therein mentioned. By those articles (after declaring the uses of a term of 99 years thereby created and subject to a life estate reserved to himself) John N. Richards covenanted to convey the land to trustees upon trust, and to and for the use of William Nunn Richards for life, with remainder to the use of the first and every other son of the marriage successively in tail male; and in default of issue male, then to the issue female of the said marriage, if more than one, in such share, manner, and proportion, and subject to such restrictions, provisions, and limitations as the said William Nunn Richards should by deed or will limit or appoint; and if but one child, son or daughter, then to such only child, subject as thereinbefore and thereafter mentioned. And in case there should be no issue male of the marriage, and issue female more than one child, and that William Nunn Richards, in his lifetime, should not by deed or will make an appointment of the estate to or for such female children; that then in such case, after the death of William Nunn Richards, such female children as should be living at the time of the death of William Nunn Richards and their heirs should take and inherit the same as tenants in common, share and share alike. The articles further contained a proviso that in the event of William Nunn Richards surviving his said intended wife, without any issue of the marriage, the trustees should hold the lands upon the like trusts for the issue of any subsequent wife; and that if William Nunn Richards should die without issue male or female, then the lands so agreed to be settled should revert to John Nunn Richards and his heirs in fee. The marriage was shortly after solemnized, and there were issue of it two children, viz., William Irwin Richards and Caroline Maria Richards. John Nunn Richards, the settlor, died prior to the year 1820, without having executed any deed in pursuance of the articles of agreement. Upon the death of William Nunn Richards in the year 1822, William Irwin Richards entered into possession of the lands as the first tenant in tail under the articles of settlement; and on the 5th of March, 1849, he duly executed a disentailing deed in pursuance of the statute, which was registered on the 4th of April in the same year, and enrolled in Chancery on the 11th of June following. William Irwin Richards died on the 20th of May, 1849, and by his last will and testament (afterwards duly proved) devised to Robert King Piers, the owner in this matter, and to his heirs and assigns the lands before referred to. Robert King Piers having thereupon entered into possession of the lands on the 24th of December, 1857, executed a mortgage of them, under which Henry Brown, the appellant, presented a petition for the sale of the lands in the Landed Estates Court, and obtained a conditional order therefor on the 12th of November, 1862. On the 1st of December, 1862, Charles Rolleston, the respondent in the present appeal, filed an affidavit showing cause against the conditional order being made absolute on the following grounds:—It appeared that by indenture of settlement dated the

28th day of February, 1849, and made in contemplation of the marriage of Caroline Maria Richards with Henry William Woodhouse (which was afterwards had and solemnized), after reciting that Caroline Maria Richards was entitled to the lands in question as tenant in tail or otherwise in remainder expectant upon the decease and failure of issue of William Irwin Richards, she the said Caroline Maria Richards and the said Henry William Woodhouse covenanted with Charles Rolleston and two other trustees therein named, that after the marriage and so soon as the said Caroline Maria Richards and the said Henry William Woodhouse, in her right, should on the decease and failure of issue of William Irwin Richards, or otherwise become entitled in possession to the said lands either as tenant in tail or otherwise, all such acts, deeds, and assurances should be done and executed as should be declared requisite for barring such estate tail of any as might be subsisting in the said lands, and for conveying the lands to the use of Henry William Woodhouse for life, and after his decease to the use of Caroline Maria Richards, his wife, for life, with remainder to the trustees upon the trusts, and to the uses therein mentioned, and amongst others for the issue of the said marriage. In pursuance of this covenant and after the death of William Irwin Richards, Caroline Maria Woodhouse and her husband Henry William Woodhouse, on the 1st of June, 1849, executed a disentailing deed, whereby, after reciting the last mentioned covenant, the lands to which Caroline Maria Woodhouse or Henry William Woodhouse, in her right, was entitled for any estate tail or in fee-simple, were conveyed to the trustees and their heirs for ever, freed and discharged from all estates tail therein of Caroline Maria Woodhouse, and all other estates tail therein, if any, and all estates, interests, and powers to take effect on the determination or in defeasance of the said estate tail, to such uses and upon such trusts as were contained in the indenture of settlement of the 28th of February, 1849. This disentailing deed was duly acknowledged by Caroline Maria Woodhouse, and was afterwards duly enrolled in Chancery on the 4th of June, 1849. Under these circumstances it was urged on behalf of the respondent, Charles Rolleston, that the second disentailing deed was entitled to priority over the disentailing assurance executed by William Irwin Richards in consequence of its prior registration. The points relied on in the argument on behalf of the petitioner were substantially as follows:—First,—That the disentailing deed executed by William Irwin Richards was valid, having been enrolled within six months after its execution although not until after his death. Second,—That the second disentailing deed could not take priority by its previous enrolment by force of the 66th section of the Fines and Recoveries Act, inasmuch as this section contemplates separate deeds executed by the same tenant in tail and not by different persons. Third,—That on the true construction of the marriage articles of 1815, Caroline Maria Woodhouse upon the death of William Irwin Richards, if she took any estate in the lands, took an estate in fee and not in tail. Fourth,—That upon the true construction of the Fines and Recoveries Act the execution and enrolment of the second disentailing deed

were of no effect, inasmuch as the parties had express notice of the first disentailing deed. An affidavit had been filed by Patrick Nolan setting forth the owner's title to the lands and charging (a fact which was not denied) that the second disentailing deed was executed with full knowledge on the part of Charles Rolleston, Henry William Woodhouse, and Caroline Maria Woodhouse, of the first disentailing deed having been executed, and also of the last will and testament of William Irwin Richards. On the part of the respondent the following grounds were relied on:—First,—That the alleged disentailing deed executed by William Henry Richards in March, 1849, was wholly inoperative, inasmuch as it was not enrolled during his lifetime. Second,—That on the death of William Irwin Richards his sister took an estate tail in the lands under the articles of 1815; and that the disentailing deed executed by her having been enrolled before the deed of March, 1849, the parties claiming under her marriage settlement of 1849 being purchasers for value acquired a prior estate in the lands by virtue of the 66th section of the Fines and Recoveries Act. Third,—That even if Caroline Maria Woodhouse took an estate in fee under the articles of agreement still the disentailing deed executed by her having been first enrolled, took priority by force of the Act. Judge Longfield, after stating that the Court was of opinion that on the death of William Irwin Richards Caroline Maria Woodhouse took an estate in fee and not in tail, and that the first disentailing deed was valid by the enrolment within six months though not till after the death of William Irwin Richards, held that it was displaced by the prior enrolment of the deed executed by Caroline Maria Woodhouse by reason of the 66th section of the statute, and accordingly the cause shown was allowed to the respondent, Charles Rolleston, with costs.* From this order Henry Brown now appealed.

The Solicitor-General (with him *Flanagan, Q.C.*, and *C. J. O'Donell*) for the appellant.—The first point to be noticed is the question relative to the period within which an enrolment of a disentailing assurance must be made. We maintain that this is determined by the 39th section of the 4 & 5 Will. 4, c. 92 (corresponding to the 41st section of the English Act) by which the time is fixed as six calendar months from the date of the execution of the deed—*Honeywood v. Forster* (30 Beav. 1; 7 Jur. N. S., 1264). *Hawkins v. Kemp* (3 East. 410) is not applicable. *Comyn's Dig. Bargain and Sale, B. 9; Marlborough v. Godolphin* (2 Ves. Sen. 79). [*The Lord Chancellor*—It is generally the grantee that enrolls the deed; and it would be a hard thing on him if he should lose his estate because the grantor dies before the enrolment has been made] The 74th sec. of the English Act (66th sec. Irish)† refers to different dispositions by the same

tenant in tail, and cannot be fairly construed as including the case of deeds executed by successive tenants in tail, or by a tenant in tail and a succeeding tenant in fee. Such is the view taken of it by Lord St. Leonards in his *Real Property Statutes*, 2nd ed. p. 237, where he expresses his opinion that the 38th section must be read in conjunction with the 74th; and that by the provision of the 38th section whenever a voidable estate is created by a tenant in tail in favor of a purchaser for valuable consideration, it will be confirmed by a subsequent valid disposition under the Act unless the disposition be in favour of a purchaser for valuable consideration who bought *without express notice of the voidable estate*—*Dart's V. & P.* 447.

Brewster, Q.C., on behalf of the trustees of the marriage settlement of Mrs. Woodhouse.—In the first place we insist that this is an executory instrument, and therefore the first question to be determined is how the Court would execute it. The expression, "issue of the intended marriage," has been held sufficient to show an intention to provide for all the issue of the marriage. The rules applicable to wills are applied also to executory articles; and the principles upon which the Court will act, and the nature of the limitations which it will introduce, are settled by numerous decisions—*Jervoise v. Northumberland* (1 Jac. & Wal. 559); *Rochfort v. Fitzmaurice* (2 Dr. & War. 1); *Fitzmaurice v. Sadleir* (9 Ir. Eq. Rep. 595). In the present case there are a series of limitations which would be void if Mrs. Woodhouse's estate were an estate in fee. If then the intention of the parties is but imperfectly worked out by the articles, the Court will execute the articles in the usual course of a fa-

in such lands, or any of them, a voidable estate, in favour of a purchaser for valuable consideration, and shall afterwards under this Act, by any assurance other than a lease not requiring enrolment, make a disposition of the lands in which such voidable estate shall be created, or any of them, such disposition, whatever its object may be, and whatever may be the extent of the estate intended to be thereby created, shall, if made by the tenant in tail with the consent of the protector (if any) of the settlement or by the tenant in tail alone, if there shall be no such protector, have the effect of confirming such voidable estate in the lands thereby disposed of to its full extent as against all persons except those whose rights are saved by this Act; but if at the time of making the disposition there shall be a protector of the settlement, and such protector shall not consent to the disposition, and the tenant in tail shall not without such consent be capable under this Act of confirming the voidable estate to its full extent, then and in such case such disposition shall have the effect of confirming such voidable estate so far as such tenant in tail would then be capable under this Act of confirming the same without such consent: provided always, that if such disposition shall be made to a purchaser for valuable consideration, who shall not have express notice of the voidable estate, then and in such case the voidable estate shall not be confirmed as against such purchaser and the persons claiming under him."

3 & 4 Wm. 4, c. 74, sec. 74.—"That every deed required to be enrolled in his Majesty's High Court of Chancery in England or Ireland, by which lands or money subject to be invested in the purchase of lands, shall be disposed of under this Act shall, when enrolled as required by this Act, operate and take effect in the same manner as it would have done if the enrolment thereof had not been required, except that every such deed shall be void against any person claiming the lands or money thereby disposed of, or any part thereof, for valuable consideration, under any subsequent deed duly enrolled under this Act, if such subsequent deed shall be & at enrolled.

* *In re R. K. Piers* (8 Ir. Jur., N. S., 76; 18 Ir. Ch. Rep., 459).

† The references are made to the English statute, the difference between its provisions and those of the Irish Act being unimportant with regard to the questions involved in this case. The following are the sections referred to:—

3 & 4 Wm. 4, c. 74, sec. 38.—"Provided always, and be it further enacted, that when a tenant in tail of lands under a settlement shall have already created or shall hereafter create

mily settlement, that is to say by giving to the daughters estates in tail general with cross remainders—*Dod v. Dod* (1 Amb. 274); *Bastard v. Proby* (2 Cox Ch. Ca. 6); *Trevor v. Trevor* (13 Sim. 108; 1 H. of L. Ca. 239). The Court in such cases will both alter words and introduce words—*Marryat v. Townly* (1 Ves. Sen. 101); *Targus v. Paget* (2 Ves. Sen. 194); *Kentish v. Newman* (1 P. W. 234). As to the other questions, the first disentailing deed not having been enrolled in the lifetime of the tenant in tail was not equivalent to a perfect recovery. The Fines and Recoveries Act was not designed to alter the nature of estates tail but merely to improve the machinery by which a recovery could be suffered. With respect to the argument as to the mischief of this construction of the Act, no injury to purchasers is likely to occur, for no man will take an estate under such circumstances, until the disentailing deed is enrolled. On the other hand, by the construction contended for by the appellants a tenant in tail succeeding a previous tenant in tail will be compelled to wait six months before executing a disentailing assurance.

J. E. Walsh, Q.C. (with whom was *Ryan*) for the same parties, cited *Doe d. Newman v. Rusham* (17 Q. B. 723); *Hawkins v. Kemp* (3 East. 410); 4 & 5 Wm. 4, c. 92, sec. 22.*

June 19.—Flanagan, Q.C., in reply.—As to the question of the enrolment, there is no necessity that the deed should be enrolled in the lifetime of the party executing it.—*Hayes on Conveyancing*, p. 215. In the next place, as to the construction of the 74th section of the Act, the two deeds must be executed by the same tenant in tail. The general scheme of the Act was to substitute new assurances in lieu of fines and recoveries. The 15th section, which is the general enabling clause, is confined in its terms to the power of a tenant in tail to dispose of his own estate and the estates in remainder. There is not a line giving a tenant in tail power to affect in any way a prior estate; nor would it be a reasonable construction to give to any section of the Act, that a tenant in tail in remainder should have a greater power of disposition than if he had an estate in fee in remainder. In the 40th and 47th sections, the only dispositions of lands under the Act are clearly expressed to be dispositions by a tenant in tail, and it is, therefore evident that when the 74th section speaks of deeds by which lands are disposed of under the Act, it refers to deeds executed by tenants in tail

under the provisions of the Act, and to such deeds alone. If a tenant in tail in possession executes for value a disentailing assurance, that is good against the remainderman. There are no equities between the tenant in tail in question and the remainderman, and this proposition is equivalent to saying that a purchaser from a party who has no equity is to be preferred to a purchaser from the tenant in tail, if, from no default in the latter, his deed is subsequent in its enrolment.—*Doe d. Newman v. Rusham* (17 Q. B. 723).

THE LORD CHANCELLOR.—In my opinion, the order of the Court below cannot be sustained, taking the case in either of the two points of view—namely, whether Mrs. Woodhouse took an estate in fee in remainder under the marriage articles of 1816, or whether she took an estate tail in remainder under the limitations in these articles. It has been strongly argued and ably argued, particularly by Mr. Flanagan, that Mrs. Woodhouse took an estate in fee, and undoubtedly, on the language of the articles alone, such a construction would appear very reasonable; but the settlement itself does not amount to anything more final than mere executory articles, the uses declared by which might at some future time be carried out in a more full and formal manner. Supposing that this estate were apparently an estate in fee, we must then consider how these limitations would be moulded by this Court, if it were called on to carry out the intent of these articles in the fashion it usually adopts. In my opinion, there are strong grounds for saying that as far as respects the intent of the articles, it was intended that the sons should take successive estates in tail, and the daughters the fee in remainder, with a provision to Mr. Richards to appoint to them absolutely or not, as he pleased. The language of the articles point strongly to this construction. No doubt, the Court will mould the limitations to carry out what the testator may have inartificially expressed, but it will not alter a whole chain of limitations unless there are words which entitle it to do so. However, the subsequent limitations are very ambiguous, for it is a question whether they point to a failure of issue, or to the contingency of there being no issue at all of the marriage, or none living at the death of Mr. Richards. But supposing this to be an estate in fee (and I confess the inclination of my mind is to consider that it decidedly was such), we come to the following state of facts, that upon the death of William N. Richards, William I. Richards, who was entitled to an estate tail in remainder, entered into possession of the lands, and in March, 1849, executed a disentailing deed, which, however, was not enrolled until after his death. If we assume then that the power of enrolment extends after the death of the tenant in tail, who has executed the deed, Mrs. Woodhouse's right would be barred. Then it is said that the rights of a purchaser from her, enrolling his purchase-deed as a deed under the Act for the Abolition of Fines and Recoveries, and enrolling it previous to the enrolment of the disentailing assurance, would not be so barred. I can find no authority for the proposition that any deed which a party may choose to enrol, a deed which derives no validity under this Act, must necessarily bear the character of a deed under this Act, and I am of opi-

* "From and after the 31st day of October, 1834, it shall be lawful for any person, either before or after he shall become entitled in any manner, except as expectant heir of a living person, or as expectant heir of the body of a living person, to an estate in lands, not being a vested estate, and whether he be or be not ascertained as the person or one of the persons in whom the same may become vested, to dispose of such lands for the whole or any part of such estate therein by any assurance, whether deed, will, or any other instrument by which he could have made such disposition of such estate were a vested estate in possession: provided nevertheless that no such disposition shall be valid or have any effect where the person making the same shall not at the time of the disposition have become entitled to such estate, unless the deed, will, or other instrument by virtue of which he may become entitled be existing and in operation at the time of the disposition."

nion that the Act has no application at all to the enrolment of a deed executed by an owner in fee. We were referred by Mr. Walshe to the 22nd section of the Irish Act, as referring, amongst other things, to contingent remainders in fee. What does this section declare? It empowers persons having estates in lands, which are not vested, to dispose of them by an assurance, whether deed, will, or other instrument, by which they could make such a disposition, if the estate was a vested estate in possession—plainly pointing to such an instrument or deed as would be valid at law, while the 38th and 74th sections of the English Act refer to nothing except to those assurances which derive their validity from the Act itself. Taking this, then, to be an estate in fee in remainder, under the articles of 1815, it appears to me that the judgment of the Court below cannot be upheld.

This is one view of the case: next, let us consider the matter on the supposition that Mrs. Woodhouse took only an estate tail in remainder. The first question that now arises is as to what is the effect and operation of the disentailing deed executed by William Nunn Richards, but not enrolled until after his death, although enrolled within the six months required by the statute. Have we to interpolate "provided that the grantee shall so long live," or words to that effect, and thus hold the deed to be void? Unless there is an authority to be drawn from the case of *Hawkins v. Kemp* (3 East, 410), there has been no case cited to favour such a construction. In the case referred to also, there was no provision as to the time in which the deed might be enrolled, and altogether there is no analogy between that case and the present. In recoveries, however, it is said, unless all the particulars were completed, the recovery was entirely ineffectual, and one instance was cited where nothing remained to be done except execution.—*Witham v. Derby* (1 Wils., 55); *Shelley's case* (1 Coke's Rep. 92). However, it is not true in general that a recovery must be completed at one time, for after the death of the recoverer, execution might have issued against the tenant in tail, and therefore the argument has not much weight. Here, then, is an express enactment giving six months as the time during which a disentailing deed may be enrolled, and such a deed, if enrolled within six months from the time of its execution, even though after the death of the tenant in tail, will, in my opinion, operate in the same manner as it would have done if enrolled during his lifetime.

The last question which arises is, what is the construction to be given to the 74th section of the English Act corresponding to the 66th section of the Irish Act. It is contended on the part of the appellants that this section refers only to the rights of parties claiming under different deeds executed by the same tenant in tail, while on behalf of the respondents it is said, that this section points to a conflict between deeds executed by one tenant in tail and the successive tenant in tail. The respondents then maintain that the tenant in tail in remainder in the present case having sold the estate, and the purchaser, (who had full notice of the prior deed,) having enrolled the deed within six months, and before the enrolment of the disentailing deed executed by the first tenant in tail, the deed subsequent in date, but prior in enrolment, takes pre-

cedence over the previous deed executed by William Nunn Richards. I cannot bring myself to think that so monstrous a consequence was intended by the Legislature. It would amount to this, that if a tenant in tail having by a solemn deed sold his property, the purchaser, although an Act of Parliament expressly gave him six months as the period within which he might cause the deed to be enrolled, should nevertheless lose his entire estate, because a purchaser from a succeeding tenant in tail, with full notice of the previous deed, chose to have his purchase deed enrolled before the enrolment of the prior deed. Before I would assent to such a position as this, I should require very clear words to show me that such a construction was in accordance with the intention of the Legislature. The whole argument rests on the supposed conflict between the deeds executed between successive tenants in tail, whereas, in my mind, no such conflict was ever contemplated. Can it be contended that the Legislature, in this vague, blind way, would establish a principle whose effect would be so powerful? Confessedly, the complication shown to arise by the construction put on the Act by the respondents is great, but the only practical inconvenience in that construction of the Act which I consider to be the true one is, that a purchaser from a second tenant in tail may have to wait until six months from the time of the death of the first tenant in tail have expired, to see whether any previous disentailing deed will be enrolled, while by the other construction the difficulty on the other side is enormous. Taking the whole case then as it stands, I am of opinion that the order below must be reversed.

THE LORD JUSTICE OF APPEAL.—I am entirely of the same opinion as the Lord Chancellor that the order of the Court below must be reversed. I give no opinion as to the construction of the marriage articles of 1815, as to whether Mrs. Woodhouse took an estate in fee or an estate tail, for it is equally plain that in either case, under the circumstances, the remainderman is barred. It is perfectly plain that the six months prescribed by the Act as the period within which a disentailing deed might be enrolled, was allowed for the purpose of convenience, and the omission to enrol the deed in question during the lifetime of the first tenant in tail is of no moment. To hold that the second tenant in tail could by a deed first enrolled prevail against the deed executed by the first tenant in tail, although enrolled within the prescribed time, would be to defeat the object of the Act of Parliament. Unless I was convinced that this was the clear meaning of the words of the sections referred to, I would not assent to anything which would so evidently frustrate the plain object and purposes of the Act. *Order below reversed, without costs.*

Court of Chancery.

[Reported by Edmund T. Bewley, Esq., Barrister-at-Law.]

METCALF v. RYVES.—Nov. 18; Dec. 14, 1863.

Will—Annuities—Power—Execution—Lease—Charge—Acquiescence.

A testatrix by her will devised and bequeathed all her

real and personal estate to A., in trust, amongst other things, to pay to B. and C. an annuity of £40 each during their respective lives, with remainder to the issue of B. and C. respectively as tenants in common, with remainder over on the failure of issue. The testatrix appointed A. executor, and D. residuary devisee and legatee, and further empowered the executor to sell and dispose of any part of her property that he should think fit, to carry out the intent of her will, and as might appear advantageous for the parties interested. The residuary estate consisted of house property held in quasi fee, a portion of which, at the death of the testatrix, was in the possession of a tenant who held it under a lease for 99 years, from the 13th of February, 1762. In 1824, D., the residuary devisee, made a lease of the premises comprised in the lease of 1762, with some premises adjoining, to the person at that time entitled to the tenant's interest in this lease. The lease of 1824 was made without the knowledge or concurrence of the annuitants, but was made by the advice and with the approval of A., the executor and trustee, who also acted as solicitor in the preparation of the lease. A., from the death of the testatrix to his own death, managed the residuary estate, and paid the annuities, and after his death, and up to the time of the present suit, the annuitants remained in receipt of the rents and profits, which, however, for many years were insufficient to satisfy the annuities. A sub-lease had been made of the premises demised by the lease of 1824, and the sub-lessee had expended a very large sum of money in the erection of extensive tanning concerns. On the expiration of the lease of 1762, the annuitants demanded possession of the premises, which was refused on the ground of the lease of 1824, and that the lessee was a purchaser for valuable consideration without notice. In a suit instituted by the annuitants to have the annuities declared a good charge on all the real and personal estate, and to have the lease of 1824 declared a fraud on their rights—Held, that the annuities were well charged on all the estate, real and personal of the testatrix.

Held, that A., the trustee (in whom the legal estate was vested) had not, by the part which he had taken as solicitor in the preparation of the lease of 1824, executed the power of sale or disposition given by the will of the testatrix.

In some of the receipts for rent which the annuitants had given, the lease of 1824 was recognized as the lease under which the rent was payable. Held, that the rights of the annuitants were not thereby prejudiced.

MARY RYVES, of Grafton-street, in the city of Dublin, having made and published her last will and testament, bearing date the 25th of May, 1811, thereby amongst other things devised and bequeathed all her property, both real and personal, to William Ryves and Michael Harris, in trust, and for the purposes therein after declared, that is to say, she thereby bequeathed to Lucinda Metcalf and Jane Wilcocks the annual sum of £40 each during their respective lives (their own receipts to answer for the same, without any control of their then present or future

husbands); and to Catherine Delany she bequeathed the annual sum of £20 during her life; and the testatrix declared that after the deaths of either Lucinda Metcalf, Jane Wilcocks, or Catherine Delany, then the annuity of her so dying should be equally divided between her issue, share and share alike, and in case of the failure of issue, that then the several annuities should go and be divided between her cousins, Maria Ryves and Catherine Ryves. The testatrix by the said will devised all her estate and interest in her property at Stillorgan, Co. Dublin, to John Ryves during his life, and after his decease to be equally divided between his issue, and William Ryves and Michael Harris were thereby appointed executors, and Maria Ryves and Charlotte Ryves residuary legatees and devisees. She further empowered the executors to sell and dispose of any part of her property as they should think fit, to carry out the intent of the will into execution, and as might appear to them most for the advantage of the parties interested.

Mary Ryves, the testatrix, died on the 10th of March, 1819, leaving the several persons mentioned in her will her surviving, with the exception of Charlotte Ryves, who had died previously. Lucinda Metcalf died in 1845, leaving one child, Thomas Ryves Metcalf, who, in accordance with the terms of the will, became thereupon entitled to one of the annuities of £40 per annum. Jane Wilcocks died in 1833, and left one child, Letitia Maria, who became entitled to the other annuity of 40 per annum. Letitia Maria Wilcocks, in the year 1823, married William Thomas Kelly.

The testatrix at the time of making her will, and at the date of her death, was seised in quasi fee of five houses in New-row, in the city of Dublin, held under two several leases for lives renewable for ever, and was also possessed of two houses in Bishop-street, held under a lease for a term of years renewable for ever; and to the interest in all these premises Maria Ryves became entitled as residuary legatee or devisee. The will of the testatrix was proved by Michael Harris alone in June, 1809, who, during his lifetime, received the rents of the residuary estate, and after paying the several annuities granted by the will, paid over any surplus rents to Maria Ryves. At the date of the death of the testatrix, and for some time afterwards the rents and profits of the residuary estate were more than sufficient to pay the annuities; however, after the death of Michael Harris, the income arising from the residuary estate was much reduced, and thereupon, in May, 1843, Thomas Ryves Metcalf went into the receipt of the rents of the residuary estates, in order to pay and keep down the annuities, and so continued until June, 1852, when having accounted with William Thomas Kelly, and Letitia Maria, his wife, he was succeeded in the receipt of the rents of the estate by William Thomas Kelly. From June, 1852, until the date of the present suit, William Thomas Kelly continued to manage the residuary estates, but the rents proving insufficient to pay the full amount of the annuities, it was found that on the 10th of March, 1863, £453 18s. 2d. remained due on account of the arrears of the annuities.

At the time of the death of the testatrix, part of the premises in New-row were in possession of a tenant who held the same under an indenture of lease

dated the 13th of February, 1762, made between Alexander Ryves (under whom the testatrix derived her title to the premises) of the one part, and John Smithson, of the other part, whereby the premises were demised to John Smithson, his executors administrators and assigns, for the term of 99 years from the 25th of March, 1762, at the yearly rent of £10 10s., late currency. In 1824, Maria Ryves, the residuary legatee, without the knowledge or concurrence of the persons for the time being entitled to the annuities, made a lease of that part of the premises in New Row, comprised in the lease of the 13th of February, 1762, with some premises adjoining to Samuel Warren, in whom interest of John Smithson had become vested for three lives or sixty-one years, from the 25th of March, 1824, which ever should last longest, at the yearly rent of £13 10s., late currency. On the 4th of July, 1825, Samuel Warren demised the premises, comprised in the last-mentioned lease, to Walter Boyd, for the same three lives, or for a term of 59 years, subject to the same yearly rent of £13 10s.

A cause petition, under the 15th section of the Chancery Regulation Act, was filed on the 1st of July, 1862, by Thomas Ryves Metcalf, William Thomas Kelly, and his wife, Letitia Maria Kelly, praying for an account of what was due on foot of the two annuities of £40, and seeking to have the lease of the 20th of August, 1824, set aside, and to have a receiver appointed over all the residuary estates, that thereby the petitioners might be paid the arrears and the accruing gale of the annuities. The petition further prayed that, if necessary, the residuary estates, or a part of them, should be sold subject to the annuities, and that the arrears of the annuities might be paid off out of the produce of the sale. Walter Boyd, and the heir-at law of the testatrix, and the personal representative of Michael Harris, the trustee of the will, were named as respondents. The petition set forth the facts above stated, and the petitioners alleged that they had not been aware of the existence of the lease of the 20th of August, 1824, until the year 1843, and that upon the expiration of the lease of the 13th of February, 1762, possession of the premises was demanded from Walter Boyd, but was refused by him on the ground of his title under the lease of 1824. They further stated that the value of the premises so held by Walter Boyd was considerably more than the rent of £13 10s., and it was submitted that the lease of 1824 was fraudulent.

The discharge of Walter Boyd stated that at the time when the lease of 1824 was made to Samuel Warren, the premises comprised in the lease of 1762 had fallen into decay and ruin, and were of little or no value; that Samuel Warren, having extensive improvements and alterations in contemplation, applied to Michael Harris, the trustee (who was then in receipt of the rents), for a lease not only of the premises comprised in the lease of 1762, but also an adjoining plot of ground, formerly built on, but at this time covered with the debris of fallen houses; and that the lease of 1824 was executed by Maria Ryves, under the advice and direction of Michael Harris, who acted as her solicitor in its preparation. It was further stated that no fine was paid on the

leases either of August, 1824, or July, 1825, and that the rent reserved by them represented the full value of the premises at that time. On the 18th of October, 1828, Walter Boyd had demised the premises to John Hayes, who since that date had expended over £5000 in erecting an extensive tanning concern, which covered the premises so demised and other premises adjoining. Walter Boyd in this discharge also denied that the petitioners had only lately become acquainted with the existence of the lease of 1824, inasmuch as they had always received the rent reserved by that lease, and some of the receipts had specified that the rent for which they were given was reserved by the lease of 1824.

The matter of the cause petition having been referred to Master Litton, the Master decided that he had not jurisdiction to entertain the questions which had been raised, and the case was remitted by him to the Court of Chancery, where, after certain amendments in the parties and in the prayer of the petition, (which amongst other things now sought for an account, and for a declaration that the annuities were well charged on all the residuary estates, and that the residuary estate should be sold discharged of the lease of 1824,) the case now came on for hearing.

Serjeant Sullivan (with him *Richey*) for the petitioner.—Mr. Harris, the trustee, continued in possession and receipt of the rents until the date of his death, in 1843, and the affidavit of John Hayes does not state that any part of the £4000 or £5000 laid out on the premises has been expended since 1843, when the annuitants went into possession for the first time. One of the points relied on by the respondent is that the petitioners received the rent reserved under this lease, and that some of the receipts mention the existence of the lease. The receipt of rent, however, will not in itself confirm the lease. As to the lease having been made by Mr. Harris in pursuance of the power given to the trustees by the will, he was only the solicitor employed in the preparation of the lease, and was not an executing party. He acted then *diverso intuitu*—*M. Mahon v. Leonard* (6 H. of L. C. 970); *Phillips v. Phillips* (31 L. J., N. S., c. 321).

Brewster, Q. C. (with him *J. E. Walshe, Q. C.*, and *Boyd*) for the respondents.—If Harris had the legal estate in him when he negotiated the lease of 1824, he is in the position of a man standing by and allowing others to contract and to expend large sums of money, and he should not be in a better position than if he had been an actual party to the lease. On the other hand it has been held that if from any proper cause a trustee makes a lease, this lease will be upheld. Now it is evident that in the present case this lease was the very best thing that could be done for the property at the time, and therefore the Court after a lapse of nearly forty years will be very slow to do anything that will take from its validity. In reference to this point of execution of a power indirectly, *Young v. Swift* (Lyne on Leases, c. 19), is applicable—*Lewis v. Swift* (1 Jones, 422).

Warren, Q. C. (with him *Purcell*), for Mr. Hayes, cited *Howes v. Peter* (2 De G. F. & J. 333).

J. E. Walshe, for Mr. Boyd, cited *Dilkes v. Broadmead* (2 De G., F. & J., 566); *Nicholson v. Hooper* (4 My. & Cr. 179); Lord St. Leonards's Vendors and

Purchasers, c. 23, sec. 1. 17; *Govett v. Richmond* (7 Sim. 1); *Naylor v. Arnitt* (1 R. & M. 501); *Medlicott v. O'Donel* (1 B. & B., 156); 3 & 4 Will. 4, c. 27, s. 9); *Wade v. Stewart* (2 Ir. Ch. Rep. 166).

Sheldrake for Lord Castlemaine, the personal representative of Mr. Harris.

Richey in reply.—The first question to be considered is as to whether the legal estate remained in the trustees; and that such was the case will be easily collected from the language of the will. If there is an active trust it is certain that the legal estate continues in the trustees. Now the will in this case in the first place gives annuities to married women whose receipts for the payments are to be both necessary and sufficient. It is the trustees too who are to take the receipts; and thus in the commencement of the will an active duty is imposed upon them. In the next place a power is given to the trustees in the end of the will to sell or dispose of the property; and hence it is evident that the trust is an active one, and that the legal estate did not leave the trustees—*Lancashire v. Lancashire* (2 Phill. 157); *Shannon v. Bradstreet* (1 Sch. & Lef. 5). As to the difference between the non-execution and defective execution of a power.—*O'Fay v. Burke* (8 Ir. Ch. Rep. 225).

Cur. adv. vult.

Dec. 14.—THE LORD CHANCELLOR.—The question in the present case arises in reference to two annual sums or charges of £40 created by the will of Mary Ryves, bearing date the 25th of May, 1811. By this will Mrs. Ryves, who had household property in Dublin and the neighbourhood, bequeaths and devises all her property, both real and personal to her cousin, William Ryves, of Rathalla, in the County Wicklow, and Michal Harris, Merion-street, Dublin, in trust, and to and for the uses, intents, and purposes following, that is to say,—“I leave and bequeath to Lucinda Metcalf, otherwise Ryves, and Jane Wilcocks, otherwise Ryves, the annual sum of £40 a-piece during their and each of their lives, their own respective receipts only to answer for same, without any control of their present husbands or any future husband they may hereafter marry. And after the death of either of the said Lucinda Metcalf or Jane Wilcocks, then the annuity of her so dying to be equally divided between her issue, share and share alike.” The petitioners here represent in one way or another the persons entitled to these two annuities. By this will the testatrix finally appointed Maria Ryves and Charlotte Ryves her residuary legatees, and Michael Harris and William Ryves her executors. The form of the bequest would appear sufficient to attach the annuities as a charge on the residuary estate so far as it went; and the question then appears to me to be whether under the circumstances which have occurred the annuities are to be considered as an equitable charge on all the personal and real estate of the testatrix. The real contention in the case is not for an account, but rather to determine whether these annuities are now chargeable on a portion of the residuary estate in the possession of one of the respondents, who claims to be a purchaser for valuable consideration without notice. The parties who represent the annuitants have been in receipt of the annuities from the death of Mrs.

Ryves to the present day, and therefore no question as to the Statute of Limitations can possibly be raised. The security failing, however, from which the annuities were paid, the annuitants now claim to resort to the other premises which during a part of the time were in the possession of Mr. Boyd, and are now in the possession of Mr. Hayes. The title of the latter appears to be this: Mr. Harris, who, I believe, acted alone as executor and trustee under the will, was a very respectable gentleman and a solicitor well known in this Court. During his lifetime he managed this property and paid the annuities to the persons entitled; and, from the time of his death, the annuitants entered into the possession of the rents and profits, and have ever since continued in the exclusive receipt of them. Thus the residuary legatee has been out of possession all this time. The property in question was held under a lease to a Mr. Smithson, made in the year 1762, for a term of ninety-nine years, by Alexander Ryves. This lease would not have expired until 1861; and in 1861 possession of the premises was demanded by the petitioners and refused on the grounds of the existence of the subsequent lease of 1824; and the petitioners say that this lease of 1824 ought not to bind them as it was made without their knowledge or consent, and to the prejudice of their rights. This lease was made to Mr. Warren, who at the time was possessed of the lessee's interest in the lease of 1762. The lease was made under an increased rent, viz., £13 10s., there being a difference of £3 or £4 between this and the rent reserved in the former lease; but an additional plot of ground was included, which was not comprised in the lease of 1762. The premises in this lease were subsequently demised by Mr. Warren to Mr. Boyd, and by the lease from Mr. Boyd to Mr. Hayes they ultimately came into the possession of the present occupier. If this was a valid lease it would be very plain that Mr. Hayes would be entitled to hold the premises at the rent reserved, free from the annuities. The right of the petitioners to enter did not accrue until 1861. All the title in Mr. Warren, however, was merely equitable. In point of fact, as it appeared on the argument of the case here, the property was held under a lease of lives renewable for ever from the Earl of Meath, the last renewal of which was made to the trustee, Mr. Harris. The legal estate was then in Mr. Harris. The lease of 1824 is not made by him. He, indeed, it seems was the solicitor employed in the preparation of it; but it was made by Mrs. Ryves, and made by her in her title as owner. It is said, however, that there is a clause in the will under which the lease could have been properly made. I would have been glad indeed if I could entertain this view, especially when it is plain that this lease was a most judicious and proper thing at the time of its execution. The will gives an express power to the trustees to sell and dispose of any part of the property as they should think necessary to carry the intents of the will into execution, and as should appear for the advantage of the parties interested. It would be very difficult, however, to contend that Mr. Harris, if he had acted in this matter by virtue of this power, would not have made some reference to it in the lease; but the lease is entirely silent on this subject, and I cannot

feel myself justified in coming to any such conclusion. The only other view of the case presented by the respondents is this; the annuitants, it is said, were perfectly aware of the existence of this lease, and received for a number of years the rent reserved by it. This argument, however, was very satisfactorily met by Mr. Richey in his reply. The petitioners had no power to make leases nor to prevent them being made. They had only a charge on the premises; and as long as their annuities were paid they had no right to interfere in any way. On the whole case then I feel I cannot refuse the relief sought, so far as to declare, that the premises are well charged with these annuities. It strikes me, however, that the account prayed for ought not to go beyond the date of the termination of the lease of 1762. If, on taking the account, there should not be sufficient to satisfy the annuities, the lands must be sold, in such order, however, as to have the premises in the possession of Mr. Hayes sold last. The lands should be sold, if possible, subject to the lease of 1824. If not, they must be sold discharged of the lease.

Decree accordingly.

Rolls Court.

[Reported by John Munroe, Esq., Barrister-at-Law.]

COLCLOUGH v. SMITH.—Nov. 13, 1863; Jan. 12, 1864.

Veritas nominis—Falsa demonstratio—Evidence.

In a lease for lives renewable for ever the name of "Beauchamp Colclough the younger, son of Beauchamp Colclough, of Zion Hill, in the county of Carlow, Esq., now of the age of fifteen years or upwards," was inserted. No person answered the entire description. There was a Beauchamp Urquhart Colclough, son of Beauchamp, who did not reside at Zion Hill, and there was also a Beauchamp, son of Henry, who did reside at Zion Hill. Held that the case was governed by the rule, "Veritas nominis tollit errorem demonstrationis;" that the name being substantially correct, the false description should be rejected, and that Beauchamp Urquhart, son of Beauchamp, was therefore the life in the lease.

Held also, that evidence of reputation was inadmissible to prove a person's age.

THIS was an appeal from an order of Master Litton. The original cause, of which the material facts are given below, had been before the Master of the Rolls on several occasions. A lease for lives renewable for ever had been made in 1719, the beneficial interest in which became ultimately vested in the petitioner, Harriet Colclough, and the reversion, subject to such lease, in the respondent, Thomas James Smyth. The petition prayed that a renewal should be granted for the lives now nominated according to the provisions of the lease, on payment of the renewal fines, rent, and interest; and that an account should be taken of what was due. The prayer of the petition was

granted, and the Master was directed to take the necessary accounts. He accordingly found that there was due to the respondent a sum of £235 4s. 5d., viz., rent, £199 7s., renewal fines £30 9s. 2d., and interest £5 8s. 3d. This finding involved the determination of the question,—who was the last life in the lease under the renewal of 1803. The last surviving *cestui que vie* having died in that year Bridget Colclough, in whom the beneficial interest under the lease was then vested, nominated the life of "Beauchamp Colclough the younger, son of Beauchamp Colclough, of Zion Hill, in the county of Carlow, Esq., now of the age of fifteen years or thereabouts." There was no person exactly corresponding with this description; the pedigree, so far as it is necessary to state it, standing thus:—Bridget Colclough had two sons, Beauchamp (known throughout the cause as Beauchamp the first) and Henry; the former residing at Kildavin, the latter at Zion Hill. Beauchamp the first had a son named Beauchamp Urquhart, known as Beauchamp the second, and Henry had a son, Beauchamp, known as Beauchamp the third. Beauchamp the second died in 1845, and Beauchamp the third in 1858. The point in controversy was, which of these two was the life nominated in the last renewal. On the one hand, Beauchamp the second had an additional Christian name, and did not reside at Zion Hill; on the other, Beauchamp the third, who did reside at Zion Hill, was not the son of Beauchamp but of Henry. The Master admitted some evidence of reputation which went to prove that in 1803, Beauchamp the third was about fifteen years of age, while Beauchamp the second was only nine; and accordingly he found in favour of the former. Against the finding the present appeal came to be heard.

Warren, Q.C., May, and C. Ferguson, in support of the appeal.—The Master should have found that the life in the lease was Beauchamp Urquhart, son of Beauchamp the first. The words are to be construed as if they occurred in a will or deed. This is but another illustration of the rule, *Veritas nominis tollit errorem demonstrationis* (1 Jarman on Wills, 350), under which it is held that where there is a person to answer the name it is immaterial that any further description does not precisely apply. In *Del Mare v. Rebello* (3 Bro., C. C., 444), the evidence in favour of there being a mistake in the name was very strong. The testator in that case had left a residue to the children of his sisters, Estrella and Reyna. Estrella had children; Reyna had none, but had become a nun professed, and had changed her name. He had, however, a third sister, named Rebecca, who had children. Lord Thurlow held that "Reyna" could not be changed into "Rebecca." In *Holmes v. Custance* (12 Vcs. 279) the bequest was to the children of Robert Holmes, late of Norwich, and now of London. Robert had left Norwich at the age of fourteen, and died in London several years before the will, yet his only child was held entitled to the legacy against the claim of the children of George Holmes, formerly of Norwich, and residing in London at the testator's death. The same rule was held to apply in the case of *Garner v. Garner* (29 Beav. 114), and in *Roe v. Lidwell* (9 Ir. C. L. 184). So also in *Re Plunkett* (11 Ir. Ch. 361) the words "now residing in France with

her uncle," were rejected as false description, and were not allowed to control the name. Neither can it be considered very material that Beauchamp the second has another name, "Urquhart;" for in the case of *Pryce v. Newbolt* (14 Sim. 354), where there was a gift to John Newbolt, second son of William Strangways Newbolt, rector of Somerton, it was held that John Rice Newbolt, third son of William Robert Newbolt, rector of Somerton, was entitled.

F. Walsh, Q.C. (with him *J. D. Robinson*) in support of the Master's order.—This is not an illustration of the rule, "*Veritas nominis tollit errorem demonstrationis*," for the "*veritas nominis*" does not exist. The rule might have applied had the name been Beauchamp Urquhart. It is necessary to look to the whole description (*Hiscocks v. Hiscocks*, 5 M. & W. 363). The words "son of Beauchamp" are as much words of description as those which follow, viz., "of Zion Hill, in the county of Carlow." One part of the description cannot be retained and the rest rejected. The two parts of the description being inconsistent, it becomes necessary to see which part is favoured by the name. It is found to be Beauchamp, and not Beauchamp Urquhart; a circumstance strongly in favour of Beauchamp the third. The facts of *Blundell v. Gladstone* (11 Sim. 467) were similar to those of the present case; and the principal there applied is applicable here. The gift was to the second son of Edward Weld, of Lulworth, for life; and there was, among other subsequent remainders, a remainder to the first and other sons of each brother, except the eldest, of Edward Weld; and also a remainder to Lady Stourton, one of the sisters of Edward Weld. The facts were, that there was no Edward Weld, of Lulworth; but there was a Joseph Weld of that place, who had three sons, and an elder brother, and a sister, Lady S.; and there was an Edward Joseph Weld, of the same place (son of Joseph Weld), who had no children or elder brother, and no sister named Lady S. It was decided that the second son of Joseph, who perfectly answered the description, and not of Edward Joseph, who partly answered the name, was the person designated to take the first estate for life, under the description of the second son of Edward. The case came before the Lord Chancellor on appeal; and Mr. Justice Patteson, who assisted his Lordship, lays down the rule very clearly (1 Phill. 286). "Evidence of two facts," he says, "would be necessary to enable Edward Joseph Weld to take. First, the fact that no person of Lulworth existed bearing the name of Edward Weld only; and secondly, that he himself, although his name was Edward Joseph, was known by and used the name of Edward only. The necessity for having such evidence clearly shows that he does not fully and accurately answer the whole description; and if so, another rule of construction applies, namely, that if the name be wrong but the description right, and no person fully and accurately answers the name, the Court may apply the devise to the description." The opinion of Parke, B., in stating his opinion on the same case to the House of Lords is to the same effect (1 H. L. Ca. 786). So also the observations of the Vice-Chancellor in *Bennett v. Marshall* (2 K. & J. 740). The case of *Del Mare v. Rebello* (*ubi sup.*) has no application here, as there

was no misnomer in that case. There is, besides, here evidence by one of the family, that at the time of the renewal in 1803 Beauchamp the third was fifteen years of age, while Beauchamp the second was only nine. It is clear, therefore, that Beauchamp the third was the life in the lease.

J. D. Robinson, on same side, cited *Thomas v. Thomas* (6 T. R. 671).

May in reply.—Evidence of reputation as to age is not admissible as in questions of pedigree—*Ree v. The inhabitants of Erith* (8 East. 538). This case is entirely distinguishable from *Blundell v. Gladstone*. In that case there was no second son of Edward Joseph, nor had he a sister Lady Stourton. The facts in that case clearly designated who was meant by the testator. Suppose the date had been reversed, and that Beauchamp the third had died in 1845, could the landlord have brought an action of ejectment had this been the last life of the lease? There can be little doubt, however, as to the old lady's intention. It can scarcely be supposed that, having but two sons, Beauchamp and Henry, and wishing to insert the name of one of her grandchildren, she should say "the son of Beauchamp" instead of the "son of Henry;" while it is by no means impossible that she might not have been clear as to the respective residences of her two sons. There is no evidence that in 1803 the son of Beauchamp the first was known as Beauchamp Urquhart; and it is the experience of every day that persons having two names are more frequently known and designated by one only.

Jan. 12, 1864.—THE MASTER OF THE ROLLS now delivered judgment. After fully stating the facts of the case, and the manner in which it came before the Court, he proceeded to observe, that the Master's report was not altogether satisfactory, as the rent was calculated up only so far as the 1st May, 1862, while the interest was calculated up till May, 1863. He would, however, apply himself to the main question which had been discussed at the bar, viz., who was the life nominated in the renewal of 1803. The life nominated was that of "Beauchamp Colclough the younger, son of Beauchamp Colclough, of Zion Hill, in the County of Carlow, esquire, now of the age of fifteen years or upwards." There could be no doubt that there was no person exactly corresponding with this description, and the conflict lay between Beauchamp, son of Henry, who resided at Zion Hill, and Beauchamp Urquhart, son of Beauchamp, who did not reside there. He had little doubt on his mind, while the case was being discussed, that this was but another illustration of the rule, "*veritas nominis tollit errorem demonstrationis*;" but, as several considerations in opposition to his impression were urged by the petitioner's counsel, he had considered the cases as carefully as he could. The first point strongly urged was, that Beauchamp Urquhart, son of Beauchamp, did not reside at Zion Hill, and it was contended that it was much more likely that there should have been some accidental error in the name than a deliberate misdescription of the residence. With this conclusion he could not concur. It was almost impossible to conceive that a lady, having but two children, and wishing to insert in a lease the name of a child of either one or the other, should not know which of

her own children she referred to, but should say "son of Beauchamp," when she meant "son of Henry." It was besides a very difficult matter to say where a man's actual residence was so far back as 1803. Zion Hill may not have been the recognised residence of Beauchamp Colclough the first, but there was no evidence to show that he was not then actually residing with his brother Henry. Although, however, this may not have been so, he considered the case was governed by the observations of Lord Wensleydale in *Lord Camoye v. Blundell* (1 H. L. Ca., 786). "It may be conceded," said his Lordship, "that where a devisee is described by his Christian name and surname, and some other distinctive circumstances, and no person answers both descriptions, and there is nothing in the rest of the will, or the admitted evidence, to show who was meant, the name would prevail, and the descriptive circumstance would be rejected." So, also, the Master of the Rolls observes in *Garner v. Garner* (29 Beav., 116)—"It is admitted that the cases do not assist us much; but this principle is established by them, that, *prima facie*, the right name is to govern, and that the *falsa demonstratio* is not to take away the *verum nomen*." It was further urged that there was not here even the *verum nomen*—that the name was Beauchamp Urquhart, and not Beauchamp simply. To this argument he would attach but little weight. The custom of calling a person, who has two names by one only, was so generally recognized, that he did not consider the argument required any further answer. Again, it was insisted that there was some evidence of age which would go to show that Beauchamp the third was about fifteen years old in 1803, while Beauchamp the second was only nine. The affidavits on this subject were merely, however, on hearsay and belief; and evidence of reputation was not admissible in reference to a person's age. It was to be further observed that this was not the case of a will, but of a deed. In the case of a will, the principal question would be as to the intention of the testator. In the case of a deed, the question would be, what was the intention of all the parties concerned. Before the name of "Beauchamp, son of Henry," could be inserted, it should be shown not only that Bridget Colclough intended to insert that name, but also that such name was accepted by the landlord: in fact, before an error could be remedied, it should be proved that there was mutual mistake.—*Fowler v. Fowler* (4 De G. & Jones, 250). Suppose, as had been well urged by counsel, this life, whoever it was, had been the last life in the lease, and that Beauchamp the third had died in 1845, and the landlord had then brought his ejectment, could it have been contended for a moment that he had a shadow of a case? It certainly could not, for the obvious answer would have been that "Beauchamp, son of Beauchamp," the life nominated in the lease, was still alive. He could not, therefore, bring himself to agree with the Master's opinion. He should accordingly direct that the Master's report of the 30th May, 1863, should be set aside, so far as it found the sum due for renewal fines and interest, and so far as it found that the life in the renewal of 1803 died in the year 1858; and he should further declare that the life therein nominated was Beau-

champ Colclough the younger, son of Beauchamp Colclough, the second son of Bridget Colclough, to whom the said renewal was granted, and was not Beauchamp Colclough, son of Henry Colclough, the eldest son of said Bridget Colclough, as decided by the Master.

Order accordingly.

THE GOVERNORS AND GUARDIANS OF STEEVENS' HOSPITAL v. JOHN DYAS.

Contract—Corporation—Seal—Part performance.

A proposal was made by J. D. to a corporation, to take out a lease of part of their lands, at a certain rent. The proposal was accepted, and the acceptance entered on the corporation-books. This was immediately communicated to J. D., who, soon after, took possession, and paid the first year's rent, when due. He then refused to complete his contract, by taking out the lease. Held, in a suit for specific performance, that there was here sufficient acts of part performance to take the case out of the general rule, by which corporations can contract only under their common seal.

THE cause petition in this matter was filed for the purpose of compelling the respondent, specifically, to execute a contract whereby he agreed to accept from the petitioners a lease of the lands of Foster-fields, at the yearly rent of £2 10s. per acre. The petition stated that on the 6th of June, 1860, the respondent made a proposal in the following terms: "Gentlemen, I agree to accept the offer of the Governors of Steevens' Hospital, of the farm of Foster-fields, containing 41 acres, Irish, at the rent of £2 10s. per acre: to commence from the 1st of May, 1860, and to receive immediate possession of the entire farm, and the crops thereon, (provided James M'Kenna has not a legal claim to said crops), paying for same whatever two valuers shall award, one to be named by me, and the other by your agent. I propose to take out a lease for 31 years, having in addition to the usual covenants, others against sub-letting, conacreing, selling or assigning or building thereon." This proposal was laid before the committee on the 21st of June, and being referred by them to the general body of governors, was finally accepted on the 29th of June, and an entry to that effect was made in the books. On the 23rd of June, Mr. John Connor, the respondent's solicitor, addressed the following letter to Mr. F. W. Cusack, the secretary to the governors.

MY DEAR SIR—As Mr. Dyas' proposal has been accepted by the committee for the lands of Foster-field, would you be good enough, either yourself or through Mr. M'Kenna, to have a person appointed to value the crops sown by Mr. M'Kenna, in conjunction with a person to be named by Mr. Dyas. This should be done early next week, in order that the habere may issue so soon as the governors confirm the act of the committee, which, I understand will be upon Friday, the 29th instant. Kindly let me know the day you appoint, and the person you name for the valuation.—

Very truly yours,
F. W. Cusack, Esq

JOHN CONNOR.

To this letter Mr. Cusack replied on the 29th of June.

MY DEAR SIR—I laid your letter of the 23rd inst. before the board this day, and on the other side you have their minute relative thereto.—Yours very truly,

John Connor, Esq.

F. W. CUSACK.

The minute referred to is in these terms:—"Three arbitrators to be named to value the crops: one by Mr. Dyas; one by Mr. M'Kenna; and Mr. F. W. Cusack on the part of the board to have the casting vote."—B. M. TABUTEAU, Chairman.

The respondent was afterwards put into possession under this agreement; and, in May, 1861, paid one year's rent according to the terms mentioned therein. He refused to pay the subsequent gales, as they accrued due, till he was compelled to do so by an action in February, 1863. From that time to the present, he had refused to complete the agreement of the 5th June, 1860, and therefore the present cause petition became necessary.

The case for the respondent was that he did not receive possession till the 14th of July, 1860; that he did not then receive possession so as to bind him to take out a lease pursuant to the proposal; that the proposal was wholly independent of the remainder of the document; and that, as the acceptance of the exact terms of that proposal had not been communicated to him within a reasonable time, he had now ceased to be bound by it. The answering affidavit went on to state that the proposal was made under circumstances of peculiar pressure, brought to bear on him by Mr. F. W. Cusack. That the real value of the lands was not more than 35s. per acre; that Mr. Connor's letter of the 23rd June was written by him not as his solicitor but as his friend, and therefore he had no authority to bind him. That respondent was never applied to to take out a lease till February, 1863, that he paid the first year's rent under protest, declaring no more should be paid till the rent was lowered; that in the summons and plaint issued against him he was described as tenant from year to year, and that in the minute of this matter in the corporation books there appeared to be an erasure which respondent insisted was "subject to such covenants as the governors should approve." It was further urged that the petitioners being a corporation, and obliged, therefore, to contract under their corporate seal, there was no sufficient acceptance of the proposal in law. The petitioners filed further affidavits in reply, denying the material allegations in the answering affidavit, asserting that the lands were fully worth 12 10s. per acre, that M'Kenna had offered the same sum, and that the respondent had used all his influence to induce the governors to accept his proposal.

Brewster, Q.C., J. E. Walsh, Q.C., and Leslie Montgomery, for petitioners.—The case seems to be as clear as any that ever came before a Court. The questions raised on the pleadings may be reduced under three or four different heads, first, Was there an acceptance of the proposal by the governors? second, Was that acceptance communicated to the respondent? third, Was the acceptance sufficient in point of law? fourth, Was the contract too unconscionable for the Court to decree its specific execution? With regard

to the first question, there is no difficulty, the proposal was first accepted by the committee on the 21st June, 1860, and by them referred to the general body of governors. The matter was considered by them on the 29th June, and there was then an entry in the books "accepted and confirmed." The second question seems to be as easily answered: on the very day on which the proposal was accepted, the secretary to the corporation wrote to the respondent's solicitor, enclosing a copy of the minute of the board, whereby he was required to appoint a valuator to have M'Kenna's crops valued pursuant to the agreement. The third question is the only one capable of argument, viz., as to the sufficiency of the acceptance in point of law, no doubt the general rule is that corporations can contract only under their corporate seal, but, in this case, there has been a sufficient part-performance of the contract to take the case out of this general rule. In the case of *Marshall v. The Corporation of Queenborough*, (1 S. & St. 520) the Vice-Chancellor says. "If a regular corporate resolution had passed for granting an interest in part of the corporate property, and, upon the faith of that resolution, expenditure was incurred, he was inclined to think both principle and authority would be found for compelling the corporation to make a legal grant in pursuance of the resolution." So also in the case of *Wilmut v. The Corporation of Coventry* (1 Y. & C. 518) it was distinctly admitted by Baron Alderson in his judgment, that a Court of Equity would compel a corporation to execute a legal assurance of corporate property, in pursuance of a contract not under seal, if evidence were given of acts done, or omitted, by the contracting party, on the faith of the alleged legal assurance. In the case of *London and Birmingham Railway Company v. Winter*, (1 Cr. & Ph. 57) a bill was filed for specific performance of a contract for the purchase of land entered into by their agent. It was objected that it did not appear the agent was authorized under the corporate seal, and therefore there was no mutuality in the contract. The objection was, however, overruled on the ground that the company had, before the bill was filed, acted on the contract, by entering into possession. *The case of Power v. College of Physicians* (7 Ir. Ch. 104) and numerous other authorities are to the same effect. On the last question it is unnecessary to trouble the Court, considering the anxiety which the respondent displayed to have his proposal accepted, and the fact that another person offered the same sum for the land. To test the truth of the allegation that the lands are let at an exorbitant price, the board are willing to accept a surrender of the lands, provided the respondent pay the costs of this suit.

The Solicitor-General, Serjeant Sullivan, and W. D. Andrews, for the respondent.—The communication made by the respondent to the Governors of Stevens' Hospital on the 6th June, 1860, consists of two distinct parts. There is first the acceptance of a former offer made by the Governors to the respondent, in which there was no mention of a lease. There is again a proposal to take out a lease at a certain rent. The respondent received no intimation that this latter proposal was accepted till the commencement of these present proceedings. It is laid down in *Fry on Specific*

Performance, s. 167, that the acceptance of a proposal should be communicated without unreasonable delay; and for this he refers to *Meynell v. Surtees* (1 Jur., N.S., 737), and *Williams v. Williams* (17 Beav. 213). The only communication received by Mr. Dyas was to the effect that he should have a valuator appointed to value the crops. This valuation, however, was just as necessary under the former part of the agreement as under the proposal in the latter half of the document; and there was nothing to show to which of these it was referable. The respondent was entitled to a clear and unequivocal answer, that his proposal had been accepted in the exact terms in which it was made. The proposal to take out a lease was made under great pressure brought to bear on him by F. W. Cusack. The offer made by McKenna was not a real and *bona fide* one, as he is, as stated in the affidavit, "a mere man of straw." The land is worth little more than one-half the sum now demanded, as shown by the affidavits of eminent valuers. This, therefore, is not a case in which the Court will exercise its discretion in decreeing specific performance of the contract. There is here, however, no sufficient acceptance in law. Corporations can only contract under seal.—*London Docks Co. v. Sinnott* (8 E. & B. 347); *Paine v. Guardians of Strand Union* (8 Jur. 308). The cases cited on the other side have no application here, as it has not been shown that the respondent went into possession on faith of this contract; and there is, therefore, no sufficient part performance. The erasure in the minute is extremely suspicious, especially considering that F. W. Cusack has since absconded, and no light has been thrown on the matter. On looking at some of the other entries the words "subject to such covenants as the Governors should think fit" are found. It is by no means improbable that these are the words erased, and therefore that other terms were to be added to the proposal.

J. E. Walsh, Q. C., for petitioners.—The document of 6th June must be regarded as one and entire. It cannot be dissected in the manner contended for. The minute, therefore, in which the respondent is desired to have a valuator appointed was a sufficient intimation that his proposal had been accepted. The affidavits filed in the cause further prove that this was the view taken by Mr. Dyas himself. There is here sufficient part performance taking the case out of the general rule requiring the contracts of corporations to be under seal. The cases are exactly analogous to those under the Statute of Frauds. Thus in *Pain v. Coombe* (3 Sm. & Giff. 165), it was held that where a man had been let into possession of land as tenant upon a parol agreement, and paid money and enjoyed that possession, with a certainty as to the term of years, the rent, and the quantity of land, it could not be said in a court of equity that he was not to have the benefit of the tenancy where the agreement was properly proved. Taking possession under an agreement is always regarded as part performance.—*Sugden's Vend. and Purch.* 161, 14th ed.; *Powell v. Lovegrove* (8 De G. Mac. & G., 357). The rent in this case is by no means too high; but even if it were, it would take a very strong case to make a mere excess of price sufficient ground for refusing specific perform-

ance.—*Adams v. Weare* (1 Bro. C. C. 566); *Abbott v. Swoorder* (4 De G. & Sm. 456).

Serjeant Sullivan followed for respondent.

W. D. Andrews, on the same side, cited Woodfall's Landlord and Tenant, p. 666, to show that if the respondent had entered under an agreement for a lease, the proper form of action would have been "use and occupation;" and he should not have been sued as tenant from year to year. He further referred to 3 Geo. III., c. 23, s. 9, the Act under which the petitioners were incorporated, which provided that all leases made by the corporation not under seal should be *ipso facto* void.

L. Montgomery in reply.

Jan. 17.—THE MASTER OF THE ROLLS now delivered judgment. After detailing at length the facts as given above, he proceeded to consider *seriatim* the several objections put forward on the part of the respondent. A considerable portion of the answering affidavit had been occupied in describing certain circumstances of pressure, under which, it was alleged, the proposal of the 6th June, 1860, had been forwarded to the Governors of Stevens' Hospital. He did not believe there was a single word of truth in these statements, and therefore he might leave them entirely out of his consideration. There was ample evidence to show that not only were the lands not valued too highly when let at £2 10s. per acre, but also that the respondent believed at the time he had made a very favourable arrangement. There was the letter of his solicitor; the application to some members of the board to use their influence on his behalf, and his thanks conveyed to them when his offer was finally accepted. He could not assent to the argument addressed to him on behalf of the respondent, that the document of 6th June, 1860, consisted of two distinct parts, and that there was no sufficient intimation that the proposal, contained in the latter part of that document, had been accepted. The affidavit of Ralph W. Cusack, one of the Governors, in which he stated that the respondent thanked him for having accepted his offer, seemed to him quite conclusive on this point, without having regard to the further evidence to the same effect. It seemed to him that the main question in the case was the sufficiency of the acceptance in law. He should, however, observe, that the mode in which this question was raised was most improper. It was introduced into an affidavit by way of rejoinder, instead of forming part of the original answering affidavit. He would, however, give his opinion on the point which had been raised, and that was strongly in favour of the petitioners. No doubt, the general rule was, that corporations could contract only under seal, but the effect of this rule might be avoided, where there was a part performance of the contract. The rule had been clearly and accurately stated in *Fry on Specific Performance*, pp. 176-7—"The principle on which Courts of Equity exercise their jurisdiction in decreeing specific performance of parol agreements accompanied by part performance is the fraud and injustice which would result from allowing one party to refuse to perform his part after performance by the other on the faith of his contract, and this principle extends not only to contracts which, but for such

part performance, would be void by reason of the Statute of Frauds, but also to such as, being entered into by corporations are invalid for want of their corporate seal." Going into possession in pursuance of a contract, had been often held to be sufficient part performance. For this he need only refer to *Marshall v. Corporation of Queenborough*, cited in the argument of counsel (*ubi sup.*); to *Attorney-General v. Ball* (10 Ir. Eq., 146); and to *Parker v. Taswell* (2 De G. & Jones, 571), where the Lord Chancellor makes these observations—"It must be borne in mind that this agreement has been partly executed, by possession being taken under it, and there are many authorities to show that, in such a case, the Court will strain its power to enforce specific performance." It had been urged in this case that the Act of Incorporation prevented the Governors of Steevens' Hospital from making a lease otherwise than under seal. The case last cited was, however, a sufficient answer to this argument. The third section of 8 & 9 Vict., c. 106, had rendered all leases void unless under seal, yet it was held, in this case, that a lease not under seal, was good as an agreement. With regard to the erasure, it would, of course, have been much more satisfactory had nothing of the kind appeared. The presumption, no doubt, was, that in deeds erasures had been made prior to execution.—*Williams v. Ashton* (1 Johns. & Hem., 188). However, as fraud had been here distinctly imputed, he would, if the respondent wished, allow a *viva voce* examination regarding this matter. If fraud were proved, it would, of course, vitiate the whole transaction. But if the respondent failed to prove fraud, he should decree the specific execution of the contract, and make him pay the expenses of the inquiry.

Court of Common Pleas.

[Reported by J. Field Johnston, Esq., Barrister-at-Law.]

SHANE V. NEEDHAM.—June 2.

Pleading—Additional defences.

Malley, for the defendant in this action, which was brought to recover the price of a carriage sold and delivered, applied to amend by pleading an additional traverse. The defence already pleaded admitted the sale and delivery, and alleged an agreement for credit. The defendant had made an affidavit stating that the carriage had been the property of a Mr. Reeves, who had died, and whose widow became his administratrix. She executed a bill of sale of the property in question to the plaintiff; and by the defence now sought to be pleaded the defendant disputed the validity of this bill of sale. The affidavit further stated that at the time of pleading the first plea the defendant was not aware of the facts on which he now relied. By reason of the present plaintiff suing, the defendant was prevented from availing himself of a set-off of £110, a larger sum than the price of the carriage, advanced to the administratrix.

J. P. Hamilton, for the plaintiff, contended that these two defences were inconsistent, and would not

have been allowed by the Court to have been pleaded together. The defendant should give up one of them.
Motion granted.

ALEXANDER V. ROBINSON.—June 2.

Pleading—Indictable offence.

Porter, for the defendant, applied for liberty to plead several pleas to all the counts in the summons and plaint, and to demur to the third count. The action was brought for slander; and the summons and plaint contained four counts, the third of which stated that the defendant falsely and maliciously spoke the words, "I," meaning the defendant, "have no doubt that he," meaning the plaintiff, "could have had the key for no purpose but one," meaning that the plaintiff had the key for the purpose of unlocking the cash-box and stealing money. To have a key for the purpose of stealing is not an indictable offence.—*Cooke on Defamation*. The pleas sought to be pleaded are,—1st. A traverse. 2nd. A traverse of the defamatory sense. 3rd. A plea that the plaintiff and defendant were partners; and that the words were spoken to a third co-partner, and constituted a privileged communication.

Fitzgibbon, for the plaintiff, offered to amend the plaint by inserting the words "will [account for the missing of the money," so as to avoid a demurrer. [*Monahan, C.J.*—That will not be sufficient unless you show an attempt to steal.]

Motion granted.

MURPHY V. LANCASHIRE AND YORKSHIRE RAILWAY COMPANY.—June 3.

Demurrer—Pleading—Amendment of defence.

Macdonogh, Q.C., in this case in which a demurrer had been taken to the defendant's plea, applied to amend the defence, and offered on this condition to allow the demurrer. The action was brought for the non-delivery of cattle by the servants of a railway company according to the direction of the plaintiff. A mistake occurring in reference to the identity of the cattle, some one had taken them away and subsequently restored them. The plea admitted the contract, and averred that it was the duty of the plaintiff by himself or his servants to have attended upon the arrival of the train at Preston in order to point out the cattle. The defendant sought to amend by pleading that there was an additional term in the contract that the plaintiff or his servants should be at Preston to point out their cattle.

Hemphill, Q.C., contra.—The Court ought to allow the demurrer with costs, and leave the defendant to make any motion he may think fit. There is no affidavit, no document, nothing but an opinion of the defendant's counsel.

MONAHAN, C.J.—It seems to be of course. We do not want any consent. We allow the demurrer, with liberty to the defendant to amend. The only

question is as to the terms of amendment. If the plaintiff wishes to go to trial it would be shorter to have a traverse, and under that traverse let it be competent for the defendant to rely on this: that it was part of the contract that the plaintiff undertook that himself or some person on his behalf should be at Preston to point out the cattle.

Rule accordingly.

HOARE v. FLYNN.—June 9.

Writ of error—Intendment after verdict.

The plaintiff obtained judgment in an inferior court for the breach of an agreement that in consideration that the plaintiff would become surety to the defendant the defendant would not put said suretyship in force until after the death of one B. A. The Court refused to reverse the judgment.

Palles moved to reverse a judgment of the Borough Court of Cork upon a writ of error. The action had been brought for breach of an agreement; and the second count of the declaration stated that in consideration that the plaintiff would become surety to the defendant the defendant promised the plaintiff that he would not put said suretyship in force until after the death of one Betsy Atwill. There was judgment for the plaintiff in the Court below. This count is bad, as it does not appear by it that the suretyship was to be by deed or bond or anything higher than the contract itself. The promises by the plaintiff and defendant are part of the same agreement, which really means this: in consideration of your paying money on the death of Betsy Atwill, I agree to take you as security for such payment. This is an attempt to re-recover money properly recovered, or money that would not have been recovered if a certain defence had been pleaded. If a memorandum make the payment contingent it will be incorporated in the instrument—*Byles on Bills*, 88; *Leeds v. Lancashire* (2 Camp. 205). Money recovered in a court of law cannot be recovered back—*Notes to Marriott v. Hampton* (2 Smith's L. C. 356); *Emblin v. Dartnell* (12 M. & W. 830); *Leach v. Thomas* (2 M. & W. 427).

W. M. Johnson (with him *Sullivan, Serjt.*) contra. —This is a collateral contract, and could not have been pleaded as a defence to the first action—*Brad-dick v. Thompson* (8 East. 344). [*Christian, J.*—Here the two promises are the one in consideration of the other. How is there a collateral agreement if they are laid to be made at the same time? They are two separate agreements though of the same time. [*Monahan, C. J.*—Where there was no time of payment mentioned in the first instance there was no agreement on your part to pay until after the death of this woman.] [*Keogh, J.*—If they are separated where is the consideration for the not suing? If they are not separated then it is one agreement.] [*Christian, J.*—An agreement has a promise and a consideration. If two promises are made and laid to be made at the same time, and the one in consideration of the other, then together the two promises make the agreement.] They could not be one agree-

ment in this instance. [*Christian, J.*—I could understand that if the payment were to be immediate.] *Monahan, C. J.*—It is said upon the other side that taking the whole together it amounts to this: that you became surety, but that this was not to be enforced till the death of Betsy Atwill. If so, the other party could not have succeeded in his action on the suretyship short of the death of this lady; and that being so, you ought to have defended the action, this being a portion of the original agreement.] The suretyship must be taken on the face of the count to have been in writing, and undertaken within a reasonable time. [*Keogh, J.*—Where does the reasonable time appear?] It must be assumed when there is silence as to the time. [*Christian, J.*—That is assuming the point to say there is silence. A better way to put it for you is to say the contract of suretyship was not entered into till after the promise not to sue was entered into.] The rules of law require that after verdict the Court will intend everything to sustain the verdict—1 Chitty on Pleading, 711. There was no promise to be fulfilled if this suretyship was not to be till after the death of Betsy Atwill. The Court ought to imply an averment that the suretyship was to be within a reasonable time.

Palles in reply.—As to a reasonable time being inferred, the Court will examine the entire document; and if no time be limited and only then, it will insert a reasonable time. As to the contract of suretyship not being entered into till after the promise not to sue was made, suretyship does not mean payment of money. It is sufficient that the party becomes liable, and the Court cannot infer any contract to pay on demand. [*Christian, J.*—Does not "would become surety" refer to a future suretyship?] *Monahan, C. J.*—Would it not be becoming a surety to say, "I undertake that A. B. shall pay?" It would. [*Monahan, C. J.*—Is it not a collateral agreement for the party to say "Though you would be liable upon that, I undertake in consideration of something else not to sue till a certain time?"] The contracts are of the same nature and must not be inconsistent. As to intendment after verdict, the Court may supply what is non-existing, but cannot correct what is vicious. If there was any other agreement that Betsy Atwill should pay, it should be in writing—*Salmon v. Webb* (3 H. of L. N.S., 510).

MONAHAN, C. J.—We had some difficulty at the beginning of this argument; but having regard to this, that we are bound to support the verdict, we think we can do so. It is quite consistent with the averment that the guarantee was given that that guarantee was at a given time.

Judgment for the defendant in error.

CURTIS v. MOREWOOD.—June 10.

Pleading—Double replication.

Coates, for the plaintiff in this action, which was brought on a bill of exchange, applied for liberty to file a replication. The plaintiff had made an affidavit

stating that interest on the bill had been regularly paid to her. He wished also to take an issue that the defendant's pleading was not true in substance and fact. [*Monahan, C. J.*—That is, to reply double.] That is allowed by the Common Law Procedure Act, 1853. [*Monahan, C. J.*—In a proper case.] The affidavit states that the bill of exchange was payable three months after notice; and there is a controversy as to whether the notice was given or not. This was acceded to, the plaintiff's counsel to certify.

Motion granted.

Court of Exchequer.

[Reported by Oliver J. Burke, Esq., Barrister-at-Law.]

KEEGAN v. MOWLDS.—Nov. 20, 1863.

Attorney's licence—5 & 6 Vict., ch. 82, s. 16, Sched. A.—16 & 17 Vict., ch. 63.

Where an application was made on behalf of the plaintiff to stay the taxation of defendant's costs, in an action tried in Dublin in 1863, on the ground that G. F. M., defendant's attorney, had taken out a certificate to enable him to practise as a country attorney for 1863, for which he paid the sum of £6, same being the amount required to be paid by a country practitioner not ordinarily carrying on his business in the city of Dublin for more than 40 days in the year, and where it appeared that though G. F. M. lived altogether in the country in said year, yet that his entire business was carried on in the Superior Courts, and attended to by a town agent in the city of Dublin, it was Held, that an attorney living in the country, whose ordinary business was transacted in Dublin, should pay a city licence.

Held also, that a party who employs an uncertificated attorney is entitled merely to his costs out of pocket.

THIS was an application made on behalf of the plaintiff that all further proceedings in and towards the taxation, certifying and recovering of the defendant's costs, under an order of Court made on the 5th May, 1863, in this cause, be stayed on the grounds that George Frederick Mowlds, the defendant's attorney on the record was the real defendant in this action; and that he was not at the commencement of the action or at any time since duly certificated as such attorney pursuant to the provisions of the statute. The action in which the defendant's attorney was so engaged was an action in ejectment for non-payment of rent (Reported *sup.* 172), in which judgment as of non-suit was had against the plaintiff. The affidavit upon which the present motion was grounded stated that one of the defendants, George Frederick Mowlds, was an attorney of the Court of Exchequer: that he resided at Larkfield, near Kilgobbin, in the county of Dublin. That he took out a certificate to enable him to practise as a country practitioner for the year 1863, for which he paid the sum of £6, same

being the amount to be paid by a country attorney not ordinarily carrying on business as an attorney in the city of Dublin for more than forty days in the year, under the provisions of the 5 & 6 Vict., c. 82, s. 16. That said license of George Frederick Mowlds was registered or entered in a book ordinarily kept for that purpose in the Seal Office of the Law Courts, Dublin, on the 19th of January, 1863; and his place of business entered in said book is No. 7 Montague-street, Dublin. That the costs of the action aforesaid, amounting to £97, were served on the plaintiff on the 12th May, 1863, and on the 20th of same month the parties appeared on summons before Mr. Gartlan, the taxing master, by counsel, when the plaintiff objected to the taxation being proceeded with on the grounds that George Frederick Mowlds was licensed for a country attorney not carrying on his business ordinarily in Dublin, while Mowlds on the contrary carried on his business in Dublin, at his registered residence, No. 7 Montague-street. The taxing master, nevertheless, proceeded with the taxation, having taken a note of the objection. The affidavit then stated that Mowlds had no office for the transaction of business whatever at Larkfield. That his address in Thom's Directory, for 1863, was No. 7 Montague-street; and that he had no place or office whatever for business in the country, and further, that his entire business was carried on in the Superior Courts. Mowlds, on the contrary, in his affidavit alleged that he had a place of business or office in the country at Larkfield. That he did not carry on business as an attorney within the city of Dublin or within three miles therefrom for the space of 40 days from the taking out of his certificate in January, 1863, to the date of the present application. That he, George Frederick Mowlds, was a defendant in person in the before-mentioned suit of *Keegan v. Mowlds and others*; and that he also acted in that suit as attorney for his son, George Frederick Mowlds, (jun.) who had an interest also in said suit, and who, it was admitted, had acted as his father's town-agent and clerk in the progress thereof.

Brereton, Q.C., with *Samuel Ferguson Q.C.* were in support of the motion—The schedule to the 5 & 6 Vict., c. 82, regulates the amount of duty to be paid by attorneys practising in the Irish Courts; it is thereby enacted that every certificate to be taken out by every person admitted as an attorney or solicitor in any of Her Majesty's Courts at Dublin, who, in his own name, or the name of any other person, shall commence or prosecute any suit if he shall reside in Dublin, or within three miles thereof, shall be £12; and if he shall reside elsewhere in Ireland £8. It is submitted that the true construction of the expression "residence" is that place where the business of the solicitor is ordinarily transacted. The 16th section of that Act provides, "to prevent evasion of such higher duties, if any person shall ordinarily carry on his business within the city of Dublin, or within the distance of three miles therefrom, or shall for the space of forty days or more in any one year reside within the limits aforesaid, every such person shall be deemed to be resident within such limits within the true intent and meaning of this Act, and shall be liable to the higher duties imposed on such certificates, notwithstanding he may at other times in such year reside elsewhere without

the limits aforesaid; and provided that any certificate taken out by any person as aforesaid, chargeable with or upon payment of a lower duty than is hereby required or ought to be paid, shall not be deemed to be a certificate within the meaning of this or any other Act, but the same shall be null and void." If, then, Mowlds's ordinary business was transacted in Dublin, though he himself lived in the country, still the Court will hold, that though living in the country, his residence is in Dublin; if, then, he be unduly certificated, or not certificated at all, he cannot recover his costs. In *Reed v. Bloom* (3 Bing. 10), Best, C.J., says, "The statutes show that if an attorney practise without a regular title, he is disabled to sue for costs." In like manner *Humphrey v. Harvey* (1 Bing. N.C. 62); *Young v. Dowdman* (3 Y & J., 26).

Walter Bourke, Q.C. with *John M'Mahon*, resisted the motion.—This motion is untenable. Mowlds was not an uncertificated attorney; he paid the licence which it was requisite that country practitioners should pay; and a country attorney, *bond fide* residing out of the county of the city of Dublin, was not bound to pay the higher rate of licence. The meaning of the word "residence" is defined in the 16 & 17 Vic. c. 63, s. 1, and Schedule thereto. This construction is not only warranted by the Act of Parliament itself, but by the rules of construction as applicable to penal statutes. The law on the subject of stamps is altogether *positivi juris*; it depends entirely on the language of the Legislature—*Mowlesley v. Hall* (2 Dowl. 496); the construction of the revenue laws is ever in favour of the subject—*Hubert v. John* (3 Taunt., 177); *Sandys v. Concannon* (4 Law Rec. O. S., 110); *Walsh v. Pribble* (1 Dowl. & R. 215); *Middleton v. Chambers* (1 Scotts N.R. 110); *Stephens v. Strangleys* (1 Ir. Jur. 159). It is impossible to give the word "residence" in 16 & 17 Vict. the construction that is contended for by the plaintiff; it must, therefore, receive in this Act its ordinary signification. But even assuming that George Frederick Mowlds was not a duly certificated attorney, yet even so would the defendant who employed him be entitled to his costs out of pocket. The leading case on that doctrine is *Wilson v. Knapp* (8 Dowl. 426); the same proposition is decided in *McDonnell v. Barber* (1 L. R., O.S., 323).

Ferguson, Q.C., was about to reply, but was stopped by the Court.

Pigor, C.B. said that a country attorney, living in the country, whose ordinary business was transacted in Dublin, should pay a city licence. In this case it appeared that Mowlds's ordinary business was transacted in Dublin, and not in the country; and that being so, the licence he should have paid to entitle him to his full costs, was a town licence. The defendants were entitled to their costs out of pocket. This case was governed by *Wilson v. Knapp*, that a party who employs an uncertificated attorney is entitled to his costs out of pocket.

[HILARY TERM.]

PECK v. NOLAN.—Jan. 14.

Interrogatories—Common Law Procedure Act, 1856, ss. 56, 57—Executor.

Where to an action by a simple contract creditor an executor has pleaded plene administravit, the Court will, upon production of the affidavit required by the 57th section of the Common Law Procedure Act, 1856, allow interrogatories to be exhibited requiring particulars and dates of the payments made by him out of the assets of the testator.

After plea pleaded the motion to exhibit interrogatories to the defendant should be upon notice.

Exham, Q.C. (with him *Mark O'Shaughnessy*) moved on behalf of the plaintiffs for liberty to exhibit to the defendant, John Nolan, (executor of James Nolan, deceased) the following interrogatories, that is to say: "1st,—What was the total amount of all the personal estate and effects of the said James Nolan, deceased, in the writ of summons and plaint named which came to your hands as his executor to be administered? 2nd, Of what did the same consist? Set forth the particulars of the same. State in what manner have you administered the same, specifying in particular what the interest in the business of deceased, as a grocer or such like sold for, and to whom it was disposed of. 3rd,—What have you paid as and for testamentary expenses? Set forth the amount and the dates at which same were paid. 4th,—What have you paid as and for debts to the Crown, and any other debts upon record? Set forth the amount and the dates at which the same were paid respectively. 5th,—What have you paid as and for specialty debts? Set forth the amount and the date at which the same were paid respectively. 6th,—What have you paid as and for simple contract debts of the said James Nolan? Set forth the amounts paid at foot of same, and the dates at which same were paid respectively. 7th,—In what further and other manner have you disbursed any of the estate and effects of the said James Nolan? Set forth the amounts you have paid, and the dates at which the same were paid respectively. 8th,—What assets are there yet outstanding unrealized of the said James Nolan? Set forth the nature, quality, and amount of same, and on what security they now stand." The action was for goods sold and delivered to James Nolan, deceased, and for goods bargained and sold, and on an account stated; the defences were *plene administravit*, and that no account was stated with the defendant. The account lodged by the defendant on taking out administration showed assets to a large amount. The creditor is entitled to such an account as that sought.—Hare on Discovery, 253. This course is the only one open to test the truth of the plea.—Bullen & Leake, 494, note. In equity such an account would be ordered.—Mitford, Eq. Pl., sect. 45; Story, Eq. Pl., sect. 37. The interrogatories here sought to be exhibited are taken from the forms in use under the former equity practice.—Willis on Interrogatories. Van Heythysen,

Eq. Draftsman. In England, the Common Law Courts have carried this power much farther than is here sought.—*Barlett v. Lewis* (9 Jur., N. S., 202).

James Murphy, contra.—If the Court exercises such a power in cases like this, the executor's costs should be provided for, in case of his examination showing that his plea is true, and that he has no assets to meet the plaintiff's demand. [*Pigot, C. B.*—Has any case occurred where this power was used at Common Law in the case of an executor?] It would appear not as yet. The principle on which this provision should be acted on is stated by Erie, C. J., in *Stern v. Sevastopolo* (14 O. B., N.S., 797; s. c., 2 N. Reports, 329).

THE COURT made the following order:—

“That the defendant do answer the said interrogatories by affidavit, to be filed in this Court within three weeks from the date hereof; and that the costs of the said interrogatories, of the answers thereto, and of this motion, be, and the same are, hereby reserved until further order.”

NOTE.—On the first day of Term, *O'Shaughnessy* having moved the above as a motion of course, Hughes, B., intimated that during last Term this Court had come to a decision that such motions should be upon notice.

Court of Bankruptcy & Insolvency.

[Reported by John Levy, Esq., Barrister-at-Law.]

[BEFORE LYNCH, J.]

RE ARTHUR M. ROBERTSON.—Jan., 1864.

Life interest in a chattel—Order and disposition—Legal estate in trustees.

Where a testator bequeaths to trustees certain jewellery which he should die possessed of, upon trust that they or the trustees for the time being should permit his widow to enjoy the same for her life, and that after her decease the same shall form a portion of the residue of his personal estate, and the widow of the testator, shortly after her husband's death, lends the ornaments to her daughter on the occasion of her marriage, and they remain in her possession until shortly before her death, when they are pledged by her, and are then in the possession of the husband, who becomes insolvent after he releases them, they do not pass to his assignees either as the absolute property of his wife, and consequently his own property, or as being in his order and disposition with the consent of the trustees, who are the legal owners.

This case came before the Court under the following circumstances:—Mr. Robertson was a captain in the 6th Dragoon Guards, and having for some alleged offence undergone a court martial of a very protracted character, the expenses attending it had so reduced his circumstances that he was unable to meet his liabilities, and having been arrested for debt, a creditor's petition was filed against him, and a vesting order obtained, but Mr. Robertson filed no schedule, and remained in prison rather than take the

benefit of the Insolvent Act. In the meantime he sold his commission, and two thousand pounds of the proceeds were brought into the credit of the estate, and were at the disposal of the Court for the purpose of a dividend. It appeared that his entire debts were about twelve thousand pounds. He was married to the daughter of Colonel M'Alpine, who by his will vested his property in trustees for certain trust purposes. Among the property thus disposed of were certain diamonds, or articles of jewellery, with regard to which the will contained the following disposition:—“I give and bequeath to my brother, Robert M'Alpine, and William Goddard, Esq., their executors, administrators, and assigns, all the jewellery which I shall die possessed of, upon trust that they, or the trustees for the time being, shall permit my widow, Louisa M'Alpine, to enjoy the same during her life, and that after her decease the same shall form a portion of the residue of my personal estate for the purposes in my said will mentioned.” Colonel M'Alpine died in the year 1857, and his widow proved his will, and thus became absolutely entitled for life to the articles of jewellery which belonged to her husband at the time of his decease. These articles consisted of a diamond cross, and diamonds set in the form of a butterfly, said to be of the value of four or five hundred pounds. Shortly after the death of Colonel M'Alpine, his daughter was married to the insolvent, and, upon the occasion of her marriage, her mother lent her the diamonds in question, saying at the time she gave them to her that she was sorry she could not make her a present of them, as she had herself only a life interest in them, but that after her death she (Mrs. Robertson) would be the owner of them. The diamonds thus given to Mrs. Robertson remained in her possession from the year 1858, when she was married, up to the time of her husband's insolvency in 1863, and on the 3rd of February in that year, Mrs. Robertson pledged the diamonds with Mr. Jones, solicitor, for a sum of seventy pounds for a pressing necessity of her husband. Mrs. Robertson died in the month of March afterwards, and her husband, whilst in prison, released the diamonds, which were now claimed by her assignees as the absolute property of his wife, and consequently his property, or that being in his order and disposition at the time of his insolvency, they passed to his assignees. This claim having been made by the assignees, the diamonds were directed to be lodged in the Bank of Ireland, pending a legal decision on the question. In the meantime, Messrs. Dickson and Laurence, the now trustees of the will of Colonel M'Alpine, filed a charge claiming these diamonds on the part of themselves and Mrs. M'Alpine. To this charge the assignees filed a discharge, and in this way it now came before the Court.

Wall, Q.C., (with him *John F. Walker*) appeared for the trustees of the will.—The claim of the assignees was wholly unfounded, upon any ground whatever. In the first place, the trustees of the will, who had the legal estate of the chattels in them, had no notice whatever that the diamonds ever reached the possession of the insolvent or his wife; they gave them to the party entitled to the life use of them. She lent them to her daughter on the occasion of her marriage, but that gave the daughter no right to them, and

consequently her husband had no right to them; so that neither under the reputed ownership clause, nor as being the property of the insolvent's wife, could the assignees of the insolvent claim them. The wife of the insolvent was dead, and her infant child was a ward of the High Court of Chancery in England. They cited *Joy v. Campbell* (1 Scholes & Lefroy, 328); *Ex parte Martin* (19 Ves., 491); *Re Bankhead's Trusts* (2 Kay & Johnson, 560); *Ex parte Moore in the matter of Moore* (2 Mon. D. & D., 616). They also referred to Lewin on Trusts, page 183, and cases there collected.

Kernan, Q.C., (with him *Green*) for the assignees and the petitioning creditor.—In the first place, there was no distinct evidence to shew that the articles of jewellery bequeathed by the will of Colonel M'Alpine included the diamond cross and butterfly, which were the subject of the present inquiry; but suppose they were, they were given by Mr. M'Alpine to her daughter at the time of her marriage, and were never taken out of her possession until her death, and after her death, got into the possession of the insolvent, and at the time of the insolvency he was, beyond all doubt, the reputed owner of them. The trustees were the legal owners, and if they were so careless of their trust, and never inquired for years where the property was, they could not now say that the property was not in the apparent ownership of the insolvent with their consent. A sum of seventy pounds had been raised on these diamonds; the insolvent paid that sum to release them, which was so much abstracted from his estate, and at all events the assignees ought to be repaid that sum by the trustees before they got back the diamonds.

Walker in reply.—The £70 raised on the diamonds were of great advantage to the creditors; but for it the insolvent would not have been able to pay his troop, and would, beyond all doubt, have lost his commission, so that the obtaining the seventy pounds had the effect of bringing two thousand into the estate. The cases cited by Mr. Wall were unanswerable, whilst counsel for the assignees did not cite a single authority to shew that their application was not well-founded. The legal estate in the jewels was in the trustees, who might maintain trover for them, and he contended that the trustees had no equity to be refused the £70, as the jewels had been improperly pledged by a person who had merely a loan of them. He asked for an order to restore the jewels to the trustees, and that they might be paid their costs.

JUDGE LYNCH said he thought he was bound to make an order to have the diamonds returned to the trustees. The will of Colonel M'Alpine gave to his widow a life use in those jewels, and no more, and the trustees gave possession of them to the party entitled to them for life, and so far they fulfilled their trust; and if the mother, on the occasion of her daughter's marriage, choose to forego her own right to the life use of them, and lent them, as she said, to her daughter to wear, telling her at the same time she was sorry she could not make her a present of them, but that after her death it was likely they would be hers, it could not be said that the daughter thereby became the owner. It was natural to suppose that the daughter would outlive the mother, and that it

was the mother's wish that the diamonds should be hers after her death. The daughter, however, died first; the mother was still living, and he did not think there was anything done by her or the trustees, to divest her of the life estate she had in those jewels. Nor did he see that there was anything done to create a visible or reputed possession in the husband in articles of jewellery worn by his wife, and lent to her for that purpose. No doubt they were pledged with Mr. Jones to raise seventy pounds for the husband's use, which he repaid, and if the Court had power to order the trustees to repay that sum, he would be inclined to do it. He would then direct that the diamonds be returned to the trustees, and that they abide their own costs. The assignees to have their costs out of the estate.

Attorney for the assignee—Mr. Maxwell.

Attorney for the trustees—Mr. Goddard.

Consolidated Chamber.

[Reported by Edmund T. Bewley, Esq., Barrister-at-law.]

[CORAM FITZGERALD, B.]

KELLEHER v. LANE; COSTELLO v. KELLEHER.

Dec. 10.

Interpleader—Sheriff—Poundage—Keepers' fees—Expenses of sale.

In an interpleader suit settled by consent of the parties before trial, the sheriff, out of moneys realised from a sale directed by an order of the Court, is not entitled to deduct head-rent paid by him, poundage, or the expenses of keepers prior to the date of the summoning order.

On the 29th of August, 1863, a writ of *feri facias* was lodged with the sheriff of Cork in the suit of *Kelleher v. Lane*, and under this the sheriff on the 29th of August seized the goods of Mr. Lane. On the same day the National Bank made a claim on goods under a bill of sale executed by Mr. Lane to the National Bank, and bearing date the 4th of July, 1863; and this claim was served on the sheriff, the bailiff, and the execution creditor. On the 25th of September the sheriff obtained a summoning order, and on the 2nd of October an interpleader order was issued, by which the sheriff was directed to proceed to a sale of the goods and to lodge the proceeds in Court; and an issue as to the property in the goods was directed between Mr. Costello, the public officer of the National Bank, and the execution creditor. The sheriff accordingly sold the goods on the 13th of October, and having realized £50 by the sale, lodged £24 13s. 5d. in Court. Out of the £50 the sheriff claimed to be entitled to the following credits:—

Half-year's rent paid by sheriff, -	£9	1	1
Keepers' fees from date of seizure			
to sale, -	-	-	13 16 6
Poundage, -	-	-	2 9 0

£25 6 7

Before the interpleader issue came on to be tried the execution creditor by a consent, which was made a rule of Court, admitted that the bill of sale held by

the National Bank was valid at law, and consented that the Bank should draw out the money ordered to be lodged in Court, and undertook to pay all costs incurred by the Bank in preparing for the interpleader issue and in making the consent a rule of Court. The present motion was made on behalf of the public officer of the National Bank, that the sheriff might be directed to lodge in Court, pursuant to the order of the 2nd of October, the whole proceeds of the sale, less all proper and necessary expenses of the sale and keepers' fees from the date of the summoning order to the time of sale.

W. M. Johnson in support of the motion.

Shekleton, on behalf of the sheriff, claimed that the sheriff should be allowed credit in addition for keepers' fees from the date of seizure to the date of the summoning order, also for the half year's rent which the sheriff had paid, and for poundage—*Yates v. Meehan* (11 Ir. C. L. Rep., App. i.); *Bland v. Delane* (6 Dowl. 293).

Fitzgerald, B.—The writ cannot be executed at all, and therefore the sheriff is not entitled to poundage; and on what possible grounds can it be argued that the sheriff has a right to pay the half year's rent out of the claimant's money? You cannot main-

tain for a moment the proposition that my goods are liable for your rent. It is also quite settled that the expenses of keepers up to the date of the interpleader order cannot be allowed. The sheriff's liabilities and rights are governed by certain Acts of Parliament, and by these he is entitled to no such expenses. The whole matter is now a mere question of costs. [*W. M. Johnson*.—By our notice served on the sheriff we offer all that he was fairly entitled to, but we stated that he was not entitled to poundage nor to the rent.] Under these circumstances I shall grant the motion, with costs.

[*Norm.*—The sheriff is not entitled to deduct rent paid to the landlord—*White v. Bustead* (18 C. B., 304; s. c. 17 Jur., 394), *Gill v. Wilson* (3 Ir. C. L. Rep. 544 and 556); *Wilcoxon v. Leach* (29 L. J., N. S., Exch. 154); *Beard v. Knight* (4 Jur. N.S. 782). The sheriff has no right to poundage except out of the sum levied or against the execution debtor—*White v. Bustead* (*loc. cit.*); *Colls v. Coates* (11 A. & E. 326). The sheriff is not entitled to keepers' fees up to the date of the interpleader order—*Yates v. Meehan* (11 Ir. C. L. Rep. App. i); *Moran v. Tyrrell* (5 Ir. Jur. 148); *Buckle v. Bens* (5 B. & C. 688). The sheriff will not be allowed any expense prior to the date of the interpleader order—*Yates v. Meehan* (*loc. cit.*); *Cotton v. Oregon* (4 Ir. C. L. Rep. 250); but he is entitled to the costs of sale and keepers' fees from the date of the interpleader order—*Bland v. Delane* (6 Dowl. 293).—*Rxx.*]

END OF REPORTS.

APPENDIX TO THE IRISH JURIST,

CONTAINING

The Public General Statutes

PASSED IN THE SESSION 1863, AND 26 & 27 VICTORIA.

N.B.—The Statutes relating to Ireland only are printed in full.

CAP. I.

An Act to enable Her Majesty to provide for the establishment of His Royal Highness the Prince of Wales and Her Royal Highness the Princess Alexandra of Denmark, and to settle certain annuities on Her Royal Highness. [5th March 1863.]

CAP. II.

An Act to make Provision concerning Bills of Exchange and Promissory Notes payable in the Metropolis on the Day appointed for the Passage through the Metropolis of Her Royal Highness the Princess Alexandra of Denmark. [5th March 1863.]

CAP. III.

An Act to extend the Credit for Payment of a Portion of the Excise Duty on Malt. [27th March 1863.]

Sec. 1. Credit for payment of a portion of the excise duty on malt extended under conditions herein named.

2. Bonds and securities given by makers of malt under former Acts to continue in force.

3. Nothing to prejudice immediate proceedings for duties considered in danger.

‘WHEREAS the time for payment of the duty of excise on malt made by makers of malt who have given security in that behalf is limited by law to six weeks after the making up of the account or return of the duty chargeable, and it is expedient to alter and extend the time for payment of a portion of the said duty as herein-after mentioned:’ Be it therefore enacted by the Queen’s most excellent Majesty, by

and with the advice and consent of the Lords spiritual and temporal, and Commons, in this present Parliament assembled, and by the authority of the same, as follows:

1. It shall be lawful for any maker of malt who has or shall have given such security as aforesaid, if he shall think fit, and upon giving such notice as hereinafter mentioned, to defer payment of one moiety of the duty of excise on all malt made or to be made by him on or after the first day of January and before the first day of April, and of the whole of the duty of excise on all malt made or to be made by him on or after the first day of April and before the sixteenth day of May in this present year, or in any subsequent year, for the period of three months next after the respective times at which the same would become payable under the law in force immediately before the passing of this Act: Provided that such maker of malt shall give notice in writing, signed by him, of his intention so to defer such payment to the proper collector of excise, on or before the first day of April in this or any subsequent year; and thereupon there shall be charged and paid, for the use of her Majesty, her heirs and successors, interest at the rate of three pounds five shillings per hundred pounds per annum, computed for the period of three months on the respective amounts of duty the payment whereof shall be so deferred as aforesaid.

2. Every bond or other security which has or shall have been given or entered into by any maker of malt for securing the payment of the duty of excise on malt under any former Act, and now in force, shall remain and continue in force against the principal and sureties who shall have made or entered into the same, as a security for payment as well of the said duty according to the directions of any former Act

now in force as of the said duty and interest according to the terms and conditions of this Act, as if the said terms and conditions had been inserted in and made part of the condition of such bond or security, unless the said parties or some one of them shall, before the first day of April next after the passing of this Act, give notice to the Commissioners of Inland Revenue of his desire to withdraw from such bond or security, in which case the malster shall not be entitled to any credit for payment of the duty of excise on any malt made by him until he shall have given fresh security in that behalf to the satisfaction of the said commissioners.

3. Provided always, that nothing herein contained shall be deemed to prejudice or affect the right or power of the said commissioners, whenever they shall deem any of the said duties to be in danger, to require immediate payment thereof, and in default of payment the same shall be recoverable forthwith as duties of excise due and in arrear.

CAP. IV.

An Act to extend for a further Period the Provisions of the Union Relief Aid Act of the last session.

[27th March 1863.]

CAP. V.

An Act to amend the Law relating to the Royal Naval Coast Volunteers.

[27th March 1863.]

Sec. 1. *Section 5 of 16 & 17 Vict., c. 73, repealed in part, with respect to future entries or re-entries of Naval Coast Volunteers.*

‘WHEREAS it is expedient to amend the law relating to the Royal Naval Coast Volunteers:’ Be it therefore enacted by the Queen’s most excellent Majesty, by and with the advice and consent of the Lords spiritual and temporal, and Commons, in this present Parliament assembled, and by the authority of the same, as follows:

1. Section five of the Act of the session of the sixteenth and seventeenth years of her Majesty (chapter seventy-three), “for the establishment of a body of Naval Coast Volunteers, and for the temporary transfer to the navy, in case of need, of seafaring men employed in other public services,” shall, with respect to every volunteer raised under that Act who after the passing of this Act enters or re-enters himself as such volunteer, be read as if the words “but so that no such volunteer be taken or sent beyond one hundred leagues from the shore of some part of the United Kingdom” were omitted therefrom.

CAP. VI.

An Act to apply the Sum of Ten Millions out of the Consolidated Fund to the Service of the Year One thousand eight hundred and sixty-three.

[27th March 1863.]

CAP. VII.

An Act for altering the Duties on Tobacco, and permitting the Manufacture of Cavendish and Negrohead in Bond.

[27th March 1863.]

Sec. 1. *After passing of this Act the following duties on manufactured tobacco to be paid on im-*

portation. As to drawbacks on exportation, &c.

2. *Commissioners may appoint warehouses for manufacture of tobacco in bond.*

3. *Cavendish or Negrohead may be manufactured in bond.*

4. *Cavendish and Negrohead Tobacco not to be delivered for home consumption, except on conditions herein specified. Penalty for non-compliance with foregoing conditions.*

5. *Account of stock of tobacco and materials remaining in warehouses to be taken, and balances to be struck. Deficiency to be deemed tobacco fraudulently removed.*

6. *Penalty on sale, &c., of Cavendish or Negrohead Tobacco not enclosed and labelled.*

7. *Labels to be provided, and forgery thereof punishable by imprisonment with hard labour.*

8. *Penalty on vendors failing to obliterate labels on sale of packets before delivery.*

9. *Cavendish or Negrohead Tobacco not to be imported except to be warehoused.*

10. *Importation of tobacco (except Cavendish or Negrohead) containing prohibited ingredients to be forfeited.*

11. *Commissioners of customs may make rules and regulations for carrying this Act into effect.*

12. *Officers of customs or inland revenue may carry out provisions of this Act.*

13. *How penalties and forfeitures are to be prosecuted for and recovered.*

14. *Mode of estimating penalties per value.*

15. *This Act not to repeal the provisions of 3 & 4 Vict., c. 18, and 5 & 6 Vict., c. 93.*

16. *Commencement of Act. Short title.*

Be it enacted by the Queen’s most excellent Majesty, by and with the advice and consent of the Lords spiritual and temporal, and Commons, in this present Parliament assembled, and by the authority of the same, as follows:

1. In lieu of the duties of customs now charged upon the several kinds of tobacco under mentioned, the following duties shall be charged and paid thereon upon importation into Great Britain and Ireland from and after the passing of this Act:

Tobacco, manufactured, viz.:		£	s.	d.
“	Segars . . . the lb.	0	5	0
“	“ Cavendish or Negrohead . . . the lb.	0	4	6
“	“ Snuff, containing more than 13 lbs. of moisture in every 100 lbs. weight thereof the lb.	0	3	9
“	“ Snuff, not containing more than 13 lbs. of moisture in every 100 lbs. weight thereof . . . the lb.	0	4	6
“	“ Other manufactured tobacco . . . the lb.	0	4	0
“	“ Unmanufactured, containing 10 lbs. or more			

of moisture in every
100 lbs. weight there-
of . . . the lb. 0 8 0
with 5 per cent
thereon.
" " containing less than
10 lbs. of moisture
in every 100 lbs.
weight thereof
. . . the lb. 0 3 6

Provided that no tobacco packed and prized shall, on the importation thereof, be examined as to the quantity of moisture contained therein, except by special order of the Commissioners of Customs, and unmanufactured tobacco shall as heretofore be, in the entry thereof, distinguished as stemmed or unstemmed, as the case may be.

And there shall be charged and paid on every pound of Cavendish and Negrohead Tobacco manufactured in bond, as herein-after provided, on the entry thereof for home consumption, the duty of customs of 0 4 0

Upon every pound of tobacco manufactured in *Great Britain and Ireland* upon which the duties of customs on importation shall have been paid, on the same being by any licensed manufacturer exported as merchandise, or deposited in any bonded warehouse to be used as ships' stores, and packed in whole and complete cases, each containing not less than eighty pounds net weight of such tobacco, there shall be allowed on such exportation or deposit thereof a drawback of three shillings and threepence, in lieu of the drawback now allowed by law on the exportation of tobacco, subject to such increase or reduction in the amount of such drawback as may result from the examination of such tobacco or a sample or samples thereof under the following rule; that is to say,

For every one hundred pounds of tobacco which shall be found to contain thirteen pounds of moisture and eighty-seven pounds of dry tobacco, the drawback of three shillings and threepence *per* pound shall be allowed, and so in proportion for any other quantity; and if on examination the proportion of moisture contained therein shall be found to exceed thirteen pounds in every one hundred pounds weight thereof, a proportionate reduction shall be made in the drawback allowed in respect of every pound of such excess of moisture; but if the proportion of moisture contained therein shall be found to be less than thirteen pounds in every one hundred pounds weight thereof, a proportionate increase shall be made in the drawback allowed in respect of every pound below thirteen pounds in every one hundred pounds weight thereof:

And the drawback allowed by this Act on the exportation of tobacco as merchandise shall be ascertained and paid with all convenient speed after the shipment thereof, and the drawback allowed on the deposit of tobacco in the warehouse for use as ships' stores only shall be ascertained and paid with all convenient speed after the deposit thereof:

Provided always, that no tobacco shall be exported from any ports or places which shall not have been

approved for the importation of tobacco, and no drawback shall be allowed upon any tobacco, except snuff, in which the inorganic matter contained therein shall exceed the proportion of twenty-two pounds in every one hundred pounds weight of such tobacco, exclusive of water; and if such tobacco shall contain less than twenty-two pounds and more than eighteen pounds of such inorganic matter in every one hundred pounds weight, exclusive of water, a deduction shall be made from the drawback allowed of three shillings and threepence in respect of every pound of such excess of inorganic matter above eighteen pounds in the one hundred pounds as aforesaid: Nor shall any drawback be allowed upon any tobacco in which the sand contained therein shall exceed two pounds in every one hundred pounds of such tobacco, exclusive of water: Nor shall any drawback be allowed on the exportation of any Cavendish or Negrohead Tobacco manufactured in bond and delivered for home consumption: Nor shall any drawback be allowed upon any tobacco in which there shall be found more than twenty-five pounds of tobacco stalks in every one hundred pounds weight of such tobacco, exclusive of water; nor unless the tobacco stalks contained therein shall have been fairly cut in the same with portions of the lamina of the leaf adhering thereto: Provided nevertheless, that the full drawback of three shillings and threepence *per* pound shall be allowed upon snuff on the exportation thereof, if the quantity of inorganic matter contained therein does not exceed the proportion of eighteen pounds in every one hundred pounds weight of such snuff, exclusive of water; but if it contain more than that proportion of inorganic matter a deduction shall be made from the drawback allowed of three shillings and threepence in respect of every pound of such excess above the proportion of eighteen pounds in the hundred: And in assessing the duty on any package of tobacco imported into *Great Britain and Ireland*, or in calculating the drawback allowable on the exportation or deposit in the warehouse of any package of tobacco from *Great Britain and Ireland*, no duty shall be charged or a drawback allowed in respect of any fraction of a pound: And it shall be lawful for the officers of customs for the purposes of this Act to take samples of any tobacco imported into or entered for exportation from *Great Britain and Ireland*, or deposited in the warehouse to be used as ships' stores: And in case any dispute shall arise as to the quantity of moisture contained in any tobacco imported into *Great Britain and Ireland*, or as to the quantity of water or inorganic matter, including sand, contained in any tobacco upon which drawback is claimed on exportation, it shall be lawful for the officers of customs to submit any such tobacco or samples thereof to the officers of inland revenue or excise for examination, and the decision of such officers of inland revenue or excise as to the quantity of moisture or inorganic matter contained therein shall be final, and the amount of duty or drawback in respect thereof shall be determined accordingly.

2. The Commissioners of customs shall or may by order under their hand from time to time direct in what warehouses or in what parts or divisions of any warehouses, now approved or appointed or hereafter to be approved or appointed, for the security of duties

on tobacco under this or any Act in force relating to the customs, so long as such appointment or approval shall remain unrevoked, the processes of manufacturing or converting unmanufactured tobacco into cavendish or negrohead, and the weighing, making into parcels, wrapping up, and labelling of cavendish or negrohead, whether of *British* or foreign manufacture, may respectively be carried on, and how and in what manner such warehouses, or parts or divisions thereof, shall be secured by locks, fastenings, or otherwise, and shall and may require such security by bond or otherwise as they shall deem necessary from the importer or manufacturer of any tobacco which shall be deposited therein for security of the duty due on such tobacco or other materials or ingredients, or brought therein or thereto for the purpose of being manufactured or used in the manufacture thereof, or for the purpose of being packed, wrapped, or labelled as aforesaid, or for the due and safe removal of such tobacco or other materials or ingredients from one warehouse to another, or from one part or division of any warehouse to any other part or division of the same or any other warehouse, and for the due observance of the terms, conditions, and requirements of this Act, and of the rules and regulations of the commissioners in respect thereof.

3. It shall be lawful for licensed manufacturers of tobacco to manufacture in such warehouses, or parts or divisions thereof, as shall be approved by the Commissioners of Customs for the manufacture of tobacco in bond, the several descriptions of tobacco respectively called or known as cavendish and negrohead from any leaf or other unmanufactured tobacco duly warehoused for security of duties of customs, and to use in such manufacture materials or ingredients for sweetening or flavouring the same (not being the leaves of trees or plants other than of the tobacco plant), anything to the contrary in any other Act in force to the contrary notwithstanding; and it shall also be lawful for any such manufacturer or any importer of cavendish or negrohead tobacco, in such warehouse, part or division of such warehouse, to pack or make up, wrap, and label in parcels of the weight and in the manner herein-after mentioned any cavendish or negrohead tobacco which shall have been so manufactured in bond as aforesaid, or which shall have been imported in the manufactured state: Provided, that such manufacture and the packing or making up, wrapping and labelling thereof, shall be done and performed in accordance with and under such terms and conditions as are prescribed by this Act, and under and subject to such other rules and regulations as the said commissioners shall from time to time see fit to direct.

4. No cavendish or negrohead tobacco, whether imported and warehoused as such or manufactured in the warehouse, shall be delivered from any warehouse for home consumption except under the following conditions:

1. Such tobacco shall be made into separate packets of such weights respectively as the Commissioners of Customs shall direct, not exceeding one pound nor less than one ounce each:
2. Each such packet shall be enclosed by or at the expense of the importer or manufacturer in a

wrapper approved by the Commissioners of Customs:

3. Each such wrapper shall be securely fastened by a label to be provided by the Commissioners of Customs, and pasted on such wrapper by such importer or manufacturer so that the same cannot be opened nor any part of the contents of such package be abstracted without tearing or destroying such label, or cutting or destroying the wrapper thereof, at any other part or place than that on which the label is pasted or secured:
4. Before any cavendish or negrohead tobacco imported and warehoused shall be made into packets or parcels as aforesaid the same shall be duly entered for home consumption, and the full duty of customs paid thereon:
5. When any unmanufactured tobacco shall have been manufactured or converted into cavendish or negrohead in the warehouse the same shall be duly entered for home consumption, and the full duties of customs shall be paid upon the tobacco so manufactured before the same is made into packets:
6. If any tobacco so manufactured in the warehouse shall not be made into packets for home consumption the same shall be re-warehoused either for exportation or for future packing, wrapping, and labelling for home consumption, if at any time afterwards required for that purpose:
7. All stalks, waste, and other refuse remaining after and from the manufacture of cavendish or negrohead tobacco in the warehouse or from the packing thereof shall be destroyed in the presence of the proper officer of customs or be re-warehoused for exportation at the option of the manufacturer:
8. Every licensed manufacturer shall enter in a book, to be supplied to him by the said commissioners in such form and manner as they shall direct, the following and such other particulars as the said commissioners shall require; viz.,
 The weights, quantities, and particulars of all unmanufactured tobacco and other materials and ingredients received by him into such warehouse for the purpose of being manufactured:
 The weight and quantities thereof consumed in such manufacture:
 The weight, quantities, and particulars of unmanufactured tobacco, materials, ingredients, stalks, waste, and other refuse remaining after or caused by such manufacture:
 The quantity of cavendish or negrohead produced by such manufacture:
 The quantity thereof made up into packets, wrapped, labelled, and delivered for home consumption, with the number of packets of each size or weight respectively:
 The quantity thereof re-warehoused for home consumption or otherwise, and the quantity of tobacco, materials, ingredients, stalks,

waste, or other refuse returned into the customs warehouse to be destroyed:

9. Every such book shall be kept in the warehouse and shall be at all times accessible to the officers of customs, who may make minutes in or take extracts therefrom, and such manufacturer shall correctly keep such book in the manner required, and shall not cancel or obliterate the same or any part thereof, or make any alteration in any entry therein, except for correction of any errors, with the sanction and in the presence of the proper officer of customs:

Every licensed manufacturer, dealer, or other person engaged in such warehouse in any of the operations aforesaid who shall refuse or neglect to comply with any of the foregoing conditions shall for every such offence forfeit the sum of twenty pounds.

5. From time to time when and as often as the officer of customs having charge of any such approved warehouse shall deem it to be necessary or proper, and at least once in every year, the stock of tobacco manufactured and unmanufactured, and all materials and ingredients to be used in such manufacture as aforesaid remaining in such warehouse, shall be weighed in the presence of the said officer, and an account thereof shall be taken and a balance shall be struck of all tobacco, materials, and ingredients received into such warehouse, and of all manufactured tobacco and stalks and refuse of tobacco lawfully delivered thereout; and if the quantity by weight of such tobacco, materials, and ingredients remaining in the said warehouse shall be less than the quantity which, according to the balance of such account, after making such allowance for waste by evaporation in the process of manufacture as to the proper officer of customs may appear reasonable, and as may be in accordance with any rules made by the Commissioners of Customs ought to be found therein, the deficiency shall be deemed to be so much tobacco fraudulently removed from such warehouse without payment of the duties of customs thereon, and the said manufacturer shall forfeit the sum of one hundred pounds, and moreover the amount of such duty shall be recoverable as a debt due to her Majesty.

6. If any tobacco of either of the descriptions called respectively Cavendish and Negrohead, whether of foreign or *British* manufacture, containing or having mixed therewith any material or ingredient prohibited by any Act in force to be used in the manufacture in the United Kingdom of tobacco of the like description, and not being enclosed in a wrapper securely fastened by such label as aforesaid, or of which such wrapper or label shall have been cut or torn, obliterated or cancelled, or bear any other mark or appearance of having been opened or tampered with, shall be sold or exposed for sale by or be found in the possession of any importer or manufacturer of or dealer in or retailer of tobacco, he shall forfeit either treble the value thereof or the penalty of twenty pounds, and all such tobacco shall be forfeited:

Provided nevertheless, that if at the time of the passing of this Act any manufacturer of or dealer in tobacco shall have in his possession any foreign Cavendish or Negrohead tobacco, he may bring the same to any customs warehouse approved for the wrapping and

labelling of Cavendish or Negrohead Tobacco, and may there wrap and label the same, first rendering an account thereof, and showing to the satisfaction of the Commissioners of Customs that the duty thereon upon the importation thereof has been duly paid; and if any foreign Cavendish or Negrohead Tobacco shall be found in the possession of any manufacturer of or dealer in tobacco after the expiration of twenty-eight days from the passing of this Act, not being so wrapped and labelled as aforesaid, the same shall be forfeited, and such manufacturer of or dealer in tobacco shall forfeit either treble the value thereof or the penalty of twenty pounds, at the election of the Commissioners of Customs or inland revenue.

7. The labels by this Act directed to be provided by the Commissioners of Customs shall be printed or stamped with such device as they shall think proper; and if any person shall forge or counterfeit any such label or the device thereon, or shall utter any such label or device knowing the same to be forged or counterfeited, he shall, on conviction of such offence, be imprisoned in the house of Correction, with hard labour, for any term not exceeding six calendar months nor less than three calendar months.

8. If any retail dealer or vendor of any packet of Cavendish or Negrohead Tobacco, labelled as required by this Act, shall fail on the sale thereof to obliterate, before delivery to the purchaser, the label so as to render the same incapable of being again used for the same purpose, he shall forfeit the penalty of twenty pounds.

9. No Cavendish or Negrohead Tobacco containing the leaves of trees or plants other than of the tobacco plant shall be imported into *Great Britain and Ireland*, nor shall any Cavendish or Negrohead Tobacco be imported into *Great Britain and Ireland*, except to be warehoused in the first instance in some warehouse approved by the Commissioners of Customs for security of duties of customs on tobacco; and if any such Cavendish or Negrohead tobacco shall be imported contrary hereto, or being imported shall not be forthwith duly entered and warehoused, the same shall be forfeited, and the importer thereof, and every dealer or other person concerned in the importation thereof, or to whose hands the same shall come, shall forfeit either treble the value thereof or the penalty of one hundred pounds, at the election of the Commissioners of Customs.

10. All manufactured tobacco (other than Cavendish or Negrohead) imported into or found in *Great Britain and Ireland* containing or having mixed therewith any material or ingredient prohibited by any Act in force to be used in the manufacture in the United Kingdom of tobacco shall be forfeited; and the importer thereof and any dealer or other person concerned in the importation, harbouring, or concealing thereof, or to whose hands the same may come, shall forfeit either the treble value thereof or the penalty of one hundred pounds, at the election of the Commissioners of Customs.

11. It shall be lawful for the Commissioners of Customs from time to time to make such rules and regulations as shall appear to them to be necessary or proper for regulating the safe removal of any tobacco, or of any surplus, or stalks, waste, or refuse thereof, to any warehouse, part or division of any warehouse,

or from any such warehouse, part or division of a warehouse, to another for the purposes of this Act, and for securing the same against fraudulent abstraction and also for regulating the times of opening and closing any such warehouses or parts or divisions of a warehouse, and the admission of workmen for the purpose of manufacturing and packing, wrapping, and labelling the tobacco therein, and also to make all such other rules and regulations as they shall think fit for the purpose of carrying out the object and intention of this Act in all cases not herein expressly provided for, and to require such security by bond or otherwise for the purposes above mentioned, and for security of the duties on tobacco, as they shall see fit.

12. Any duty or service required by this Act to be done or performed by any officer of customs may be done by any officer of customs or inland revenue or excise, or other person appointed for that duty or service by the Commissioners of Customs or the Commissioners of Inland Revenue respectively, and every such officer or other person shall be deemed to be the proper officer for such duty or service.

13. All penalties and forfeitures which may be incurred under this Act may be prosecuted, sued for and recovered by order of the Commissioners of Customs or the Commissioners of Inland Revenue under this or any other Act or Acts relating to the customs, inland revenue, or excise respectively.

14. In any suit or prosecution for the recovery of any penalty or forfeiture under this or any other Act relating to the customs in respect of any manufactured tobacco, whether the same shall consist of cigars, snuff, tobacco stalks, tobacco stalk flour, snuff work, or other article manufactured wholly or in part from tobacco, it shall be sufficient to describe the same in any information or other proceeding had thereon as manufactured tobacco, and it shall be so deemed for the purpose of such suit or prosecution; and in estimating the amount of any penalty determinable by the value of the article with the duty of importation chargeable thereon, the same shall be ascertained, as to the tobacco, at the market price in *London*, at or about the time of the offence, of tobacco of the like sort or denomination of the best quality; and, as to the duty, at the rate then chargeable on the importation of tobacco of the like sort or denomination; but if the tobacco, the subject of such prosecution, be of a kind prohibited to be imported, a sum equal to the highest rate of duty then chargeable on the importation of any sort of manufactured tobacco shall be added to the price of the tobacco: And as to any unmanufactured tobacco, in estimating the amount of any penalty in respect thereof for the purposes of any suit or prosecution, the same shall be determined by the market price in *London*, at or about the time of the offence, of unmanufactured tobacco of the best quality, with the highest rate of duty then chargeable on the importation of unmanufactured tobacco added thereto.

15. Provided always, that nothing in this Act contained shall be construed, deemed, or taken to repeal, alter, or affect any of the provisions contained in an Act passed in the third and fourth years of her Majesty's reign, chapter eighteen, intituled *An Act to discontinue the Excise Survey on Tobacco*, and to

provide other Regulations in lieu thereof; and an Act passed in the fifth and sixth years of her Majesty's reign, chapter ninety-three, to amend the last-mentioned Act, save and except so far as the same are altered or varied by this Act.

16. This Act shall come into operation on the day of the passing thereof; and in citing it in other Acts of Parliament and in legal instruments it shall be sufficient to use the expression "The Manufactured Tobacco Act, 1863."

CAP. VIII.

An Act for punishing Mutiny and Desertion, and for the better Payment of the Army and their Quarters. [20th April, 1863.]

CAP. IX.

An Act for the Regulation of Her Majesty's Royal Marine Forces while on shore. [20th April, 1863.]

CAP. X.

An Act for prohibiting the Exportation of Salmon at certain Times. [20th April, 1863.]

24 & 25 Vic. c. 109. 25 & 26 Vic. c. 97.
22 & 23 Vic. c. 70.

Sec. 1. *Short title.*

2. "*Parts beyond seas*" defined.

3. *Export of unclean or unseasonable salmon, or salmon caught at certain times, prohibited.*

4. *Recovery of penalties.*

'WHEREAS the sale of salmon within the United Kingdom is prohibited at various times; that is to say, if caught in *England* within the limits of the Salmon Fishery Act, 1861, is prohibited between the third day of *September* and the second day of *February*; if caught in any fishery district in *Ireland* is prohibited during such time as the capture of salmon is prohibited in that district; if caught in *Scotland* within the limits of "The Salmon Fisheries (*Scotland*) Act, 1862," is prohibited between the commencement of the latest and the termination of the earliest annual close time fixed for any district; if caught in the River *Tweed*, as defined by "The *Tweed Fisheries Amendment Act*, 1859," is prohibited between the fourteenth day of *September* and the fifteenth day of *February*: And whereas the capture or possession of foul or unseasonable salmon within the limits of the United Kingdom is prohibited at all times: And whereas the provisions of the said Acts are evaded by the exportation for sale in *France* and other foreign countries of salmon that cannot legally be sold within the limits of the United Kingdom: Be it enacted by the Queen's most excellent Majesty, by and with the advice and consent of the lords spiritual and temporal, and commons, in this present Parliament assembled, and by the authority of the same, as follows:

1. This Act may be cited for all purposes as "The Salmon Acts Amendment Act, 1863."

2. No part of the United Kingdom, however situated with regard to any other part, shall be deemed for the purposes of this Act to be parts beyond seas.

3. No unclean or unseasonable salmon, and no salmon caught during the time at which the sale of salmon is prohibited in the district where it is caught, shall be exported or entered for exportation from any part of the United Kingdom to parts beyond seas.

All salmon exported or entered for exportation in contravention of this section shall be forfeited, and the person exporting or entering the same for exportation shall be subject to a penalty not exceeding five pounds in respect of each salmon so exported or entered for exportation.

The burden of proving that any salmon entered for exportation from any part of the United Kingdom to parts beyond seas between the third day of *September* and the second day of *February* following is not so entered in contravention of this Act shall lie on the person entering the same for exportation.

4. All penalties under this Act may be recovered in *England*, except within the limits of the said *Tweed Fisheries Act*, as penalties under the *Salmon Fishery Act, 1861*; in *Ireland* as penalties under the Act passed in the session of the fifth and sixth years of the reign of her present Majesty, chapter one hundred and six, intitled *An Act to regulate the Irish Fisheries*; in *Scotland*, except within the limits of the said *Tweed Fisheries Act*, as penalties under the *Salmon Fisheries (Scotland) Act, 1862*; and within the limits of the said *Tweed Fisheries Act*, in manner prescribed by "*The Tweed Fisheries Act, 1857.*"

CAP. XI.

An Act for the Registration of births and deaths in *Ireland*. [20th April 1863.]

Sec. 1. *Short title.*

2. *As to extent of Act.*

3. *Interpretation of terms.*

4. *General Register Office to be provided, and registrar general to be appointed. Proviso as to present registrar general.*

5. *Seal to be provided, and certified copies given at General Register Office to be sealed therewith.*

6. *Power to registrar general, with consent, to alter forms.*

7. *Officers, clerks, and servants to be appointed.*

8. *Power to increase salary of registrar general, which is to include remuneration for all public duties performed by him.*

9. *Salaries to be paid out of monies provided by Parliament.*

10. *Power to appoint an assistant registrar general in case of illness, &c.*

11. *Regulations to be made for management of office and for discharge of duties of officers.*

12. *Registrar general to furnish to boards of guardians notices setting forth Acts required to be done under this Act.*

13. *Fees received by registrar general to be paid into the bank to credit of exchequer.*

14. *Certain appointments to be exempt from stamp duties.*

15. *Iron boxes for register books to be provided.*

16. *Register books to be provided.*

17. *Superintendent registrar's district.*

18. *Registrar's districts.*

19. *Alterations of districts to be published.*

20. *Register office to be provided by guardians.*

21. *Power to guardians to borrow money for providing register offices.*

22. *Appointment of Superintendent registrar.*

23. *Appointment of registrars.*

24. *Officers of unions and dispensary medical officers ceasing to hold their offices to cease to act under this Act.*

25. *If guardians neglect to appoint superintendent registrars and registrars, Lord Lieutenant to appoint them.*

26. *Deputy registrars to be appointed.*

27. *Books, &c., to be transferred on death or removal of superintendent registrar or registrar.*

28. *Superintendent registrars and registrars to reside in their districts.*

29. *Exemption of superintendent registrars, &c., from serving on juries, &c.*

30. *Registrar to learn and register births and deaths, as in Forms (A.) and (B.)*

31. *Parents and others required to give notice of births within twenty-one days, and information within three months.*

32. *As to registry after the expiration of three months from birth.*

33. *Births not to be registered after six months.*

34. *Name given in baptism may be registered within six months after registration of birth.*

35. *Provision for name given without baptism after registration. Certificate of birth of child to be in form as in Schedule (F.)*

36. *Persons present at death and others required to give notice within seven days, and information within fourteen days.*

37. *Notice to be given of the finding of any newborn child or dead body.*

38. *Registrar to make entry of finding of jury upon coroner's inquest.*

39. *Register of children born at sea.*

40. *Register of persons dying at sea.*

41. *Register of birth and death of Irish subjects occurring in foreign countries as in Forms (A.) and (B.)*

42. *Register to be signed by the informant, except as herein stated.*

43. *Persons may sign by a mark before the registrar.*

44. *Correction of erroneous entries.*

45. *Registers of baptisms and burials may be kept as heretofore.*

46. *Medical attendant to transmit certificate of death to registrar.*

47. *Certified copies of registers of births and deaths to be sent quarterly, and the register books, when filled, to the Superintendent registrar.*

48. *Superintendent registrars to send certified copies of registers of births and deaths to registrar general.*

49. *Abstract of registers to be laid annually before Parliament.*
50. *Indexes to be kept at General Register Office; searches allowed and certified copies given, by paying fees herein named.*
51. *Indexes to be made at every superintendent registrar's office, and persons allowed to search them by paying fees herein named.*
52. *Searches may be made in register book, and certificates given of entries therein by registrars.*
53. *Superintendent registrars to be paid for the certified copies sent to General Register Office.*
54. *Registrars to make out accounts quarterly.*
55. *Penalty for wilfully giving false information.*
56. *Penalty for destroying or falsifying register books.*
57. *Penalty for not duly registering births or deaths, or for losing or injuring registers.*
58. *Penalty for neglecting to send register books to superintendent registrar.*
59. *Penalty for improper registry of birth, after six months.*
60. *Penalty for failing to give notice of birth or death.*
61. *Penalty for failing to give information to registrar respecting birth or death, &c.*
62. *Penalty for neglecting to give notice to registrar of finding new-born child, or any dead body.*
63. *Penalties not exigible if notice given. Notices may be given by post.*
64. *No penalty where failure not wilful.*
65. *Penalties, how recoverable. 14 & 15 Vict., c. 93.*

‘WHEREAS it is expedient that a complete system of registration of births and deaths should be established in *Ireland*, as in other parts of the United Kingdom:’ Be it enacted by the Queen’s most excellent Majesty, by and with the advice and consent of the lords spiritual and temporal, and commons, in this present Parliament assembled, and by the authority of the same, as follows:

Preliminary.

1. This Act may be cited for all purposes as “The Registration of Births and Deaths (*Ireland*) Act.”

2. This Act, except as herein otherwise provided, shall extend to *Ireland* only.

3. The following words and expressions shall, in construing this Act, be taken and understood to have the meanings hereby assigned to them, unless there be something in the context repugnant to such construction; (that is to say,)

“Lord Lieutenant” shall mean and include the Lord Lieutenant or other chief governor or governors of *Ireland* for the time being:

“Lord Lieutenant in Council” shall mean the Lord Lieutenant by and with the advice of her Majesty’s privy council in *Ireland*:

“Registrar General” shall mean the registrar general of births and deaths in *Ireland* for the time being appointed or to be appointed under this Act, and in case of the absence of the registrar

general shall also mean and include the assistant registrar general for the time being appointed or to be appointed under this Act:

“Occupier” shall, for the purposes of the notification of births and deaths for registration under this Act, include the governor, keeper, master, superintendent, or other chief resident officer of every gaol, prison, or house of correction, and of every school, reformatory, workhouse, hospital, lunatic asylum, or other public or charitable institution, and where any house is let in separate apartments or lodgings shall include the person under whom such lodging or separate apartments are immediately held, and any agent or servant of such person residing in such house:

“General search” shall mean a search during any number of successive days not exceeding six, without stating the object of search:

“Particular search” shall mean a search over any period not exceeding five years for any given register of birth or death.

PART I.

Registrar General.

4. The Lord Lieutenant shall cause a proper office to be provided in the city of *Dublin*, to be called the “General Register Office,” and shall from time to time appoint for the said office a fit and competent person to be the registrar general of births and deaths in *Ireland*, who shall hold office during the pleasure of the Lord Lieutenant, and be removable by him: Provided always, that the person who shall at the date of the passing of this Act hold the office of registrar general of marriages under an Act passed in the seventh and eighth years of her Majesty, chapter eighty-one, shall be appointed to the office of registrar general under this Act.

5. The registrar general shall cause to be made a seal of the said general register office, and shall cause to be sealed or stamped therewith all certified copies of entries given in the said office; and all certified copies of entries purporting to be sealed or stamped with the seal of the said general register office (which seal it shall not be necessary to prove) shall be admissible as evidence in all parts of her Majesty’s dominions of the birth or death to which the same relates, without any further or other proof of such entry, and no certified copy purporting to be given in the said office shall be of any force or effect which is not sealed or stamped as aforesaid.

6. It shall be lawful for the registrar general, with the consent of the Lord Lieutenant in council, to alter the forms annexed to this Act, regard being always had to the objects and purposes of this Act, and to rendering the same more effectual; and such alterations of forms shall be published in the *Dublin Gazette*, and shall thereupon be deemed to be the forms required to be used by this Act, and shall, within fourteen days after the same shall have been issued, be laid before both houses of Parliament, or if Parliament shall not be then sitting within fourteen days after the commencement of the then next session.

7. It shall be lawful for the Lord Lieutenant (or the registrar general, subject to the approval of the Lord Lieutenant,) to appoint such and so many of-

ficera, clerks, and servants as may from time to time be necessary for carrying on the business of the general register office, and at pleasure to remove any of them: Provided always, that all officers, clerks, and servants who may be employed in the business of the general register office at the time of the passing of this Act shall, if the Lord Lieutenant (or registrar general, subject to the approval of the Lord Lieutenant,) think fit, be employed in the business of the general register office under this Act as if their original appointment under the said Act of the seventh and eighth years of her Majesty had been made under the authority of this Act.

8. 'Whereas the registrar general of marriages appointed under the said Act has been heretofore required by the Lord Lieutenant to superintend the taking of the census in *Ireland*, and also the annual collection of agricultural statistics, and to perform other public duties from time to time, in addition to those he was required to perform under the said Act, for which duties special remuneration has been heretofore awarded to him, in addition to the salary received by him under the said Act; and it is expedient that in respect of such duties, and of the additional duties he may be required to perform under this Act, or otherwise, he should be paid by salary: Be it enacted, that so much of the said Act of the seventh and eighth years of her Majesty, chapter eighty-one, as enacts that the salary of the registrar general shall not at any time exceed the sum of eight hundred pounds yearly shall be repealed; and it shall be lawful for the Commissioners of her Majesty's treasury to appoint from time to time the salary of the said registrar general, so that the same shall not at any time exceed the sum of one thousand pounds.

9. The salaries of the officers, clerks, and servants, and all such salaries and all other expenses of carrying this Act into execution not herein otherwise provided for, shall be paid out of any monies which may from time to time be provided by Parliament for that purpose; and the salary so to be appointed for the said registrar general shall be deemed to include the remuneration for all duties which the said registrar general is now or may hereafter be appointed or required to perform.

10. The registrar general shall have power, subject to the approval of the Lord Lieutenant, to appoint by writing under his hand a fit person to act as his assistant in case of the illness or absence of the registrar general; and every such assistant, while so acting, shall have all the powers and duties of the registrar general, and be subject to all the provisions and penalties declared by the said Act and this Act, except that such assistant shall not have power to make or declare any general rule, or to rescind or alter any order, regulation, or approval signified by the registrar general or made by the registrar general in writing under his hand, or to dismiss any person from any office holden during the pleasure of the registrar general.

11. The Lord Lieutenant, or the registrar general, with his approbation, shall and may from time to time make regulations for the management of the general Register Office, and for the discharge of the duties of the registrar general, officers, clerks, and servants of

the said office, and of the superintendent registrars and registrars, and their deputies herein-after mentioned, so that such regulations be not contrary to the provisions of this Act; and the regulations so made and approved shall be binding on such registrar general, officers, clerks, and servants of the said office, and on the superintendent registrars and registrars, and their deputies respectively.

12. The registrar general shall, in sufficient time before the thirty-first day of *December* one thousand eight hundred and sixty-three, furnish to the guardians of every union printed notices, which the said guardians shall, on or before the said thirty-first day of *December*, cause to be fixed or placed on the outside of the several church and chapel doors, or other public and conspicuous buildings or places within their respective unions, and which said notices shall specify the several acts required to be done for the purpose of registering any birth or death, under the provisions of this Act.

13. All fees received by or on account of the registrar general under the provisions of this Act shall be accounted for and paid by the registrar general, at such times as the said Commissioners of her Majesty's Treasury shall from time to time direct, into the Bank of *Ireland*, to the credit of her Majesty's Exchequer.

14. The appointments of superintendent registrars and deputy superintendent registrars, and of registrars and deputy registrars, under this Act, and the duplicates and certified copies of registers, as herein-after mentioned, shall be exempt from all stamp duties, save and except as herein-after provided.

Supply of Books and Boxes.

15. The Commissioners of Her Majesty's Treasury shall cause to be furnished, upon the application of the registrar general, for the use of the registrars appointed under this Act, a sufficient number of strong iron boxes to hold the register books to be kept by each registrar; and every such box shall be furnished with a lock and two keys and no more, and one of such keys shall be kept by the registrar and the other by the superintendent registrar appointed under this Act; and the register books of each district while in custody of the registrar and not in use shall be always kept in the register box, which shall always be left locked.

16. The registrar general shall cause to be provided a sufficient number of such register books and forms as shall be necessary to the execution of this Act; and the register books shall be of durable materials, and in them shall be printed on each side of every leaf the heads of information herein required to be known and registered of births and deaths respectively; and every page of each of such books shall be numbered progressively from the beginning to the end of the book, beginning with number one, and every place of entry shall be also numbered progressively from the beginning to the end of the book, beginning with number one, and every entry shall be divided from the following entry by a printed line; and the registrar general shall furnish for the use of the registrars a sufficient number of register books of births and register books of deaths as may from time to time be required for the purposes of this Act.

PART II.

Division of Districts.

17. Every union which shall have been formed by the Poor Law Commissioners, under the provisions of the Acts for the Relief of the Destitute Poor in *Ireland*, shall, from and after the said thirty-first day of *December* one thousand eight hundred and sixty-three, be a superintendent registrar's district: Provided that in the event of any alteration being thereafter made in the boundaries of any of the said unions, or in the event of the registrar general considering it expedient for the better execution of this Act, it shall be lawful for the registrar general to make such alterations in the boundaries of any superintendent registrar's district under this Act as he may, subject to the approval of the Lord Lieutenant, deem expedient and proper.

18. Each dispensary district of a Poor Law Union shall, with the approval of the registrar general, be a registrar's district for the purposes of this Act; but it shall be lawful for the registrar general to subdivide any such dispensary district into two or more registrar's districts if he shall think fit to do so, and every such registrar's district shall be called by a distinct name. In the event of any alteration being made in the boundaries of any such dispensary district, or in the event of the registrar general considering it expedient for the better execution of this Act, it shall be lawful for the registrar general to make such alterations in the boundaries of any registrar's district as he may, subject to the approval of the Lord Lieutenant, deem expedient and proper.

19. The superintendent registrar's and registrar's districts of each union, and every alteration of any such districts, shall be published by the registrar general within the union and elsewhere, as may be deemed necessary, in such manner as the registrar general shall think proper.

Register Office.

20. The guardians of each union shall provide and uphold, out of the monies coming into their hands or control as such guardians, a register office, according to a plan to be approved by the registrar general, for preserving the registers to be deposited therein as herein-after provided; and such register office may, with the sanction of the Poor Law Commissioners, and if the guardians think fit, be made in some part of the existing Poor-house, and the care of the said office and the custody of the registers deposited therein shall be given to the superintendent registrar of the district.

21. The boards of guardians may borrow money for the purpose of providing such register offices, and may charge the amount of the sum borrowed on the future rates of the union of which they are guardians, in the manner provided by the Acts for the relief of the poor in *Ireland* with respect to money borrowed under the provisions of the said Acts.

Superintendent Registrars and Registrars.

22. The clerk of the union for the time being shall, if he shall think fit to accept such office, and have such qualifications as the registrar general may by any general rule declare to be necessary, be the superintendent registrar thereof. In the event of his

refusal or disqualification to act in that capacity, the guardians of the union shall appoint a person with such qualifications as the registrar general may by any general rule declare to be necessary, to be the superintendent registrar. Every superintendent registrar shall hold his office during the pleasure of the registrar general.

23. The medical officer for the time being of each dispensary district not subdivided as aforesaid, shall, if he shall think fit to accept such office, and have such qualifications as the registrar general may by any general rule declare to be necessary, be the registrar of the said district. In the event of his refusal or disqualification to act in that capacity, the guardians of the union in which such dispensary district is situate shall appoint a person with such qualifications as the registrar general may by any general rule declare to be necessary, to be the registrar of such district. In any case in which there are two medical officers in one dispensary district, the guardians shall appoint one of such medical officers, qualified as aforesaid, to be the registrar of such district; and in case the registrar general shall subdivide the dispensary district into two or more districts, the guardians shall appoint registrars, qualified as aforesaid, for such districts, preference being given to the medical officer or medical officers, as the case may be, of the dispensary district. Every registrar shall hold his office during the pleasure of the registrar general.

24. In every case in which any clerk of a union or any medical officer of a dispensary district shall hold office under this Act and shall cease to be a clerk of the union or medical officer of the dispensary district, he shall cease to hold his office under this Act in such union or district. In every such case and in every case in which any superintendent registrar or registrar shall be removed by the registrar general from his office under this Act, notice thereof shall be forthwith given by advertisement in some newspaper circulating in the county or counties wherein the district for which such officer may act shall be, and every such person shall thenceforth cease to hold his office under this Act in such district.

25. In every case in which the clerk of union or the medical officer shall not think fit or shall be disqualified to accept the office of superintendent registrar or registrar, and the guardians shall refuse or neglect, during fourteen days after being required so to do by the registrar general, to appoint a superintendent registrar or registrar properly qualified, and in every case of vacancy of the office of superintendent registrar or registrar in any district in which the guardians shall refuse or neglect, during fourteen days after such vacancy, to appoint a superintendent registrar or registrar properly qualified, the appointment shall be made by the Lord Lieutenant.

26. Every superintendent registrar and registrar shall, subject to the approval of the registrar general, appoint by writing under his hand a fit person to act as his deputy in case of the illness or unavoidable absence of such superintendent registrar or registrar; and every such deputy, while so acting, shall have all the powers and duties, and be subject to all the penalties herein declared concerning superintendent registrars or registrars respectively; and in case of the

death or resignation of the superintendent registrar or registrar, as the case may be, shall act as superintendent registrar or registrar until another superintendent registrar or registrar is appointed; and every superintendent registrar or registrar shall be civilly responsible for the acts and omissions of his deputy.

27. In every case in which any superintendent registrar or registrar shall die, or be removed from or otherwise cease to hold his office, all register boxes, keys, books, documents, and papers in his possession as such superintendent registrar or registrar, or which shall come into the possession of his representatives, shall be given up as soon as conveniently may be to his successor in office. If any person shall refuse to give up any such box, key, book, document, or paper in such case as aforesaid, it shall be lawful for any justice of the peace for the county or other jurisdiction where such person shall be or reside, upon application made for that purpose, to issue a warrant under his hand and seal for bringing such person before any two justices of the peace for the said county or other jurisdiction; and upon such person appearing or not being found, it shall be lawful for such justices to hear and determine the matter in a summary way; and if it shall appear to the justices that any such box, key, book, document, or paper is in the custody or power of any such person, and that he has refused or wilfully neglected to deliver the same to the person in whose custody the same ought to be, the said justices shall commit such offender to the common gaol or house of correction for the said county or jurisdiction, there to remain without bail until he shall have delivered up the same, or until satisfaction shall have been given in respect thereof, and the said justices may grant a warrant to search for any such box, key, book, document, or paper, as in the case of stolen goods, in any dwelling house or other premises in which any credible witness shall prove upon oath before them that there is reasonable cause to suspect the same to be; and the same when found shall be delivered to the person in whose custody it ought to be.

28. Every superintendent registrar and his deputy, and every registrar and his deputy, shall reside or have a known place of business within the district for which he is appointed, and shall cause his name, with the addition of superintendent registrar or registrar of births and deaths, or deputy superintendent registrar, or deputy registrar of births and deaths (as the case may be), for the district for which he is so appointed, and the days and hours during which he will attend at such residence or place of business, to be placed on some conspicuous place on or near the outer door of his dwelling house or known place of business; and every superintendent registrar shall cause to be printed and published in his district a list of the names and places of abode or known places of business of every registrar of births and deaths under his superintendence, and also his own name and place of abode or known place of business.

29. Every superintendent registrar and registrar appointed under the provisions of this Act shall be freed and exempted from serving on any jury or inquest, and from every parochial and corporate office whatever.

PART III.

Registration of Births and Deaths.

30. Every registrar shall, subject to the regulations to be made under this Act, be and he is hereby authorized and required to inform himself carefully of every birth and death which shall happen within his district after the thirty-first day of *December*, one thousand eight hundred and sixty-three, and to learn and register as soon after the event as conveniently may be done, and without fee or reward, save as herein provided, in one of the said register books, the particulars required to be registered, according to the forms (A.) and (B.) hereunto annexed respectively, touching every such birth or every such death, as the case may be. every such entry being made in order from the beginning to the end of the book.

31. The parents or parent of any child born in *Ireland* after the said thirty-first day of *December*, one thousand eight hundred and sixty-three, or, in case of the death or inability of the parents or parent, the occupier of the house or tenement in which to his or her knowledge such child was born, or the nurse or any person present at the birth of such child, shall, at any time within twenty-one days next after the day of such birth, give notice thereof to the registrar of the district within which such child shall have been born; and such parents and persons above specified whether they have given such notice or not, shall, upon being required personally or by written requisition of the registrar, within three months after the date of such birth, attend personally at some dispensary station or vaccination station within the registrar's district, or otherwise at the place of residence of such parents or person, and give information to the registrar of the district in which such birth occurred, according to the best of his or her knowledge and belief, of the several particulars by the said form (A.) required to be registered touching the birth of such child, and shall sign the register in the presence of the registrar.

32. After the expiration of three months following the birth of any child it shall not be lawful for any registrar to register such birth, save as herein-after provided; that is to say, in case the birth of any child shall not have been registered according to the provisions herein-before contained, it shall be lawful for any person present at the birth of such child, or for the father or mother or guardian thereof, at any time within six calendar months next after the birth of such child, to make before the superintendent registrar a declaration in writing of the particulars required to be known touching the birth of such child, according to the best of his or her knowledge and belief, which declaration the said superintendent registrar is hereby authorised to take, and it shall thereupon be lawful for the said registrar then and there in the presence of the superintendent registrar, to register the birth of such child, according to the information of the person making the said declaration; and the superintendent registrar before whom the said declaration is made shall sign the entry of the birth as well as the registrar; and for every such registry as last aforesaid the superintendent registrar shall be entitled to receive a fee of two shillings and sixpence

from the person requiring the same to be registered, and the registrar over and above the fee in this Act authorized to be taken in respect of every birth registered by him, shall be entitled, unless the delay shall have been occasioned by his default, to take a fee of two shillings and sixpence from the person requiring the same to be registered; and no register of birth shall be given in evidence to prove the birth of any child whenever it shall appear that more than three calendar months have intervened between the day of the birth and the day of the registration of the birth of such child (except in the case of a child born at sea or in a foreign country), unless the entry shall be signed by the superintendent registrar as well as by the registrar.

33. After the expiration of six months following the birth of any child it shall not be lawful for any registrar to register the birth of such child, and no register of births, except in the case of children born at sea or in a foreign country, shall be given in evidence to prove the birth of any child wherein it shall appear that six calendar months have intervened between the day of the birth and the day of the registration of the birth of such child.

34. If any child born in *Ireland* whose birth shall have been registered as aforesaid shall within six calendar months next after the registration of such birth have any name given to it in baptism, the parent or guardian of such child, or other person procuring such name to be given, may, within seven days next after such baptism, procure and deliver to the registrar or superintendent registrar of the district in whose custody the register of the birth of the child may then happen to be, a certificate, according to the form (C.) to this Act annexed, or to the like effect, signed by the clergyman, minister, or officiating person who shall have performed the rite of baptism, which certificate he is hereby required to deliver immediately after the baptism whenever the same shall be then demanded, on payment of the fee of one shilling, which he shall be entitled to receive for the same; and the said registrar or superintendent registrar, upon receipt of such certificate, and on payment of the fee of one shilling, which he shall be entitled to receive for the same, shall, without any erasure of the original entry, forthwith register therein that the child was baptized by such name and also the date of the registry of such baptismal name; and the said registrar or superintendent registrar shall thereupon certify upon the said certificate the additional entry so made, and shall forthwith send the said certificate through the post office to the registrar general; and whenever a baptismal name shall have been added to an entry of birth subsequently to the transmission to the general register office of the return of certified copies containing such entry, a duly certified copy of such entry, containing the baptismal name and the date of such entry, shall in like manner be sent to the registrar general, who shall cause the same to be duly entered in the register without any erasure of the original entry.

35. In the case of any child of parents not recognising the sacrament of baptism, or infant baptism, when any name shall have been given to any such child by the parents or guardians of such child other

than that by which it may have been registered, it shall be lawful for such parents or guardians, within six months after the birth of any such child shall have been registered, or, if after six months, then only with the written authority of one or more justice or justices of the peace presiding at the petty sessions of the district in which such parents or guardians shall reside, or (if in the police district of *Dublin metropolis*) of one or more divisional justice or justices within the said district (which authority, upon a statement of the circumstances of the case submitted to him or them, it shall be lawful for such justice or justices to give), to deliver to the registrar or superintendent registrar in whose custody the register of the birth of such child shall then happen to be a certificate in the form of the schedule (F.) to this Act annexed, or to the like effect, signed by such parents or guardians; whereupon, and upon payment of a fee of one shilling, such registrar or superintendent registrar shall, without erasure of the name by which such child shall have been registered, register therein the name of such child; and such certificate shall be certified and transmitted by the registrar or superintendent registrar to the registrar general, in the like manner and to the like effect as is in this Act prescribed regarding certificates in relation to names given in baptism.

36. Some persons present at the death or in attendance during the last illness of any person dying in *Ireland* after the said thirty-first day of *December*, one thousand eight hundred and sixty-three, or the occupier of the house or tenement in which such death took place, or if the occupier be the person who shall have died, then some one or more of the persons residing in the house in which such death took place, shall, within seven days next after the day of such death, give notice of such death to the registrar of the district in which such death occurred; and such persons as aforesaid, or if such death shall not have taken place within a house, then any person present at such death, or having a knowledge of the circumstances attending the same, shall, whether they have given such notice or not, upon being required personally or by written requisition of the registrar, within fourteen days after the date of such death, attend personally at some dispensary, district, or vaccination station within the registrar's district, or otherwise at the place of residence of such person, and give information to the registrar of the district in which such death occurred, according to the best of his or her knowledge and belief, of the several particulars required by the said form (B.) to be registered touching such death, and shall sign the registry in the presence of the registrar.

37. In case any person shall, after the thirty-first day of *December*, one thousand eight hundred and sixty-three, find exposed any new-born child, or any dead body, the person first having charge of such child in the case of the new-born child, and the coroner in case of the dead body, shall forthwith give notice of the finding of the same and of the place where the same was found to the registrar of the district in which the same shall have been found; and the registrar shall register, after proper inquiry, all the several particulars required to be known and re-

gistered touching the said birth or death; or so much and so many of the particulars as shall have been ascertained.

38. In every case in which an inquest shall be held on any dead body after the said thirty-first day of *December*, one thousand eight hundred and sixty-three the jury shall inquire of the particulars herein required to be registered concerning the death, and the coroner shall communicate the finding of the jury in writing under his hand to the registrar, and the registrar shall make the entry accordingly; provided that the coroner shall not be required to sign the register as informant; but the registrar shall state in the entry of such death that the information was received from the coroner, and shall transmit all such informations to the superintendent registrar, who shall send the same to the registrar general, who shall preserve such informations with the records of his office.

39. If any child of an *Irish* parent shall be born at sea after the thirty-first day of *December*, one thousand eight hundred and sixty-three, on board of a *British* vessel, the captain or commanding officer of such vessel shall forthwith make a minute in the log book or otherwise of the several particulars hereby required to be registered touching the birth of such child, so far as the same may be known, and of the name of the vessel in which the birth took place, and shall, on the arrival of such vessel in any port of the United Kingdom, or by any other earlier opportunity, send a certified copy of such minute through the post office to the registrar general in *Dublin*, who shall file the same, and shall cause a true and correct copy thereof, verified by his own signature, to be entered in a book to be kept for that purpose in the general register office, to be called the "*Marine Register Book of Births*," and the registrar general shall keep such book with the other registers according to the provisions of this Act.

40. If any of her Majesty's *Irish* subjects shall die at sea on board of a *British* vessel after the said thirty-first day of *December*, one thousand eight hundred and sixty-three, the captain or commanding officer of the vessel on board of which such death shall have happened shall forthwith make a minute in the log book or otherwise of the several particulars herein required to be inserted in the register touching such death, so far as the same may be known, and of the name of the vessel wherein such death took place, and shall, on the arrival of such vessel in any port of the United Kingdom, or by any other earlier opportunity, send a certified copy of such minute through the post office to the registrar general in *Dublin*, who shall file the same, and shall cause a true and correct copy thereof to be entered in a book to be kept for that purpose in the general register office, to be called the "*Marine Register Book of Deaths*," and the registrar general shall keep such book with the other registers according to the provisions of this Act.

41. The birth of any child of *Irish* parents, or the death of any person born in *Ireland* which shall take place in any foreign country, if intimated to the registrar general within twelve months after the date thereof, in accordance, as near as may be, with the forms prescribed in forms (A) and (B.) to this Act

annexed, and duly certified by the *British* Consul of the country or district within which such birth or death shall have taken place, shall be entered in a book to be kept for the purpose in the general register office, to be called "*The Foreign Register*;" and all such intimations shall be filed and the relative entries verified by the signature of the registrar general.

42. Every person by whom the information contained in any register of birth or death under this Act shall have been given, except in the case of such information being given by the coroner, or by the captain or commanding officer of a vessel at sea, or in the case of a person born or dying in any foreign country, as herein-before provided, shall sign his name, qualification, and place of abode in the register; and, except as aforesaid, no register of birth or death according to this Act shall be given in evidence which shall not be signed by some person professing to be the informant, and to be the person or one of the persons required by this Act to give such information to the registrar.

43. In case of the inability to write of any person whose signature is required or necessary under this Act, it shall be lawful for such person to adhibit, in the presence of the registrar, a cross or other mark, who shall annex the designation of such person to such cross or other mark; and such cross or other mark shall be in all respects as binding and effectual as the signature of such person if capable of writing would have been.

44. If any error shall be discovered to have been committed in the entry of any birth or death in any register the person discovering the same shall forthwith give information thereof to the justice or justices presiding at the petty sessions of the district within which such birth or death shall have occurred, or if within the *Dublin* Metropolitan Police district to a divisional justice or justices within the said district; and it shall be lawful for the said justice or justices, and they are hereby authorised and required thereupon or upon otherwise coming to the knowledge of such erroneous entry, to summons before them the person who made and any person concerned in making such erroneous entry, or having any knowledge regarding the same, and also any person interested in the effect of such erroneous entry, and to examine all such persons on oath; and if the said justice or justices shall be satisfied that any error has been committed in any such entry such justice or justices shall, by authority in writing under his or their hands, direct the registrar to correct the erroneous entry; and it shall be lawful for the registrar, and he is hereby required thereupon, to correct the erroneous entry according to the truth of the case by entry in the margin without any alteration of the original entry; and such marginal entry shall contain a reference to the deposition upon which the said justice or justices directed the correction to be made, and shall be dated on the day on which it is made, and signed by the parties applying for the correction and by the registrar; and in every case the registrar shall make the like alteration in the certified copy of the register book, to be made by him as herein-after provided; provided that in case such certified copy shall have been already made, he shall make and deliver in like manner a separate cer-

tified copy of the original erroneous entry and of the marginal correction therein made.

45. Nothing herein contained shall affect the registry of baptisms or burials as now by law established, or the right of any officiating minister to receive the fees now usually paid for the performance or registration of any baptism or burial.

PART IV.

Medical Certificate of Death.

46. 'Whereas it is expedient to establish a registration of the causes of death:' Be it therefore enacted, the registrar shall furnish from time to time, *gratis*, to every duly qualified medical practitioner within his district the necessary forms of certificates of deaths in the form (D.) hereunto annexed, which certificates the registrar general shall cause to be printed and forwarded from time to time to every registrar for that purpose; and the medical practitioner who shall have been in attendance during the last illness and until the death of any person dying after the said thirty-first day of *December*; one thousand eight hundred and sixty-three shall, within seven days after the death of such person, transmit to the registrar of the district in which the death occurred a certificate of the cause of death in the form mentioned, the particulars of which shall be entered by the registrar in the register: In case such certificate shall not be so transmitted, the registrar shall transmit to such medical practitioner a form of such certificate, and by a written or printed requisition under his hand shall require such medical practitioner forthwith to return to him such certificate duly filled up, and such medical practitioner shall, within three days after the receipt thereof, return such certificate duly filled up to such registrar.

PART V.

Returns.

47. In the Months of *April, July, October, and January*, on such days as shall from time to time be appointed by the registrar general, every registrar shall make and deliver to the superintendent registrar of his district, on durable materials, a true copy, certified by him under his hand, according to the form (E.) to this Act annexed, of all the entries of births and deaths made during the quarter of a year last preceding the first day of each of the several months herein before mentioned respectively, in the register books kept by him, the first of such certified copies to be given in the month of *April*, in the year one thousand eight hundred and sixty-four, and the superintendent registrar shall examine the same, and if found to be correct shall certify the same under his hand to be a true copy: If there shall have been no birth or death registered since the delivery of the last certificate, the registrar shall certify the fact, and such certificate shall be delivered to the superintendent registrar as aforesaid, and be countersigned by him: The registrar shall keep safely each of the register books furnished to him as herein-before mentioned until it shall be filled, and shall then deliver it to the superintendent registrar to be kept by him with the records of his office.

48. Every superintendent registrar shall four times

in every year, on such days as shall be named for the purpose by the registrar general, send to the registrar general all the certified copies of the registers of births and deaths which he shall have received from the registrars of births and deaths as aforesaid for the quarter of a year last preceding the first day of each of the several months herein-before mentioned respectively; and the registrar general, if it shall appear by interruption of the regular progression of numbers or otherwise that the copy of any part of any book has not been duly delivered to him, shall procure, as far as possible, consistently with the provisions of this Act, that the same may be remedied and supplied; the certified copies so sent to the general register office shall be thereafter kept in the said office in such order and manner as the registrar general, under the direction of the Lord Lieutenant, shall think fit, so that the same may be most readily seen and examined.

49. The registrar general shall once in every year transmit to the Lord Lieutenant a general abstract of the numbers of births and deaths registered during the foregoing year in such form and at such date as the Lord Lieutenant shall from time to time prescribe; and every such annual general abstract shall be laid before Parliament within one month after receipt thereof, or, if Parliament shall not be then sitting, within one month after the commencement of the next session.

50. The registrar general shall cause indexes of all the registers herein mentioned to be made and kept in the general register office; and every person shall be entitled to search the said indexes between the hours of ten in the morning and four in the afternoon of every day, except *Sundays, Christmas Day, and Good Friday*, and to have a certified copy of any entry in the said registers; and for every general search of the said indexes the sum of twenty shillings, and for every particular search the sum of one shilling, and for every such certified copy the sum of two shillings and sixpence shall be paid to the registrar general or such other officer as shall be appointed to receive such fees on his account, in addition to the stamp duty of one penny imposed by an Act passed in the twenty-third year of her Majesty, chapter fifteen.

51. Every superintendent registrar shall cause indexes of the register books in his office to be made and kept with the other records of his office: Every person shall be entitled on such days and at such reasonable hours as shall be directed by the registrar general to search the said indexes, and to have a certified copy of any entry or entries in the said register books, under the hand of the superintendent registrar, on payment of the fees herein after mentioned; that is to say, for every general search the sum of five shillings, and for every particular search the sum of one shilling, and for every certified copy the sum of two shillings and sixpence, in addition to the stamp duty of one penny imposed by an Act passed in the twenty-third year of her Majesty, chapter fifteen.

52. Every registrar who shall have the keeping for the time being of any register book of births or deaths shall, subject to such regulations as shall be made from time to time by the registrar general, with the approval of the Lord Lieutenant, allow

searches to be made of the register book in his keeping, and shall give a copy certified under his hand of any entry or entries in the same, on payment of the fee herein after mentioned; (that is to say,) for every such search the sum of one shilling, and the sum of one shilling for every single certificate.

Fees.

53. Every superintendent registrar shall make out an account four times in every year, on such days and for such periods as shall from time to time be appointed by the registrar general, of the number of entries in such certified copies so sent by him to the registrar general as provided by this Act, and shall send the said account to the registrar general: If on examination and comparison with the certified copies of the registers or certificates received by the registrar general such account shall be found correct, the superintendent registrar shall be entitled to receive twopence from the registrar general for every entry in such certified copies of registers of births and deaths.

54. Every registrar shall make out an account four times in every year, on such days and for such periods as shall from time to time be appointed by the registrar general, of the number of births and deaths which he shall have registered in pursuance of the provisions of this Act, and the superintendent registrar shall verify and sign the same: The guardians of the union in which he shall be registrar, on production of the said account so verified and signed, shall pay to the said registrar out of the monies in their hands or power as such guardians at the rate of one shilling for every entry of birth or death included in such account, and the same shall be charged to the union at large.

PART VI.

Penalties.

55. Every person who shall wilfully make or cause to be made, for the purpose of being inserted in any register of birth or death, any false statement touching any of the particulars herein required to be known and registered shall be subject to the same pains and penalties as if he were guilty of perjury.

56. The thirty sixth and thirty-seventh sections of an Act passed in the twenty-fourth and twenty-fifth years of her Majesty, intituled *An Act to consolidate and amend the Statute Law of England and Ireland relating to indictable Offences by Forgery*, shall be incorporated with and form part of this Act.

57. Every registrar who shall refuse or without reasonable cause omit to register any birth or death of which he shall have had due notice, or to make any addition to or alteration upon the register in accordance with the provisions of this Act, and every person having the custody of any register book or of any part thereof who shall carelessly lose or injure the same, or carelessly allow the same to be injured whilst in his keeping, shall forfeit a sum not exceeding ten pounds for every such offence.

58. Every person who under the provisions of this Act is required to deliver the registers of births and deaths, or copies of such registers, to any superintendent registrar or to the registrar general, and who

after being duly required to deliver such registers or copies as aforesaid shall refuse or during one calendar month neglect to do so, shall be liable for every such offence to forfeit a sum not exceeding ten pounds.

59. Any person who shall knowingly register or cause to be registered the birth of any child otherwise than is by this Act required after the expiration of three calendar months following the day of the birth of such child, or who shall knowingly register or cause to be registered the birth of any child after the expiration of six months following the day of the birth of such child, except in the case of children born at sea or in a foreign country, shall be liable for every such offence to a penalty not exceeding five pounds.

60. Any person required by this Act who shall, within the period specified by this Act, fail to give notice of any birth or death to the registrar of the district within which such birth or death shall have occurred shall be liable to a penalty not exceeding twenty shillings.

61. Any person required by this Act who shall, within the period specified by this Act, fail to attend personally at the place specified by the registrar of the district within which such birth or death shall have occurred, and to give information to such registrar of the particulars required by this Act to be registered touching such birth or death, or shall refuse to sign the register in the presence of the registrar, shall be liable to a penalty not exceeding forty shillings.

62. In the case of finding exposed any new-born child, or any dead body, any person who shall be required by this Act to give notice, and who shall not give notice forthwith of finding the same, and of the place where the same was found, to the registrar of the district in which the same shall have been found shall be liable to a penalty not exceeding twenty shillings.

63. No penalty imposed by this Act on persons failing to give any notice required by this Act shall be exacted if any of the persons so required shall have given such notice; and whenever notice is required to be given by this Act, the person bound to give the notice shall be held to have sufficiently discharged himself, if he shall have put into the post office, before the expiration of the period within which the notice is required to be given, a letter addressed to the person to whom and containing the particulars of which the notice is required to be given.

64. No penalty shall be exacted in any case when it shall appear to the satisfaction of the justice or justices that the person failing to comply with the provisions of this Act, in relation to the giving notices or information under the same, has not wilfully been guilty of such failure, but that such failure has been occasioned by unavoidable accident, or by circumstances over which he had no control, and where he had used every reasonable endeavour towards compliance with such provisions.

65. Any penalty recoverable under the provisions of this Act shall be recoverable in a summary way with respect to the police district of *Dublin* metropolis, subject and according to the provisions of any Act regulating the powers and duties of justice of

the peace for such district, or of the police of such petty sessions, subject and according to the provisions of "The Petty Sessions (*Ireland*) Act, 1851," and before a justice or justices of the peace sitting in any Act amending the same.

FORMS to which the foregoing Act refers.

FORM (A.)

BIRTHS registered in the district of [] in the Union of [] in the county of []

No.	Date and Place of Birth.	Name (if any).	Sex.	Name and Surname and Dwelling place of Father.	Name and Surname and Maiden Surname of Mother.	Rank or Profession, or Occupation of Father.	Signature, Qualification, and Residence of Informant.	When registered.	Signature of Registrar.	Baptismal Name if added after Registration of Birth and Date.
1	16th January 1864. 15 George's Street.	John	Male	James Rea 1b George's street	Sarah Rea, formerly Thompson, [if married more than once Surnames of former Husbands should be stated.]	Carpenter.	James Rea, (Father) Carpenter, 15, George's-st., Kingstown.	10th Jan. 1864	John Cox REGIS- TRAR.	Robert. 15th Feb., 1864.

The Words and Figures in *Italics* to be filled in according in the facts.

FORM (B.)

DEATHS registered in the district of [] in the Union of [] in the county of []

No.	Date and Place of Death.	Name & Surname.	Sex.	Condition.	Age last Birthday.	Rank, Profession, or Occupation.	Certified Cause of Death and Duration of Illness.	Signature, Qualification and Residence of Informant.	When registered.	Signature of Registrar.
1	24th January, 1864, 10, High-street, Kingstown.	James Greene.	Male.	Married, Bachelor, or Widower (as the case may be.)	43 Years.	Carpenter.	Pneumonia. Two Months, certified.	Sarah Greene, Widow, High Street, present at the Death.	25th Jan. 1864	John Cox REGIS- TRAR.

The Words and Figures in *Italics* to be filled in according to the facts.

FORM (C.)

I of do hereby certify, that I have this day baptized, by the name of a [state the sex] child produced to me by as the child of A.B. and C.D. of , and declared by the said to have been born at in the county of on the day of one thousand eight hundred and .
Witness my hand this day of one thousand eight hundred and .

FORM (D.)

To the registrar of the district of in the union of , in the county of .
I hereby certify, that I attended , who was apparently aged or was stated to be aged years; that I last saw him [or her] on the day of 186 ; that he [or she] died on the day of 186, at ; that the cause of his [or her] death was and that the disease had continued .
Witness my hand this day of one thousand eight hundred and .
(Signed)
Profession,
Residence,

FORM (E.)

I , registrar of births and deaths in the district of in the union of , in the county of , do hereby certify, that this is a true copy of the registrar's book of births [or deaths] within the said district from the entry of the birth [or death] of No. , to the entry of the birth [or death] of , No. .
Witness my hand this day 18 .
, registrar.

FORM (F.)

I do hereby certify that the child named was born at , in the county of on the day of 18 ; that A.B. and C.D. of are the parents of the said child; and that the name was given to the said child on the day of 18 , according to the rules or usage of the sect or persuasion of to which the said parents belong.
Witness my hand this day of one thousand eight hundred and .
(Signed by parent or guardian of child.)
[The words in *Italics* and the blanks for words and figures in the above forms to be filled in as the case may be.]

CAP. XII.

An Act to abolish the office of Secretary at War, and to transfer the Duties of that Office to One of Her Majesty's Principal Secretaries of State.

[4th May, 1863.]

CAP. XIII.

An Act for the Protection of certain Garden or Ornamental Grounds in Cities and Boroughs.

[4th May, 1863.]

CAP. XIV.

An Act to amend the Law relating to Post Office Savings Banks.

[4th May, 1863.]

Sec. 1. *As to transfer of accounts of minors.*

2. *On closing of Savings Banks, Funds, &c., to be paid over to Commissioners for reduction of National Debt. Receipt of trustees on sale of property to be a discharge to purchaser. Security to purchasers.*

3. *Provisions when trustees have determined on closing Savings Banks.*

4. *As to Conversion of Annuities.*

5. *Power to appoint managers to sign transfer certificates.*

6. *Warrants to be laid before Parliament.*

'Whereas it is expedient to amend the law relating to post office savings banks; to provide for the relief of the trustees where savings banks have been or shall be closed; and to make further provisions in respect to the investment of the monies of post office savings banks;' Be it therefore enacted by the Queen's most excellent Majesty, by and with the advice and consent of the lords spiritual and temporal, and commons, in this Parliament assembled, and by the authority of the same, as follows:

1. In the case of the accounts of minors, or of accounts standing in the names of a minor and any other party, either in a post office savings bank or in a savings bank established under the laws relating to savings banks, the postmaster-general in the one case, and the trustees of the savings bank in the other, on the application in writing of the parent or other relative of the minor, if under seven years of age, and of the minor himself, if above that age, and also of the other party, if any, in whose name the account may stand, shall issue a certificate for the transfer of such account, and of all money standing to the credit of such account, according to the provisions of the Act, twenty-four *Victoria*, chapter fourteen, section ten, anything in the rules of any savings bank notwithstanding, and such account so transferred shall be opened in the post office savings bank or other savings bank to which the transfer is made in the name of such party, if any, and of the minor, or in the name of the minor alone, as the case may be; and the receipt of the party or parties making such application and receiving such transfer certificate shall be a sufficient discharge to the postmaster-general and to such trustees; but the money so transferred shall not be withdrawn, except with the consent of the postmaster-general, or of any two trustees or

managers of the savings bank to which the transfer is made, until the minor shall have obtained the age at which it might have been withdrawn under the rules of the savings bank from which it was transferred, a note whereof shall be made on the said certificate.

2. Upon the final closing of any savings bank, or where any savings bank has already closed, the trustees or trustee for the time being thereof, or any two or more of them, shall forthwith notify the same in writing to the commissioners for the reduction of the national debt, and shall, with the consent of the said commissioners, convert into money any property, not being money held by the said trustees of the savings bank, or by any person as trustee of the savings bank, and after paying the expenses of such conversion, and any claims thereon, shall account for and pay over the residue to the said commissioners, to be by them carried to the separate surplus fund standing in the books of the said commissioners, and the monies carried on account of each savings bank to the said separate surplus fund under this and the following section of this Act shall be subject to any claim that may thereafter be substantiated on account of any depositor in the savings bank so closed; and the receipt in writing of the said trustees or trustee for the time being, or any two or more of them, for any money paid to them by any purchaser or lessee, shall be an effectual discharge for the same, and the purchaser or lessee shall not be obliged to see to the application of such money, or be accountable or answerable for the loss, mis-application, or non-application thereof, or be bound to inquire whether the assent of the said commissioners has been obtained to such sale or lease, or to the regularity thereof; and all purchases of any freehold or copyhold or leasehold estates which have already been made or may hereafter be made, with the consent of the commissioners for the reduction of the national debt, or the comptroller general acting under them, by the trustees of any savings bank, with the monies thereof, shall be and shall be deemed to have been as good, valid, and effectual in the law to all intents and purposes whatsoever as if the same had been or were expressly authorized or sanctioned by any statute relating to savings banks; and such purchases shall not be liable to any objection or their validity affected by reason of any defect in the right or power of such trustees to make such purchases; and a certificate under the hand of the said comptroller general of any such purchase having been made, with such consent and with such monies as aforesaid, shall for all purposes whatsoever be conclusive evidence thereof: Provided always, that trustees of savings banks which are desirous of closing shall have power to compensate their officers out of any separate surplus fund that may belong to any such savings bank, with the consent of the commissioners for the reduction of the national debt.

3. When the trustees of any savings bank shall have determined to close the savings bank for the receipt of deposits, and shall have given public notice of such intention by letter through the post office, prepaid, to each depositor at his residence when known, by advertisement in some one newspaper circulating in the district in which the savings bank is situate,

and by affixing such notice on the outer door of the building in which the business of the savings bank is carried on, and shall have paid off three-fourths of their depositors amount, either in money or by transfer to a post office savings bank, such trustees may, if they think fit, transmit, under the hands of two trustees and three managers, to the commissioners for the reduction of the national debt a certified list of such depositors as have not applied to them to receive their deposits or for transfer certificates, and of the amount due to them respectively, and the said commissioners may thereupon receive from the said trustees all money remaining in the hands of the said trustees or of their treasurer, and if such money, with the money belonging to the said savings bank in the hands of the said commissioners, together with the proceeds of the sale of other property, as referred to in section two of this Act, shall be sufficient to discharge the whole of the liabilities of such trustees to the depositors, as set forth in the said list, then the certificate of the said commissioners shall be a sufficient discharge to the said trustees in respect of all such money so paid over, or in the hands of the said commissioners; and all such monies shall be held by the said commissioners, subject to the rights and claims of the depositors named in such list, who shall thenceforth be considered to be depositors in a post office savings bank; and such depositors, on presenting their deposit books at any post office savings bank, shall be entitled to claim payment of the sums due to them respectively, with the interest due to them thereon, and on establishing their claim shall be paid out of the monies so paid over by the trustees under this and the foregoing section of this Act and in the hands of the commissioners as above referred to, and the surplus of such monies, if any, after providing for the sums due to such depositors, shall be carried to the separate surplus fund in the books of the said commissioners.

4. The commissioners of her Majesty's treasury, by warrant under the hands of any two or more of them, addressed to the governor and company of the bank of *England*, may from time to time direct that out of the total amount of the capital stock of any perpetual Government annuities, bearing interest at or exceeding the rate of three *per centum per annum*, standing in the names of the commissioners for the reduction of the national debt on account of post office savings banks in the books of the bank of *England*, the amount of stock mentioned in such warrant shall be cancelled, and that in place thereof there shall be created and inscribed in the said books, in the names of the said commissioners, a like amount of capital stock bearing interest at the rate of two pounds ten shillings *per centum per annum*; and the said commissioners of her Majesty's treasury shall by the said warrant authorize and direct the said governor and company to create and inscribe in the books of the bank, in addition to the said capital stock, bearing an interest of two pounds ten shillings *per centum per annum*, such an amount of annuity for a term of years ending on the fifth *April*, one thousand eight hundred and eighty-five as shall be equivalent in value to the difference between the rate of two pounds ten shillings *per centum* and the rate of in-

terest on the capital stock so cancelled, and the amount of such terminable annuity shall be ascertained and determined by the tables in force under the Act of the tenth *George the Fourth*, chapter twenty-four, under the authority of which annuities for terms of years are granted by the said commissioners for the reduction of the national debt; and such stock and annuities so created in lieu of the annuities cancelled shall be held by the said commissioners for post office savings banks; and all such two pounds ten shillings perpetual annuities shall be consolidated with and be deemed part of the two and a half *per centum* annuities created under the Act of the sixteenth *Victoria*, chapter twenty-three, section two, and such terminable annuities shall be consolidated with and form part of the terminable annuities created under the Act of the twenty-third and twenty-fourth *Victoria*, chapter one hundred and nine, section three, and the interest thereon shall be charged on the consolidated fund, and be paid and payable to the bank of *England*, and such warrant shall be a sufficient authority to the said governor and company for the creation and inscription of the said stock and annuities respectively.

5. The trustees of any savings bank, at a meeting called for that purpose, may appoint any number of managers to sign transfer certificates; and the signatures of any two of such managers to a transfer certificate shall be a sufficient authority to the commissioners for the reduction of the national debt to transfer the amount set forth in such certificate; provided that a list of such managers, with their signatures certified by two trustees, shall have been previously deposited with the commissioners for the reduction of the national debt; and provided also, that the said trustees may from time to time revoke such appointment and appoint other managers, notifying such revocation and appointment to the said commissioners.

6. Whenever the commissioners of her Majesty's treasury shall exercise the powers vested in them by the fourth section of this Act, copy of the warrant issued in respect thereof by the said commissioners shall be laid before both houses of Parliament within ten days from the date thereof, if Parliament shall be then sitting, and if not then sitting, then in the ten days after the then next assembling of Parliament.

CAP. XV.

An Act to apply the sum of Twenty Millions out of the Consolidated Fund to the Service of the year one thousand eight hundred and sixty-three.
[11th May, 1863.]

CAP. XVI.

An Act for raising the Sum of One Million Pounds by Exchequer Bonds for the Service of the Year One thousand eight hundred and sixty-three.
[11th May, 1863.]

CAP. XVII.

An Act for amending the local government Act 1858.)
[11th May 1863.]

CAP. XVIII.

An Act to authorise the inclosure of certain lands in pursuance of a report of the inclosure commissioners for *England and Wales*. [11th May 1863.]

CAP. XIX.

An Act to amend the law relative to the sale of hares in *Ireland*. [8th June 1863.]

27 G. 3. c. 35. (I.)

Sec. 1. *Part of sect. 4. of recited Act repealed.*

'WHEREAS an Act was passed by the Parliament of *Ireland* in the twenty-seventh year of the reign of his late Majesty King *George* the third, chapter thirty-five, whereby it was enacted that no person should buy or sell any hare as therein mentioned: and whereas it is expedient to amend the provisions of the said recited Act: Be it enacted by the Queen's most excellent Majesty, by and with the advice and consent of the Lords Spiritual and Temporal, and Commons, in this present parliament assembled, and by the authority of the same, as follows:

1. From and after the passing of this Act so much of the fourth section of the said recited Act as enacts that "every person who shall buy or cause to be bought sell, or expose to sale, any hare at any time between the first *Monday* in every *November* and the first *Monday* in every *July* following shall forfeit a sum not exceeding five pounds for every such hare," shall be and the same is hereby repealed.

CAP. XX.

An Act to further limit and define the time for proceeding to election during the recess.

[8th June 1863.]

Sec. 1. *Recited Acts to be construed as if six and not fourteen days notice had been originally in said Acts.*

'WHEREAS by the Act of the twenty-fourth of *George* the Third, chapter twenty-six, the Act of the fifty-second of *George* the Third, chapter one hundred and forty-four, and the Act of the twenty-first and twenty-second of *Victoria*, chapter one hundred and ten, the speaker is enabled to issue his warrant to the clerk of the crown to make out new writs for the election of members of the House of Commons in certain cases during the recess of Parliament, after giving fourteen days notice in the *London Gazette*: And whereas it is expedient to limit the time of notice required by the said Acts: Be it enacted by the Queen's most excellent Majesty, by and with the advice and consent of the Lords Spiritual and Temporal, and Commons, in this present Parliament assembled, and by the authority of the same, as follows:

1. The Act of the twenty-fourth year of *George* the third, chapter twenty-six, the Act of the fifty-second year of *George* the Third, chapter one hundred and forty-four, and the Act of the twenty-first and twenty-second years of *Victoria*, chapter one hundred and ten, shall be so construed as if six and not fourteen days notice had been originally in the said Acts, and this Act and the said Acts shall be construed and read together.

CAP. XXI.

An Act to amend the law enabling boards of guardians to recover costs of maintenance of illegitimate children in certain cases in *Ireland*. [8th June 1863.]

25 & 26 Vict. c. 83.

Sec. 1. *After passing of this Act, sect. 10. of recited Act repealed.*

2. *Power to Board of Guardians to recover cost of maintenance of illegitimate child from putative father.*

3. *At time when civil bill is served a copy of affidavits, &c. shall also be served, and matter shall be heard by chairman of quarter sessions, or judge having jurisdiction.*

4. *Payment by putative father, previous to hearing, to stop proceedings.*

5. *This Act incorporated with recited Act.*

'WHEREAS an Act was passed in the twenty-fifth and twenty-sixth years of her Majesty, chapter eighty-three, intituled *An Act to amend the laws in force for the relief of the destitute poor in Ireland, and to continue the powers of the commissioners*: And whereas it is expedient to amend the provisions of the said recited Act with respect to the recovery of the cost of the maintenance of any illegitimate child from its putative father during the time that such child is in receipt of relief from the poor rates and while under the age of fourteen: Be it enacted by the Queen's most excellent Majesty, by and with the advice and consent of the Lords spiritual and temporal, and Commons, in this present parliament assembled, and by the authority of the same, as follows:

1. From and after the passing of this Act the tenth section of the said recited Act shall be and the same is hereby repealed, except as to anything heretofore done under it, and except so far as may be necessary for the purpose of supporting and continuing any proceeding taken before the passing of this Act; and it is declared, that, notwithstanding such repeal, any decree made under the said section by any chairman of quarter sessions shall be as good and valid, and capable of being enforced as an ordinary civil bill decree for a debt, as if this Act had not passed.

2. It shall be lawful for the Board of Guardians of any union to recover, by civil bill process at their own suit, the cost of the maintenance of any illegitimate child during the time that such child, while under the age of fourteen years, has been or shall be in receipt of relief from the poor rates since the passing of the said recited Act, from the putative father of such child: Provided always, that no person shall be sued by the said Board of Guardians as aforesaid, save such person only as the mother of such illegitimate child shall have stated to be the father of such child in an affidavit in the form to this Act annexed, or to the like effect, sworn to by her before one or more justice or justices of the peace in petty sessions, or (if made in the police district of *Dublin* metropolis) before one or more divisional justices within the said district, which affidavit the said justice or justices are hereby authorized to take, on the application of the guardians.

3. At the time when the process or the civil bill herein-before mentioned is served a copy of the afore-

said affidavit or depositions, as the case may be, certified under the hand of the clerk to the said guardians, shall also be served on the defendant and the matter shall be heard and determined as an ordinary civil bill for a debt by the chairman of quarter sessions or other judge having jurisdiction to hold a court for hearing civil bills; and such civil bill shall be subject to all the provisions, rules and regulations affecting an ordinary civil bill for a debt and the proceedings thereunder, including the right of appeal: Provided always that such chairman or judges shall not pronounce a decree upon such civil bill unless the mother of the child shall have been examined before him, and her statement as to the defendant being the father of the child shall have been supported by corroborative evidence: Provided also, that it shall not be necessary for any Board of Guardians of any union, proceeding by civil bill process to recover the cost of the maintenance of any illegitimate child, at any time after such chairman or judge shall have pronounced such decree as in this section is mentioned, to give or adduce the evidence of the mother, or the corroborative or other evidence of any other person or persons, as to the defendant being the father of the child.

4. Nothing herein contained shall authorize any Board of Guardians to proceed against any person alleged in any such affidavits or depositions to be the father of an illegitimate child, if such person shall, previous to the hearing of such civil bill, pay to the clerk to the Board of Guardians proceeding against him the amount claimed by such guardians in such civil bill for the maintenance of such child, together with the costs theretofore incurred in such proceeding; and the said clerk is hereby authorized to receive and give a receipt for the same, and such receipt shall be received in evidence by any court as a proof that such payment was made: Provided always that in any subsequent proceedings by the guardians for the recovery from such person of the costs of maintenance of the same child, such payment shall be deemed conclusive evidence, without further proof, that such person is the father of such child.

5. This Act shall be deemed to be incorporated with the said recited Act, and shall be construed as if the said recited Act (except such parts thereof as have been repealed or amended by this Act) and this Act were one Act.

SCHEDULE.

FORM OF AFFIDAVIT.

Petty Sessions, district of
County of

The information of *Anne O'Brien*, residing at *Clonmel workhouse* in the county of *Tipperary*, who saith on oath that she is the mother of an illegitimate child called or known by the name of *John Ryan*, and that the said child was born at *Cashel* on or about the second day of *May* in the year eighteen hundred and sixty-two, and that one *James Ryan* of *Cashel* in the county of *Tipperary*, is the father of such child, and that within ten months previous to the birth of such child she was residing at *Cashel* in the county of *Tipperary* as a servant with *Michael Hayes*.

Sworn before this day of
in the year eighteen hundred and sixty at
in the said county.

(signed.)

Justice of the said county.

(The words in italics to be filled in according to the facts.)

CAP. XXII.

An Act to grant certain duties of customs and inland revenue. [5th June 1863.]

- Sec. 1. *Grant of duties specified in schedules annexed.*
2. *Provisions of former Acts to apply to this Act.*
3. *Exemption of persons whose income is under 100*l.* and abatement to those whose income is under 200*l.* a year respectively.*
4. *Certain customs duties to cease on July 1st, 1863.*
Duties now charged on sugar, &c., continued until 1st August, 1864.
Duties on chicory and tea.

Most Gracious Sovereign,

WE, your Majesty's most dutiful and loyal subjects the Commons of the United Kingdom of Great Britain and Ireland, in Parliament assembled towards raising the necessary supplies to defray your Majesty's public expenses, and making an addition to the public revenue have freely and voluntarily resolved to give and grant unto your Majesty the several rates and duties hereinafter mentioned; and do therefore most humbly beseech your Majesty that it may be enacted; and be it enacted by the Queen's most excellent Majesty, by and with the advice and consent of the Lords spiritual and temporal, and commons, in this present parliament assembled, and by the authority of the same, as follows:

1. There shall be charged, collected, and paid for the use of her Majesty, her heirs and successors, the several rates and duties of customs, excise, and income tax respectively specified and contained in the several schedules marked respectively (A.), (B.), and (C.) to this Act annexed, and there shall be allowed the several drawbacks specified and contained in the said schedule (A.), and the said rates, duties, and drawbacks shall respectively take effect at or from the respective times, and shall continue to be charged, collected, paid, and allowed for and during the periods respectively specified or mentioned in that behalf in this Act or in the said schedules; and where no time is so specified for the commencement thereof the same shall commence and take effect from and after the passing of this Act; and where no period is so specified or limited for the duration thereof, the same shall continue to be charged, collected, paid, and allowed respectively until Parliament shall otherwise order; and the said several schedules shall be deemed to be part of this Act.

2. All the powers, provisions, clauses, regulations, allowances and exemptions, forfeitures, pains and penalties, contained in or imposed by any Act or Acts or any schedule thereto, relating to any duties or drawbacks of the same kind or description as the several rates or duties or drawbacks granted and

allowed by this Act respectively, and in force at the time of the passing of this Act, and not hereby expressly repealed, or, as regards the income tax, in force on the fifth day of April one thousand eight hundred and sixty-three (except as herein after provided), shall respectively be in full force and effect with respect to the said rates, duties, and drawbacks by this Act granted and allowed respectively, so far as the same are or shall be applicable, in all cases not hereby expressly provided for, and shall be observed, applied, allowed, enforced, and put in execution for and in the raising, levying, collecting, and securing of the said last-mentioned rates and duties and the allowance and payment of the said drawbacks respectively, and otherwise in relation thereto, so far as the same shall not be superseded by and shall be consistent with the express provisions of this Act, as fully and effectually to all intents and purposes as if the same had been herein repeated and specially enacted, *mutatis mutandis*, with reference to the rates, duties, and drawbacks by this Act granted and allowed respectively: Provided always that nothing herein contained shall be construed to continue or revive the provisions contained in section three of the Act passed in the twenty-third and twenty-fourth years of her Majesty's reign, chapter fourteen; and for the purposes of this Act the year one thousand eight hundred and sixty-two mentioned in the forty-second and forty-third sections respectively of the Act passed in the last session of Parliament, chapter twenty-two, shall be read as and deemed to mean the year one thousand eight hundred and sixty-three.

3. The exemption from income tax granted by the said Acts relating to the income tax to persons whose incomes are respectively less than one hundred pounds a year shall be and is hereby continued; and in lieu of the relief granted by the twenty-eighth section of the Act passed in the sixteenth and seventeenth years of her Majesty's reign, chapter thirty-four, to persons whose respective incomes, although amounting to one hundred pounds or upwards, are less respectively than one hundred and fifty pounds a year, the following relief or abatement shall be given or made to persons whose incomes are less respectively than two hundred pounds a year; (that is to say,) any person who shall be assessed or charged to any of the duties of income tax granted by this Act, or who shall have paid the same either by deduction or otherwise, and who shall claim and prove in the manner prescribed by the said Acts that his total income from every source, although amounting to one hundred pounds or upwards, is less than two hundred pounds for the year of assessment of his profits or gains, shall be entitled to be relieved from so much of the said duties assessed upon or paid by him as an assessment or charge of the said duties upon sixty pounds of his income would amount unto, and such relief shall be given either by reduction or abatement of the assessment upon such person, or by the repayment to him of so much of the excess as he shall have paid, or by both of those means, as the case may require.

4. On and after the first day of July one thousand eight hundred and sixty-three the several duties specified and contained in Schedule (D.) to this Act annexed shall cease, and shall be no longer charged,

levied, or paid respectively; and on and after the said first day of July one thousand eight hundred and sixty-three the several parts of Acts specified and enumerated in the said Schedule (D.) shall be and the same are hereby repealed.

SCHEDULES.

SCHEDULE (A.)

Containing the RATES and DUTIES of CUSTOMS granted, and the DRAWBACKS allowed, on the following articles by this Act.

The duties of customs now charged on the articles next mentioned shall continue to be levied and charged on and after the first day of July one thousand eight hundred and sixty-three until the first day of August one thousand eight hundred and sixty-four on importation into Great Britain and Ireland; that is to say,

	£	s.	d.
Almonds, paste of	the lb.	0	0 2
Cherries, dried	the lb.	0	0 2
Comfits, dry	the lb.	0	0 2
Confectionery	the lb.	0	0 2
Ginger, preserved	the lb.	0	0 2
Marmalade	the lb.	0	0 2
Plums, preserved in sugar	the lb.	0	0 2
Succades, including all fruits and vegetables preserved in sugar, not otherwise enumerated	the lb.	0	0 2
Sugar, viz.:			
Candy, brown or white, refined sugar, or sugar rendered by any process equal in quality thereto	the cwt.	0	18 4
White clayed sugar or sugar rendered by any process equal in quality to white clayed not being refined or equal in quality to refined	the cwt.	0	16 0
Yellow muscovado and brown clayed sugar, or sugar rendered by any process equal in quality to yellow muscovado or brown clayed, and not equal to white clayed	the cwt.	0	13 10
Brown muscovado or any other sugar, not being equal in quality to yellow muscovado or brown clayed sugar	the cwt.	0	12 8
Cane Juice	the cwt.	0	10 4
Molasses	the cwt.	0	5 0

The following drawbacks shall be allowed on exportation to foreign parts, or on removal to the Isle of Man for consumption there, of the several descriptions of refined sugar herein-after mentioned, on and after the first day of July one thousand eight hundred and sixty-three, until the first day of August one thousand eight hundred and sixty-four; that is to say,

£ s. d.

Upon refined sugar in loaf, complete or whole, or lumps, duly refined, having been perfectly clarified and thoroughly dried in the stove, and being of an uniform whiteness throughout, or sugar candy, or sugar refined by the centrifugal machine or by any other process, and not in any way inferior to the Ex-

port Standard, No. 3, approved of by lords of the treasury, for every cwt. . . .	0 17 2
Upon such refined sugar, already described, if pounded, crushed, or broken in a warehouse approved by the commissioners of customs, such sugar having been there first inspected by the officers of customs in lumps or loaves, as if for immediate shipment, and then packed for exportation in the presence of such officers, and at the expense of the exporters, for every cwt. . . .	0 17 2
Upon refined sugar unstoved, pounded, crushed, or broken, and not in any inferior to the Export Standard Sample, No. 1, approved by the lords of the treasury, and which shall not contain more than five per centum moisture over and above what the same would contain if thoroughly dried in the stove, for every cwt. . . .	0 16 4
Upon bastard or refined sugar unstoved, broken in pieces, or being ground, powdered, or crushed, not in any way inferior to the Export Standard Sample, No. 2, approved by the lords of the treasury, for every cwt. . . .	0 15 1
Upon bastard or refined sugar, being inferior in quality to the said Export Standard Sample, No. 2, for every cwt. . . .	0 12 8

In lieu of the duties of customs now charged on the articles under mentioned, the following duties of customs shall on and after the seventeenth day of April one thousand eight hundred and sixty-three be charged thereon on importation into Great Britain and Ireland: that is to say,

Chicory or any other vegetable matter applicable to the uses of chicory or coffee, viz.:	£ s. d.
Raw, or Kiln dried. . . the cwt.	1 6 6

On and after the twenty-fifth day of April one thousand eight hundred and sixty three until the first day of August one thousand eight hundred and sixty-four:

Tea the lb.	£ s. d.
	0 1 0

SCHEDULE (B.)

Containing the DUTIES of EXCISE granted by this Act.
Chicory.

For and upon all chicory or any other vegetable matter applicable to the uses of chicory or coffee grown in the United Kingdom:

For every hundredweight thereof, raw or kiln dried, until the first day of April one thousand eight hundred and sixty-four, the excise duty of one pound one shilling and ninepence, and on and after that day the duty of twenty-four shillings and threepence, and so in proportion for any greater or less quantity than a hundredweight,—

In lieu of the excise duty now chargeable on chicory or such vegetable matter as aforesaid.

SCHEDULE (C.)

Containing the RATES and DUTIES of INCOME TAX granted by this Act.

For one year commencing on the sixth day of April one thousand eight hundred and sixty-three, for and in respect of all property, profits, and gains mentioned or described as chargeable in the Act passed in the sixteenth and seventeenth years of her Majesty's reign, chapter thirty-four, the following rates and duties; (that is to say,)

For every twenty shillings of the annual value or amount of all such property, profits, and gains, (except those chargeable under Schedule (B.) of the said Act,) the rate or duty of sevenpence:

And for and in respect of the occupation of lands, tenements, hereditaments, and heritages chargeable under Schedule (B.) of the said Act, for every twenty shillings of the annual value thereof,—

In England, the rate or duty of threepence halfpenny;

And in Scotland and Ireland respectively, the rate or duty of twopence halfpenny.

SCHEDULE (D.)

Specifying certain DUTIES of CUSTOMS which are to cease, and PARTS of ACTS which are repealed by this Act.

On and after the first day of July one thousand eight hundred and sixty-three, the several duties herein mentioned shall cease and determine, and the several parts of Acts respectively specified and enumerated herein shall be and the same are hereby repealed; that is to say,

So much of the Act twenty-three and twenty-four Victoria, chapter one hundred and ten, relating to rates and charges on importation, as directs that there shall be charged (irrespective of any duties of customs or other rates or charges payable by law) upon the importation of all goods into Great Britain and Ireland, except corn, grain, and flour, and timber and wood goods, and goods in transit exported under bond, and goods imported for exportation in the same ship, provided they be so reported, the respective rates and charges following, as defined and required by the provisions of "The Customs Tariff Amendment Act, 1860," and under and subject thereto; that is to say,

Goods in packages or parcels, per package, or parcel, or other unit of entry . . . 0 1

Goods in bulk, by weight, measure, or number, for each unit of entry . . . 0 1

Animals, per head, or other unit of entry . . . 0 1

Also so much of said last-mentioned Act as relates to charges on goods exported, as directs that there shall be charged (irrespective of any duties of customs, or other rates or charges payable by law,) upon every customs bill of lading on the exportation of any goods from Great Britain and Ireland, as required by the provisions of "The Customs Amendment Act, 1860," and under and subject thereto, 1s. 6d.

Sections sixteen, seventeen, eighteen, and nineteen of the Act of twenty-three Victoria, chapter twenty-two. Section twenty of the Act of twenty-three Victoria,

chapter twenty-two, except so much thereof as requires the delivery at the time of entry of particulars, in the manner therein mentioned of goods free of duties of customs on importation.

Section twenty-one of the Act of twenty-three Victoria, chapter twenty-two, except so much thereof as constitutes the shipping bill, or the bill of lading, as the case may be, in the manner and with the particulars thereby required, the entry outwards of goods exported in respect of which no bond is required.

Sections twenty-three and twenty-four, and sections twenty-seven to thirty-five inclusive, of the Act of twenty-three Victoria, chapter twenty-two.

Section five of the Act of twenty-three and twenty-four Victoria, chapter one hundred and ten.

CAP. XXIII.

An Act to alter the Boundaries of *New Zealand*.

[8th June, 1863.]

CAP. XXIV.

An Act to facilitate the Appointment of Vice Admirals and of Officers in Vice Admiralty Courts in Her Majesty's Possessions abroad, and to confirm the past proceedings, to extend the Jurisdiction, and to amend the Practice of those Courts.

[8th June, 1863.]

CAP. XXV.

An Act to make further Provision for the Investment of the Monies received by the Commissioners for the Reduction of the National Debt from the Trustees of Savings Banks established under the Enactments of the Act Ninth *George* the Fourth, Chapter Ninety-two.

[8th June, 1863.]

Sec. 1. £24,000,000 *Stock to be cancelled, and charge for savings banks to be created in lieu thereof.*

2. *Treasury may cancel additional amount not exceeding £5,000,000, and create terminable annuities.*

3. *Commissioners may invest and sell any part of the securities.*

4. *Issues may be made out of Consolidated Fund.*

5. *One half of securities to be Parliamentary securities.*

6. *Accounts to be made up annually to 20th November.*

7. *Deficiency to be a charge on the Consolidated Fund.*

8. *Powers of investment to continue in force.*

‘WHEREAS by the Acts now in force relating to Savings banks the Commissioners for the Reduction of the National Debt are invested with certain powers and authorities for investing the monies remitted to them for that purpose by the trustees of savings banks: And whereas it is expedient to make further provisions in respect to the investment of such monies: Be it therefore enacted by the Queen's most excellent Majesty, by and with the advice and consent of the lords spiritual and temporal, and commons, in this present Parliament assembled, and by the authority of the same, as follows: (that is to say)

1. On the passing of this Act, the Governors and Company of the Bank of *England* shall, out of the total amounts of the capital stocks of annuities standing in their books to the credit of the Commissioners for the Reduction of the National Debt for Savings Banks, cancel the following sums, *viz.*, the sum of thirteen million of pounds of new three pounds *per centum per annum* annuities, the sum of five million pounds of three pounds *per centum per annum* reduced annuities, and the sum of six million pounds of consolidated three pounds *per centum per annum* annuities, and all interest or dividends shall thenceforth cease to be payable, and in place of the capital stocks of annuities so cancelled there shall be created and written in the books of her Majesty's Treasury, and at the receipt of her Majesty's Exchequer, a charge for savings banks upon the Consolidated Fund of the United Kingdom, under the authority of this Act, for twenty-four million pounds sterling, bearing interest at the rate of three pounds *per centum per annum* payable half-yearly out of the said Consolidated Fund, and such interest shall be payable in respect to the sum of eighteen million pounds of such charge in equal half-yearly payments on the fifth day of *April* and the tenth day of *October*, and in respect to the remaining sum of six million pounds of such charge in equal half-yearly payments on the fifth day of *January* and the fifth day of *July* in every year; and such charge shall be raised in such books at the Treasury and Exchequer aforesaid as a charge for and on account of the fund for the banks for savings established under the provisions of the Act of the ninth of *George* the Fourth, chapter ninety-two.

2. In addition to the capital stock of annuities held for savings banks by the said Commissioners for the Reduction of the National Debt, and directed to be cancelled as aforesaid, the Commissioners of her Majesty's Treasury, if they shall think it advantageous to the public service, may from time to time, by warrant under their hands, direct the Governor and Company of the Bank of *England* to cancel such further amount of the capital stocks of annuities standing in the books of the said Governor and Company to the credit of the Commissioners for the Reduction of the National Debt for Savings Banks as said Commissioners of her Majesty's Treasury may think advisable, not exceeding in the whole the sum of five million pounds, and all interest and dividends thereon shall thenceforth cease to be payable; and whenever the said Commissioners shall exercise the powers in them vested in that respect by this Act, they shall, by warrant under their hands, create and cause to be inscribed in the books of her Majesty's Exchequer and in the books of the Governor and Company of the Bank of *England* to the account of the Commissioners for the Reduction of the National Debt for Savings Banks, established under the provisions of the Act of the ninth of *George* the Fourth, chapter ninety-two, equivalent terminable annuities for the amount of capital stocks of annuities so cancelled; and such terminable annuities shall be charged upon the Consolidated fund of the United Kingdom, and shall be payable half-yearly on the tenth day of *October* and the fifth day of *April* in every year, the last half-yearly payment thereof to fall due and pay-

able on the fifth day of *April* one thousand eight hundred and eighty-five; and the amount of such terminable annuities so to be charged upon the Consolidated fund shall be ascertained by the Commissioners for the Reduction of the National Debt, to be certified to the Commissioners of her Majesty's Treasury under the hands of the Comptroller General or Assistant Comptroller and of the Actuary of the National Debt, setting forth the amount of the terminable annuities which would be granted by the Commissioners for the Reduction of the National Debt under the tenth of *George* the Fourth, chapter twenty-four, to any person or persons desirous of purchasing such terminable annuities, as a consideration for the like amount of capital stock of annuities to be transferred by such person or persons to the said Commissioners to be cancelled under the authority of the said last mentioned Act; and such terminable annuities shall be consolidated with and be deemed to be part of the terminable annuities created by the Act of the twenty-third and twenty-fourth years of *Victoria*, chapter one hundred and nine, section three; and such warrants shall be sufficient authority to the said Governor and Company for the cancelling of the amount of such capital stocks of annuities and for the creation and inscription of such terminable annuities; and copies of all warrants issued by the said Commissioners of her Majesty's Treasury under the authority of this section of this Act shall be laid before both Houses of Parliament not later than ten days from the date thereof, if Parliament shall be then sitting, and if not then sitting within ten days from the next meeting of Parliament.

3. The Commissioners for the Reduction of the National Debt, after reserving thereout from time to time such sums as they shall think fit, shall, under such regulations as the said Commissioners shall direct, invest the interest payable to them on account of the securities created under this Act, and the dividends and interest on all other securities held by them for savings banks, and all monies remitted to them on account of savings banks, in the purchase of Parliamentary securities, of whatsoever kind, created or issued, or which may hereafter be created or issued under the authority of any Act or Acts of Parliament, and directly chargeable on the Consolidated Fund of the United Kingdom, or in any stock or debentures or other securities, the due payment of the interest on which is expressly guaranteed by authority of Parliament.

4. If it shall at any time or times appear to the Commissioners for the Reduction of the National Debt desirable on account of the fund for the banks for savings that an issue in money should be made out of the Consolidated Fund upon account of the amount charged thereon for savings banks under section one of this Act, the Commissioners of her Majesty's Treasury may, upon a certificate to that effect, under the hands of the Comptroller General or Assistant Comptroller, acting under the said Commissioners for the Reduction of the National Debt, issue to the said Commissioners out of the Consolidated Fund or the growing produce thereof such sum as shall be named in such certificate, and the amount of the charge for savings banks under section one of this Act, shall be reduced by the amount so issued accordingly.

5. At least one half of the whole amount of securities held by the Commissioners for the Reduction of the National Debt for Savings Banks, exclusive of and in addition to the amount of the charge upon the Consolidated Fund for Savings Banks created under section one of this Act, shall be in Parliamentary stocks of annuities, or in exchequer bills or bonds, or other securities, the interest of which is chargeable upon the Consolidated Fund; and if it shall appear on the twentieth day of *November* in any one year that the amount of all such securities held by the said Commissioners for Savings Banks shall be less than one half of the whole of the securities so held by them, it shall not then be lawful for the said Commissioners to make the investments in any other securities authorized by this Act until the amount of such first named securities shall be raised by further investments to the full amount of not less than one half of the whole securities held by the said Commissioners, exclusive of the said charge upon the Consolidated Fund under section one.

6. A balance sheet shall be prepared by the Commissioners for the Reduction of the National Debt as soon as may be after the twentieth day of *November* in every year, in which shall be set forth the assets and liabilities of the said Commissioners in respect of savings banks established under the Act of the ninth of *George* the Fourth, chapter ninety-two, to the credit of which shall be placed the amount of the said charge upon the Consolidated Fund for twenty-four millions, and of all other monies and securities, of whatsoever kind, held by the said Commissioners on account of such savings banks, on the said twentieth day of *November*, valuing such securities respectively at the price which securities of like kind shall bear on that day in the public market, and to the debit of which account shall be carried the total amount due by the said Commissioners to the trustees of savings banks on account of the remittances made by them for investment, and a copy of such balance sheet shall be laid before both Houses of Parliament not later than the thirty-first day of *March* then next following.

7. If it shall appear upon such balance sheet that the amount at the credit of the said accounts is insufficient to meet the liabilities as therein set forth, and the Commissioners of her Majesty's Treasury shall be satisfied thereof, the said Commissioners shall, by warrant under their hands, declare the amount of such deficiency to be a charge on the Consolidated Fund of the United Kingdom, subject to the legal claims of the trustees of savings banks on account of the sums remitted to the Commissioners for the Reduction of the National Debt for investment.

8. The several powers and authorities which now are or may hereafter be vested by law in the said Commissioners for the Reduction of the National Debt in respect to the funds of savings banks, except in so far as the powers now vested in the said Commissioners are varied by this Act, shall be held to continue vested in the said Commissioners.

CAP. XXVI.

An Act to facilitate the drainage of land in Ireland.
[8th Jan., 1863.]

Sec. 1. *Short title.*

2. *Act to apply to Ireland only.*

3. *Definition of terms.*
4. *Application for outfall to adjoining owner.*
5. *Mode of making application.*
6. *Assent of adjoining owner.*
7. *Record of assent of adjoining owner.*
8. *Dissent of adjoining owner. Result of decision.*
9. *Application of compensation in case of owners under disability.*
10. *If drainage scheme approved of, map shall be prepared.*
11. *Power of applicant to clear drains.*
12. *Power of adjoining owner to divert drains.*
13. *Penalty for obstructing or injuring drains.*
14. *Costs of application.*
15. *Provision in case of change of natural outfall.*
16. *Appointment of arbitrators.*
17. *Powers of Act cumulative.*

‘WHEREAS it is expedient that greater facilities should be afforded for the drainage of lands in Ireland: Be it therefore enacted by the Queen’s most excellent Majesty, by and with the advice and consent of the lords spiritual and temporal, and commons, in this present Parliament assembled, and by the authority of the same, as follows:

Preliminary.

1. This Act may be cited for all purposes as “The Land Drainage Act (Ireland), 1863.”

2. This Act shall extend to Ireland only.

3. “Watercourse” shall include all rivers, streams, drains, sewers, and passages through which water flows:

“Persons” shall include any body of persons, corporate or unincorporate, unless there is something in the context inconsistent therewith:

“Owner,” as used throughout this Act, shall have the same meaning as it has in “The Lands Clauses Consolidation Act, 1845:”

“Land” shall extend to all arable, pasture, or otherwise profitable, and to all waste uncultivated land, and shall also extend to messuages, tenements, mills, weirs, easements, and other hereditaments, corporeal or incorporeal, and any estate or interest therein, and any undivided part thereof, or any of them.

Power of private owners to procure outfalls.

4. Any person or persons interested in land, who is or are desirous to drain the same, and in order thereto deems it necessary that new drains should be opened through lands belonging to another owner or owners, or that existing drains in or immediately adjoining lands belonging to another owner or owners should be cleansed, widened, straightened, deepened, or otherwise improved, may apply to such owner or owners, who is or are hereinafter referred to as the adjoining owner or owners, for leave to make such drains or improvements in drains through, on, or adjoining the lands of such owner or owners.

5. Any such application as aforesaid shall be by notice in writing under the hand of the applicant or applicants, and shall be served on the owner or owners, and also on the occupier or occupiers, if the owner be not the occupier. The notice shall state the nature of such drains or improvements in drains, be accom-

panied by a map, on which the length, width, and depth of the proposed drains or improvements in drains shall be delineated, and shall further state the compensation, if any, which the applicant or applicants proposes or propose to pay.

6. The adjoining owner or owners may, by deed under his or their hand and seal, assent to such application, upon such terms and on payment of such compensation as he or they may require, and any assent so given shall be binding on all parties having any estate or interest in the land, subject to the following provisions:

1stly. That any arrangement entered into by any adjoining owner under any disability or incapacity, or not having power to assent to such application except under the provisions of this Act, shall not be valid unless the same is approved by two surveyors, one of whom is to be nominated by the applicant or applicants, and the other by the adjoining owner; and each of such surveyors, if they approve of the arrangement, shall annex to the document containing the same a declaration to that effect, subscribed by them:

2ndly. That any compensation to be paid by the applicant or applicants to the adjoining owner in cases where such owner is under any disability or incapacity, or has not power to assent to such application except under the provisions of this Act, shall be applied in manner in which the compensation coming to parties having limited interests, or prevented from treating, and not making title, is applicable under “The Lands Clauses Consolidation Act, 1845:”

3rdly. That any occupier or person other than the owner interested in the lands shall be entitled to compensation for any injury he may sustain by the making of the proposed drains or improvements in drains, so that the claim therefor be made within twelve months after completion of such drains or improvements in drains, the amount of such compensation to be determined, in case of dispute by two or more justices in petty sessions assembled, or if such occupiers or other person do not consent to a determination by such justices, then by arbitration.

7. The applicant or applicants shall forward to the clerk of the peace of the county, riding or division of the county, wherein the land is situate, the deed containing the assent of the adjoining owner to the proposed drains or improvements in drains, who shall keep the same in his office as a record of the proceedings between the parties.

8. The adjoining owner shall be deemed to have dissented from the application made to him if he fail to express his assent thereto within one month after the service of the notice of application on him; and in the event of such dissent there shall be decided, by two or more justices in petty sessions assembled (unless the adjoining owner require the same within such period of one month to be decided by arbitration), the questions following: (that is to say)

(1.) Whether the proposed drains or improvements in drains will cause any injury to the adjoining owner, or to the occupier or other person interested in the lands:

- (2.) Whether any injury that may be caused is or is not of a nature to admit of being fully compensated for by money.

The result of any such decision shall be as follows; that is to say,

- (1.) If the decision is that no injury will be caused to the adjoining owner, to the occupier, or other parties interested in the lands, the applicant or applicants may proceed forthwith to make the proposed drains or improvements in drains:
- (2.) If the decision is that injury will be caused to the adjoining owner, occupier, or other parties interested in the lands, but that such injury is of a nature to admit of being fully compensated by money, the justices or arbitrators shall proceed to assess such compensation and to apportion the same amongst the parties in their judgment entitled thereto; and in assessing the amount of such compensation the justices or arbitrators shall take into consideration the benefit, if any, to be derived from such drains or improvements by such adjoining owner, occupier, or other persons, and to set off the same against the amount to be assessed by them for such compensation; and on payment of the sum so assessed the applicant or applicants may proceed to make the proposed drains or improvements in drains:
- (3.) If the decision is that injury will be caused to the adjoining owner, occupier, or other parties interested in the lands, and that such injury is not of a nature to admit of being fully compensated by money, the applicant or applicants shall not be entitled to make the proposed drains or improvements in drains.

9. Where the compensation assessed by the justices or arbitrators under the last preceding section is payable to any owner or other person who is under any disability or incapacity, or is not entitled to receive the same for his own benefit, such compensation shall be applied in the manner in which the compensation is applicable under the "Lands Clauses Consolidation Act, 1845."

10. The justices or arbitrators, as the case may be, in the event of their approving of a scheme of drainage as proposed by the applicant or applicants, or as modified by themselves, shall cause a map thereof to be prepared, and shall certify under their hands the correctness of such map; and it shall be the duty of the applicant or applicants to forward the same to the clerk of the peace of the county, riding, or division of the county, wherein the land is situate, who shall keep the same in his office as a record of the proceedings between the parties.

11. After drains have been opened or improvements in drains made, in pursuance of this Act, it shall be lawful for the applicant or applicants, his or their heirs and assigns, for ever thereafter, from time to time, as it becomes necessary, to enter upon the lands through which such drains have been opened or improvements made, for the purpose of clearing

out, scouring, and otherwise maintaining the same in a due state of efficiency; and if such drains or improvements in drains are not kept so cleared out, scoured, and maintained in a due state of efficiency, the owner or occupier for the time being of the lands through or on which such drains or improvements in drains are made may clear out, scour, and otherwise maintain the same in a due state of efficiency, and recover the expenses incurred in such clearing out, scouring, or maintenance, in a summary manner, at petty sessions or by civil bill, from the applicant or applicants, his or their heirs or assigns.

12. The owner for the time being of the land through or in which any drain may be opened or improvements in drains made, in pursuance of this Act, may fill up, divert, or otherwise, deal with such drains or improvements in drains, on condition of first making and laying down in lieu thereof drains equally efficient; and any dispute as to the efficiency of drains so laid down shall be decided by two or more justices assembled in petty sessions, or, if desired by either party, by arbitration.

13. Any person who wilfully obstructs any person making any drains or improvements in drains, in pursuance of this Act, and any person who wilfully dams up, obstructs, or in any way injures any drains or improvements in drains so opened or made, shall for each offence incur a penalty not exceeding ten pounds, to be recovered in a summary manner before two or more justices at petty sessions.

14. All costs, charges, and expenses reasonably incurred by the adjoining owner in respect of any application made in pursuance of this Act shall be defrayed by the applicant or applicants.

15. Where any person is desirous, in pursuance of this Act, of constructing any drain by means whereof any brook, river, or other watercourse will be diverted from its ordinary channel into any other brook, river, or watercourse, he shall cause a copy of the notice hereby required to be served on the adjoining owner to be published by advertisement once at least in each of three successive weeks in some local newspaper circulating in the district in which the drain proposed to be constructed is situate, and to be served on all owners of land abutting upon the brook, river, or other watercourse into which the diversion is made, and situate within four miles of the point of junction, and shall deposit a copy of the map hereby required to accompany the notice served on the adjoining owner with the clerk of the peace of the county, riding or division of a county, wherein the proposed drain is situate; and it shall be lawful for any person, being the owner of land capable of being injured by the proposed drain, within eight weeks after the first notice of the proposed drain appears in the newspaper, to serve notice that he apprehends injury from such drain on the person proposing to make the same, and thereupon such owner shall be deemed to have dissented, and shall be entitled to the same rights and privileges under this Act as if he were the adjoining owner.

16. Where any question is by this Act to be decided by justices or arbitration, at the option of an adjoining owner, occupier, or other person interested, two arbitrators shall be nominated, one by the appli-

cant or applicants, and the other by such adjoining owner, occupier, or other person interested, as the case may be; and in default of such adjoining owner, occupier, or other person interested in nominating an arbitrator, it shall be lawful for any two or more justices in petty sessions, after notice to such adjoining owner, occupier, or other person to nominate such arbitrator; and the arbitrators shall decide the several questions mentioned in this Act, and shall have power, in case of disagreement, to call in an umpire; and such arbitrators and umpire, as the case may be, shall make their award on the said several matters.

17. All powers given by this Act shall be deemed to be in addition to and not in derogation of any other powers now existing by common law, or under any Act or Acts of Parliament heretofore passed and now remaining unrepealed; and every person may exercise such other powers in the same manner as if this Act had not passed, anything herein contained notwithstanding.

CAP. XXVII

An Act to amend the Law relating to marriages in Ireland. [8th June, 1863.]

Sec. 1. *No notice of marriage to be published before Poor-Law Guardians.*

2. *Form of notice of marriage to Registrar as in schedule (A.)*

3. *Proceedings of registrar.*

4. *Notice of marriage to be accompanied by a solemn declaration by one of the parties as form in schedule (B.)*

5. *Certificate not to issue until after twenty-one days, nor licence to be granted after seven days.*

6. *Registrar-General to furnish registry books.*

7. *Place, time, &c. of marriage.*

8. *Marriages under this Act good and cognizable.*

9. *Entry of marriage by minister in registry books.*

10. *Penalty for not registering marriage.*

11. *Registrar not to grant licences for marriage in certain cases.*

12. *The registration of places of public worship by trustees, &c.*

13. *Consent of minister, &c. necessary.*

14. *Omission to send notice of marriage, penalty £40.*

15. *Penalty on making false declaration, or giving false notice.*

16. *Not to alter provisions of existing Act, except where at variance with this Act.*

17. *Commencement of Act.*

18. *Limitation of Act.*

‘WHEREAS an Act was passed in the seventh and eighth years of the reign of her present Majesty, chapter eighty one, intituled *An Act for Marriages in Ireland, and for registering such Marriages*; and it is expedient to alter and amend the provisions of the said Act, so far as is hereinafter provided: Be it therefore enacted by the Queen's most excellent Majesty, by and with the advice and consent of the lords spiritual and temporal, and commons in this present Parliament assembled, and by the authority of the same, as follows:

1. In case of any party intending marriage under the provisions of the said recited Act or of this Act, no notice of such intended marriage shall be read or published before the guardians of any Poor-Law Union in Ireland, or be transmitted by any registrar to the clerk of any such guardians.

2. Every notice of an intended marriage given to the registrar under the provisions of the said recited Act or of this Act shall be in the form set forth in the schedule (A.) to this Act annexed, and shall state,—

(1.) The true name, surname, profession, or condition of each of the persons intending marriage:

(2.) The church, chapel, or place of public worship which the persons intending marriage, or either of them, usually attend:

(3.) The usual dwelling place of each of them:

(4.) The time, not being less than seven days, during which each has dwelt therein (unless such time is more than one month, in which case it may be so stated):

(5.) The church, chapel, or registered place of public worship, or other place in which the marriage is intended to be celebrated (which must be a place within the district of the registrar to whom the notice is given):

(6.) Whether the marriage is intended to be celebrated by virtue of the registrar's certificate, or by virtue of his licence.

3. The registrar shall then proceed as follows:

(1.) He shall file the notice so given to him, and keep the same with the records of his office:

(2.) He shall forthwith enter a true copy of the notice in his marriage notice book (supplied to him by the registrar general):

(3.) He shall keep this book open for the inspection of all persons at all reasonable times without fee:

(4.) He shall, on the day on which he shall have received such notice, or on the following day at the latest, send by post, in a registered letter, a copy of the notice, under his hand,—

To the minister of the church, chapel, or registered place of public worship stated in the notice as that in which the marriage is intended to be solemnized; and

To the minister of the church, chapel, or place of public worship to which the parties to the marriage, or either of them usually attend;

Or the registering officer of the Society of Friends, or secretary of a Synagogue, by whom respectively the marriage is to be registered, as the case may require:

(5.) When the marriage is intended to be contracted in the office of the registrar, he shall, in addition to sending a copy of the notice to the minister of the church, chapel, or place of public worship as aforesaid, forthwith suspend a copy of the notice, on a printed form properly and legibly filled

up, in some conspicuous place in his office, and keep the same so suspended,—in the case of a marriage intended to be celebrated by virtue of a certificate, for twenty-one days,—and in the case of a marriage intended to be celebrated by virtue of a licence, during seven days, next after the day of entry of the notice;

And the registrar shall be entitled to a fee of one shilling for each registered letter sent by him.

4. Any party intending marriage under the provisions of this Act, shall, at the time of giving the registrar the notice required by this Act, make and sign or subscribe a solemn declaration in writing (according to the form set forth in schedule (B.) to this Act annexed), that he or she believes that there is no impediment of kindred or alliance or other lawful hindrance to the said marriage, and that the parties to the said marriage have for the space of one month immediately preceding the giving of such notice usually attended Divine worship in the church, chapel, or meeting-house named in such notice, and that the parties to the said marriage, in case the marriage is intended to be had without licence, have for the space of seven days immediately preceding the giving of such notice had their usual place of abode and residence within the district of the registrar or respective registrars to whom such notice or notices, as the case may be, shall be so given; or in case such marriage is intended to be had by licence, that one of the parties had for the space of fifteen days immediately preceding the giving of such notice had his or her usual place of abode and residence within the district of the registrar to whom such notice shall be so given; and when either of the parties intending marriage, and not being a widower or widow, shall be under the age of twenty-one years, the party making such declaration shall further declare that the consent of the person or persons whose consent to such marriage is by law required has been given, or (as the case may be) that there is no person whose consent to such marriage is by law required; and every declaration so made as aforesaid shall be signed and subscribed by the party making the same in the presence of the registrar to whom the notice of the marriage is given, who shall attest the same by adding thereto his name, description, and place of abode; and no certificate or licence for marriage shall be issued or granted pursuant to any such notice as aforesaid unless the said notice be accompanied by such solemn declaration duly made and signed or subscribed and attested as aforesaid, and the registrar shall file such declaration, and keep the same with the records of his office.

5. The registrar shall not in any case issue a certificate until after the expiration of twenty-one days, or grant a licence until after the expiration of seven days, from the day of entry of the notice by him.

6. The registrar general shall furnish to the minister of every registered place of public worship in which marriages may be solemnized, marriage register books in duplicate, and forms for certified copies thereof, as provided under the said recited Act. One copy of every such register book, when filled, shall be delivered to the registrar of marriages of the district in which such registered place of worship is situate,

and the other copy shall remain in the custody of such minister, and be kept by him with the other registers of his place of worship.

7. Every marriage solemnized by virtue of a registrar's certificate of publication of notice, or of a registrar's licence, according to the usages of any church, denomination, or body of Protestant Christians shall be solemnized,—

- (1.) By a minister of the church, denomination, or body to which the parties to the marriage, or either of them, shall belong;
- (2.) In the registered place of public worship named in the notice;
- (3.) Between the hours of eight in the morning and two in the afternoon;
- (4.) With open doors;
- (5.) In the presence of two or more credible witnesses besides the officiating minister or person solemnizing the marriage;

And not elsewhere or otherwise. If any person wilfully solemnize a marriage, or pretended marriage, contrary to the present provision, he shall be guilty of felony.

8. The presence of the registrar shall not be necessary at any marriage celebrated under the provisions of this Act, in any house of worship registered or certified under the said recited Act or this Act; and every such marriage shall be good and cognizable in like manner as any marriage solemnized under the provisions of the said recited Act; nor shall the minister who shall solemnize any such marriage without the presence of the registrar be guilty of felony.

9. Every minister, immediately after the solemnization of any marriage by him, shall enter in both the duplicate marriage register books of the place of worship in which the marriage is solemnized, the requisite particulars respecting such marriage; and every such entry shall be signed by such minister, and by the persons married, and by two witnesses at the least; and such minister shall, in *April, July, October, and January*, every year, send to the registrar of marriages of the district in which such place of worship is situate, on a printed form (supplied to him by the registrar-general), a copy, certified by him under his hand, of all entries in the duplicate marriage register books in his keeping made in the quarter of a year then last past, or certify under his hand that no such entry has been made in such quarter, if the case so be.

10. If any minister neglect or refuse to register as aforesaid any marriage which under this Act it is his duty to register, he shall for such offence be liable to a penalty of forty pounds, recoverable in the same manner in which fines and forfeitures imposed by the said recited Act are now recoverable, with full costs of suit, by any person who shall sue for the same.

11. Nothing in this Act contained shall authorize any registrar to grant a licence for marriage in any church or chapel in which marriages may be solemnized according to the rites of the united Church of *England and Ireland*, or in any church or chapel belonging to the said united Church, or licensed for the celebration of Divine worship according to the rites and ceremonies of the said united Church.

12. Any trustee or owner of a separate building

(not being a church or chapel belonging to the united Church of *England and Ireland*) used as a place of public worship by any Church, denomination, or body of Protestant Christians, or any officiating minister of any such place of public worship, may certify in writing, signed by him, to the registrar-general, that such building is so used, and shall at the same time deliver to the registrar-general a certificate signed by ten householders at the least that such building has been used by them during one year at least as their usual place of public worship, and that they are desirous that such place should be registered; and such trustee, owner, or minister shall countersign such certificate. On the receipt of such certificates the registrar-general shall register such place of public worship in the general registry office, and shall send a certificate of such registration to the person certifying, and to the registrar of the district in which such place of public worship shall be situated, who shall keep the same with the other records of his office; the registrar-general shall also give public notice of such registration by advertisement in the *Dublin Gazette*, and in a newspaper circulating in the county where the place of public worship is situate. For every such entry, certificate, and publication the registrar-general shall receive, at the time of delivery to him of the certificates, the sum of one pound.

13. No such marriage as aforesaid shall be solemnized in any such place of public worship without the consent of the minister, or of one of the trustees or owners, deacons, or managers thereof.

14. If any registrar shall neglect or refuse to send a copy of the notice given to him by either of the par-

ties intending marriage to the minister of the church, chapel, or registered place of public worship where the marriage is to be solemnized, and to the minister of the church, chapel, or registered place of public worship where the parties to the marriage, or either of them, usually attend, he shall be liable to a penalty of forty pounds, recoverable as aforesaid, with full costs of suit, by any person who shall sue for the same.

15. Any person who shall knowingly or wilfully make any false declaration, or sign any false notice, required by the said recited Act or by this Act, for the purpose of procuring any marriage, shall suffer the penalties of perjury.

16. Except where the provisions of the said recited Act are expressly altered by or are at variance with the provisions of this Act, nothing herein contained, shall alter, repeal, or affect, or be construed so as in any manner to alter repeal, or affect any of the provisions or clauses contained in the said Act, but, except as aforesaid, the same provisions and clauses respectively shall be and remain in full force and effect as if this Act had not been passed; and this Act shall, except as aforesaid, be considered as incorporated with the same provisions and clauses, and be construed in connexion therewith.

17. This Act shall come into operation on the first day of *August*, one thousand eight hundred and sixty-three, and none of the provisions thereof shall take effect previous to that day.

18. This Act shall not apply to either *England* or *Scotland*.

SCHEDULE (A.)

NOTICE OF MARRIAGE.

To *A.B.*, Registrar [or Deputy Registrar] of the District of _____ in the County of _____
I, the undersigned *James Smith*, hereby give you notice, that a Marriage is intended to be had, without [or by, as the case may be] licence, within three calendar months from the date hereof, between me and the other party named and described; (that is to say),

Name and Surname.	Condition.	Rank or Profession.	Age.	Dwelling Place.	Length of Residence.	Church, Chapel, or Place of Worship which the Parties usually attend respectively.	Church, Chapel, Place of Public Worship, or Building in which the Marriage is to be solemnised.	District and County in which the parties respectively dwell.
<i>James Smith</i>	<i>Widower</i>	<i>Iron-monger</i>	<i>Twenty-five Years</i>	<i>28 Trinity-Street, Parish of St. Andrew's, City of Dublin.</i>	<i>Seven Days [or Fifteen Days, as the case may be].</i>	<i>Primitive Wesleyan Methodist Chapel, Great George's St.</i>	<i>Maryborough.</i>	<i>District of ——— South District.</i> <i>County of ——— the City of Dublin.</i>
<i>Martina Green</i>	<i>Spinster</i>	<i>...</i>	<i>Nineteen Years</i>	<i>Grove Farm Townland of Grove, Parish of Maryborough.</i>	<i>More than One Month.</i>	<i>Sion Chapel, Maryborough</i>	<i>Sion Chapel, Maryborough.</i>	<i>District of Maryborough, County of Queen's Co.</i>

Witness my hand this [] day of [] One thousand eight hundred and [sixty-three].

(Signed) *James Smith*.

(The particulars in this schedule to be entered according to the fact.)

SCHEDULE (B.)

I, the undersigned, *James Smith*, of 23 Trinity-street, parish of St. Andrew's, city of Dublin, hereby solemnly declare, that I believe there is no impediment of kindred or alliance or other lawful hindrance to my marriage with *Martha Green*, of Grove Farm, townland of Grove, parish of Maryborough, and that we, the above-named *James Smith* and *Mary Green*, have for the space of one month immediately preceding the giving the notice of our marriage usually attended Divine worship in the church, chapel or meeting-house belonging to the [here insert the church, denomination, or body of Protestant Christians to which such place of worship shall belong (as the case may be)] "in the parish of _____," or "ecclesiastical district of _____," within the south district of _____, and county of the city of Dublin.

And that I, the above-named *James Smith*, have for the space of fifteen days immediately preceding the giving the notice of marriage, had my usual place of abode and residence [if the marriage is intended to be had in a church or chapel of the United Church of England and Ireland, insert the following words "in the parish of _____," or "in the ecclesiastical district of _____," (as the case may be) and add the name of the parish or ecclesiastical district in which one of the parties resides] within the south district of _____, county of the city of Dublin:

And I further declare that I am not a minor under the age of twenty-one years, and that the other party herein named and described is not a minor under the age of twenty-one years [if one or both of the parties be under age these words must be expunged], [or as the case may be]:

And I further declare that she [or I], the said *Martha Green* not being a widow [or widower], is [or am] a minor under the age of twenty-one years, and that the consent of *George Graham*, whose consent to her [or my] marriage is required by law, has been duly given and obtained thereto [or "that there is no person whose consent to her [or my] marriage by law is required" (as the case may be)]:

And I make the foregoing declarations solemnly and deliberately, conscientiously believing the same to be true, pursuant to the provisions of an Act passed in the _____ year of her Majesty Queen Victoria, chapter _____ intitled, "An Act to amend the Law relating to Marriages in Ireland," well knowing that every person who shall knowingly or wilfully make and sign or subscribe any false declaration, or who shall sign any false notice, for the purpose of procuring any marriage under the provisions of the said Act above mentioned, or of any Act therein recited, shall suffer the penalties of perjury. In witness whereof I have hereunto set and subscribed my hand, this fifth day of August, 1863.

James Smith.

Signed and declared by the above named

James Smith in the presence of

James Casey, of [insert place of abode],
Registrar of the south district, county
of the city of Dublin.

CAP. XXVIII.

An Act to give further Facilities to the Holders of the Public Stocks. [8th June, 1863.]

Sec. 1. *Short title.*

2. *Definition of terms.*

3. *Right to certificate of title to stock.*

4. *Restriction as to trustees taking certificates of title.*

5. *General provisions as to certificates of title.*

6. *Distinction between certificates of title to bearer and nominal certificates.*

7. *Nominees in a nominal certificate not entitled to have it renewed as nominal.*

8. *Fees in respect of dealings with stock under this Act.*

9. *Remuneration to the bank.*

10. *General regulations with respect to certificates of title.*

11. *Income tax.*

12. *Unclaimed dividends.*

13. *Provisions as to public stocks outstanding.*

14. *Penalties on persons committing forgery.*

15. *Penalties on persons falsely personating owners of stock.*

16. *Penalties on persons engraving plates, &c.*

'WHEREAS it is expedient to give further facilities to the holders of the public stocks in respect of the transfer thereof, and the receipt of the dividends thereon: be it enacted by the Queen's most excellent Majesty, by and with the advice and consent of the lords spiritual and temporal, and commons, in this present Parliament assembled, and by the authority of the same, as follows:

1. This Act may be cited for all purposes as the "Stock Certificate Act, 1863."

2. In this section and elsewhere in this Act the following expressions have the meanings here assigned to them:

"The bank" shall, with reference to the public stocks transferable at the Bank of England, and certificates issued under this Act in respect thereof, and the coupons of such certificates, mean the governor and company of the Bank of England, and shall, with reference to the public stocks transferable at the Bank of Ireland, and certificates issued under this Act in respect thereof, and the coupons of such last-mentioned certificates, mean the governor and company of the Bank of Ireland.

"The Treasury" shall mean the Commissioners of her Majesty's Treasury, or any two of them:

"The public stocks" shall mean any stocks forming part of the National Debt, and transferable in the books of the bank, and "share in the public stocks" shall include any part of a share:

"Person" shall include corporation:

"Felony" shall mean and include crime and offence in Scotland.

3. With the exception and subject to the conditions hereinafter mentioned, every person inscribed in the books of the Bank of England or of the Bank of Ireland as proprietor of a share in the public stocks may obtain a certificate or certificates of title to the

said share, or to any part thereof, having annexed coupons entitling the bearer to the dividends payable in respect of that share or part of a share.

4. No trustee of any share in the said stocks shall apply for or hold a certificate of title to that share unless he is authorized so to do by the terms of his trust; and any contravention of this section by a trustee shall be deemed to be a breach of trust, and be punishable accordingly; nevertheless this section shall not impose on the bank any obligation to inquire whether a person applying for a certificate of title under this Act is or not a trustee, nor subject them to any liability in the event of their granting a certificate of title to a trustee, nor invalidate any certificate of title if granted.

5. No certificate shall be granted in respect of any sum of stock not being fifty pounds, or a multiple of fifty pounds, or in respect of any larger amount than one thousand pounds:

The treasury may by warrant declare that any one or more of the public stocks specified in the warrant shall be subject to the provisions of this Act; but, until that declaration is made, stock certificates shall be issued only in respect of the three *per centum* consolidated annuities, reduced three *per centum* annuities, and the new three *per centum* annuities:

The coupons annexed to a stock certificate shall comprise the dividends payable in respect of the stock described in the certificate for a period of not less than five years, commencing from the date of the certificate. At the expiration of that period fresh coupons shall be issued for a further period of not less than five years, and so for successive periods of not less than five years during the continuance in force of the stock certificate; but the bank may, if they think fit, in lieu of issuing fresh coupons in respect of a certificate, give in exchange a fresh certificate with coupons attached thereto:

Coupons shall be payable at the chief establishment of the bank at the expiration of three clear days from the day of presentation, and at any branch establishment of the bank situate more than ten miles from the chief establishment, at the expiration of five clear days from the day of presentation:

The payment to the bearer of any coupon of the amount expressed therein shall be a full discharge to the bank of all liability in respect of that coupon and the dividend represented thereby:

If any stock certificate or coupon issued under this Act is lost or destroyed, the bank shall grant a new certificate or coupon, on receiving indemnity to their satisfaction against the claims of all persons deriving title under the certificate or coupon so lost or destroyed:

No notice of any trust in respect of any stock certificate or coupon issued under this Act shall be receivable by the bank.

6. A stock certificate, unless a name is inscribed therein, as herein-after provided, shall entitle the bearer to the stocks therein described, and shall be transferable by delivery:

The bearer of a stock certificate may convert the same into a nominal certificate by inserting therein, in manner prescribed by any regulation made in pursuance of this Act, the name, address, and quality of

some person. A stock certificate when it becomes nominal shall not be transferable, and the person named therein (herein-after called the nominee), or some person deriving title from him by devolution in law as herein-after mentioned, shall alone be recognized by the bank as entitled to the stock described in the certificate:

Upon the death of the nominee in a nominal certificate his personal representative, upon his bankruptcy his assignees, and upon the marriage of any female nominee her husband, shall alone be recognized by the bank as entitled to the stock described in the certificate, and shall be deemed respectively to be a nominee or nominees in that certificate:

The death or bankruptcy of any nominee in a nominal certificate, or the marriage of any female nominee, and the loss or destruction of any certificate or coupon, shall be proved in such manner as may from time to time be directed by the bank, with the sanction of the treasury.

7. The nominee in a nominal stock certificate shall not be entitled to have the same renewed as nominal, but he shall, on delivery up to the bank of his certificate, and of all unpaid coupons belonging thereto, and on compliance with any regulation made in pursuance of this Act, be entitled to receive in exchange from the bank a stock certificate to bearer:

The nominee in a nominal stock certificate, and the bearer of a stock certificate to bearer, may, on the like delivery, and on compliance with any regulation made in pursuance of this Act, require to be registered in the books of the bank as a holder of the stock described in the certificates under which they respectively derive title, and thereupon the stock shall be re-entered in the books kept by the bank for the entry of transferable stock, and become transferable, and the dividends payable as if no certificate had been issued in respect of such stock.

8. No fees shall be charged on the grant of a stock certificate to bearer in exchange for a like certificate, but there shall be charged with respect to the several other proceedings in relation to stock authorised by this Act the fees specified in the Schedule hereto, or such less fees as may be determined by the treasury.

All fees received in pursuance of this Act shall be paid into the receipt of her Majesty's Exchequer:

No stamp duty shall be payable in respect of any certificate or coupon issued in pursuance of this Act.

9. There shall be paid to the Bank of *England* out of the Consolidated Fund, on account of the additional trouble, expense, and responsibility, if any, imposed on it by this Act, in addition to the remuneration otherwise payable to it in respect of the management of the National Debt, such remuneration as may be agreed upon between the treasury and the Bank of *England*.

10. The Bank of *England* and the Bank of *Ireland*, with the sanction of the treasury, may from time to time issue any forms that may be required for carrying into effect the provisions of this Act, and also from time to time make any regulations that are not inconsistent with this Act relative to the following things:

1. The time for which coupons are to be given:

2. The conversion of a stock certificate to bearer into a nominal certificate:
3. The authority under which and the mode in which the bank is to act in issuing stock certificates or exchanging nominal certificates for certificates to bearer, or registering in their books the holders of stock certificates, or taking any other proceedings in relation to stock authorized to be taken under this Act:
4. The mode of proving the title of or identifying any person applying for a stock certificate or deriving any title under a stock certificate issued under this Act:
5. With respect to any other matter necessary to carry this Act into effect:

And any regulation so made shall be deemed to be part of this Act in the same manner as if it were herein enacted.

11. The income tax shall be deducted from any coupons payable under this Act in the same manner and subject to the same regulations in and subject to which it may, in pursuance of any law for the time being in force, be deducted from the dividends payable at the bank in respect of the stock of proprietors inscribed in the books of the bank.

12. All sums due and not demanded on any coupons issued under this Act shall for all purposes be dealt with as if they were dividends due and not demanded in respect of the stock of proprietors inscribed in the books of the bank.

13. When any certificate of title issued under this Act in respect of any share in the public stocks is outstanding, the stock represented thereby shall cease to be transferable in the books of the bank;

Save in so far as relates to the mode of transfer and payment of dividends thereon, any stock described in a stock certificate issued under this Act shall be deemed to be charged on the same securities, and to be subject to the same powers of redemption, and to the same incidents in all respects, including the remuneration payable to the bank, as if it had continued registered in the books of the bank as stock transferable therein:

Any stock described in a stock certificate in respect of which no coupons have been presented for payment for a period of ten years may in all respects be dealt with as if it were stock upon which no dividends had been demanded for a period of ten years, and be transferred accordingly to the Commissioners for the Reduction of the National Debt, and shall be subject to the rights of the parties proving themselves entitled to such stock in pursuance of the Act passed in the fifty-sixth year of the reign of King George the Third, chapter sixty, or the Act passed in the session held in the twenty-third and twenty-fourth years of the reign of her present Majesty, chapter seventy-one; and the provisions of those Acts and of all other Acts relating to stock transferred to the aforesaid commissioners shall apply to stock in respect of which certificates shall have been issued in pursuance of this Act.

14. Whosoever shall forge or alter, or offer, utter, dispose of, or put off, knowing the same to be forged or altered, any stock certificate or coupon or any document purporting to be a stock certificate or coupon issued in pursuance of this Act, or shall demand or

endeavour to obtain or receive any share or interest of or in the public stocks, or to receive any dividend or money payable in respect thereof, by virtue of any such forged or altered certificate or coupon or document purporting as aforesaid, knowing the same to be forged or altered, with intent in any of the cases aforesaid to defraud, shall be guilty of felony, and being convicted thereof shall be liable, at the discretion of the court, to be kept in penal servitude for life or for any term not less than three years, or to be imprisoned for any term not exceeding two years, with or without hard labour, and with or without solitary confinement.

15. Whosoever shall falsely and deceitfully personate any owner of any share or interest of or in any of the public stocks, or of any stock certificate or coupon issued in pursuance of this Act, and shall thereby obtain or endeavour to obtain any such stock certificate or coupon, or receive or endeavour to receive any money due to any such owner, as if such offender were the true and lawful owner, shall be guilty of felony, and being convicted thereof shall be liable, at the discretion of the court, to be kept in penal servitude for life or for any term not less than three years, or to be imprisoned for any term not exceeding two years, with or without hard labour, and with or without solitary confinement.

16. Whosoever, without lawful authority or excuse, the proof whereof shall lie on the party accused, shall engrave or make, upon any plate, wood, stone, or other material, any stock certificate or coupon purporting to be a stock certificate or coupon issued or made under and in pursuance of this Act, or to be a blank stock certificate or coupon issued or made as aforesaid, or to be a part of such a stock certificate or coupon, or shall use any such plate, wood, stone, or other material for the making or printing any such stock certificate or coupon, or any such blank stock certificate or coupon, or any part thereof respectively, or knowingly have in his custody or possession any such plate, wood, stone, or other material, or shall knowingly offer, utter, dispose of, or put off, or have in his custody or possession, any paper upon which any such blank stock certificate or coupon, or part of any such stock certificate or coupon, shall be made or printed, shall be guilty of felony, and being convicted thereof shall be liable, at the discretion of the Court, to be kept in penal servitude for any term not exceeding fourteen years and not less than three years, or to be imprisoned for any term not exceeding two years, with or without hard labour, and with or without solitary confinement.

SCHEDULE.

SCHEDULE OF FEES.

On the issue of a stock certificate, a fee not exceeding five shillings on every hundred pounds of stock included in the certificate, and a proportional sum for any less sum.

If the applicant is the registered holder of an amount of stock divisible into several sums of fifty pounds or multiples of fifty pounds, he may require such sums of fifty pounds or such multiples of fifty pounds to be distributed amongst different certificates,

as he thinks fit; subject to this proviso, that if the number of certificates required by him exceed the proportion of five to a thousand pounds he shall, in respect of each certificate constituting that excess, pay a sum of sixpence in addition to the per centage fee.

On the change of a nominal certificate for a certificate to bearer, or on the registration in the books of the bank of the stock included in a nominal certificate, there shall be charged a fee not exceeding one half the fee that would be chargeable on the issue of a new certificate to bearer.

On the registration in the books of the bank of the stock included in a stock certificate to bearer there shall be charged a fee not exceeding five shillings.

CAP. XXIX.

An Act to amend and continue the Law relating to Corrupt Practices at Elections of Members of Parliament.
[8th June, 1863.]

17 & 18 Vict., c. 102.

Sec. 1. *Short title.*

2. *No payment, &c., shall be made by or on behalf of candidates otherwise than through authorised agents.*
3. *Bills, &c., to be sent in within one month to agent, or right to recover barred.*
4. *As to publication of statement of election expenses.*
5. *Sec. 14 of 17 & 18 Vict., c. 102, extended to misdemeanors, &c.*
6. *General allegations sufficient in indictments.*
7. *Evidence of witness on election committee and before commissioners.*
8. *Regulations as to proceedings of election committees.*
9. *Prosecutions for bribery.*
10. *Acts as mentioned in Schedule repealed.*
11. *Continuance of Corrupt Practices Prevention Acts.*

‘WHEREAS the “Corrupt Practices Prevention Act, 1854,” as amended by an Act of the session holden in the twenty-first and twenty-second years of her Majesty, chapter eighty-seven, is limited to continue in force until the first day of *September* one thousand eight hundred and sixty-three; and from thence until the end of the next session of Parliament; and it is expedient further to amend the said Acts and to continue the same in manner herein-after mentioned:’ be it therefore enacted by the Queen’s most excellent Majesty, by and with the advice and consent of the lords spiritual and temporal, and commons, in this present Parliament assembled, and by the authority of the same, as follows:

1. The expression “the Corrupt Practices Prevention Acts” shall include this Act and the said Act of the twenty first and twenty-second years of the reign of her present Majesty, and the Corrupt Practices Prevention Act, 1854, as amended by the said other Acts.

Expenses of Elections.

2. No payment (except in respect of the personal expense of a candidate), and no advance, loan, or deposit, shall be made by or on behalf of any candidate at an election, before, or during, or after such election,

on account of or in respect of such election, otherwise than through an agent or agents whose name and address or names and addresses have been declared in writing to the returning officer on or before the day of nomination, or through an agent or agents to be appointed in his or their places as herein provided; and any person making any such payment, advance, loan, or deposit, otherwise than through such agent or agents, shall be guilty of a misdemeanor, or in *Scotland* of an offence punishable by fine and imprisonment. It shall be the duty of the returning officer to publish, on or before the day of nomination, the name and address or the names and addresses of the agent or agents appointed in pursuance of this section.

In the event of the death or legal incapacity of any agent appointed in pursuance of this section, the candidate shall forthwith appoint another agent in his place on giving notice to the returning officer of the name and address of the person so appointed, which shall be forthwith published by the returning officer.

3. All persons who have any bills, charges, or claims upon any candidate for or in respect of any election shall send in such bills, charges, or claims within one month from the day of the declaration of the election to such agent or agents as aforesaid, otherwise such persons shall be debarred of their right to recover such claims and every or any part thereof; provided always, that in case of the death within the said month of any person claiming the amount of such bill, charge, or claim, the legal representative of such person shall send in such bill, charge, or claim within one month after obtaining probate or letters of administration, or confirmation as executor, as the case may be, or the right to recover such claim shall be barred as aforesaid: provided also, that such bills, charges, and claims shall and may be sent in and delivered to the candidate, if, and so long as, during the said month, there shall, owing to death or legal incapacity, be no such agent.

4. A detailed statement of all election expenses incurred by or on behalf of any candidate, including such excepted payments as aforesaid, shall, within two months after the election, (or in cases where by reason of the death of the creditor no bill has been sent in within such period of two months, then within one month after such bill has been sent in,) be made out and signed by the agent, or, if there be more than one, by every agent who has paid the same (including the candidate in case of payments made by him), and delivered, with the bills and vouchers relative thereto, to the returning officer, and the returning officer for the time being shall, at the expense of the candidate, within fourteen days, insert or cause to be inserted an abstract of such statement, with the signature of the agent thereto, in some newspaper published or circulating in the county or place where the election was held; and any agent or candidate who makes default in delivering to the returning officer the statement required by this section shall incur a penalty not exceeding five pounds for every day during which he so makes default; and any agent or candidate who wilfully furnishes to the said returning officer an untrue statement shall be guilty of a misdemeanor, or in *Scotland* of an offence punishable by fine and imprisonment; and the said returning officer shall preserve

all such bills and vouchers, and during six months after they have been delivered to him permit any voter to inspect the same, on payment of a fee of one shilling.

Legal Proceedings.

5. The provisions of the fourteenth section of the Corrupt Practices Prevention Act, 1854, shall extend to a misdemeanor, or to any other offence under the Corrupt Practices Prevention Acts not punishable by a penalty or forfeiture, as well as to proceedings for any offence punishable by a penalty or forfeiture.

6. In any indictment or information for bribery or undue influence, and in any action or proceeding for any penalty for bribery, treating, or undue influence, it shall be sufficient to allege that the defendant was at the election at or in connexion with which the offence is intended to be alleged to have been committed guilty of bribery, treating, or undue influence (as the case may require); and in any criminal or civil proceedings in relation to any such offence the certificate of the returning officer in this behalf shall be sufficient evidence of the due holding of the election, and of any person therein named having been a candidate thereat.

7. No person who is called as a witness before any election committee, or any commissioners appointed in pursuance of the Act of the session holden in the fifteenth and sixteenth years of the reign of her present Majesty, chapter fifty-seven, shall be excused from answering any question relating to any corrupt practice at, or connected with, any election forming the subject of inquiry by such committee or commissioners, on the ground that the answer thereto may criminate or tend to criminate himself: provided always, that where any witness shall answer every question relating to the matters aforesaid which he shall be required by such committee or commissioners (as the case may be) to answer, and the answer to which may criminate or tend to criminate him, he shall be entitled to receive from the committee, under the hand of their clerk, or from the commissioners, under their hands (as the case may be), a certificate stating that such witness was, upon his examination, required by the said committee or commissioners to answer questions or a question relating to the matters aforesaid, the answers or answer to which criminated or tended to criminate him, and had answered all such questions or such question; and if any information, indictment, or action be at any time thereafter pending in any court against such witness for any offence under the Corrupt Practices Prevention Acts, or for which he might have been prosecuted or proceeded against under such Acts, committed by him previously to the time of his giving his evidence, and at or in relation to the election concerning, or in relation to which the witnesses may have been so examined, the Court shall, on production and proof of such certificate, stay the proceedings in such last-mentioned information, indictment, or action, and may, at its discretion, award to such witness such costs as he may have been put to in such information, indictment, or action: provided that no statement made by any person in answer to any question put by or before such election committee or commissioners shall, ex-

cept in cases of indictments for perjury, be admissible in evidence in any proceeding, civil or criminal.

Election Committees.

8. The following regulations shall be made with respect to the proceedings of select committees appointed to try election petitions:

1. On any charge of treating being brought before any election committee, it shall not be necessary, unless the committee should otherwise decide, to prove agency in the first instance before giving in evidence the facts whereby the charge of treating is to be sustained:

2. Where any person who has voted at any election is found by any committee to have been guilty of bribery or treating at such election, his vote shall be void, and may, upon a scrutiny, be struck off the list of voters, notwithstanding that the name of such guilty person has not been included in the list of voters to be objected to:

3. Where any election petition complains that bribery, treating, or other corrupt practices have been committed at any election, the committee to whose determination such petition is referred shall report to the House of Commons whether or not corrupt practices have, or whether there is reason to believe corrupt practices have, extensively prevailed at such election in the place to which the petition refers.

9. Where an election committee has reported to the House of Commons that certain persons named by them have been guilty of bribery or treating, and where it appears by the report of any commission of inquiry into corrupt practices at any election made to her Majesty and laid before Parliament that certain persons named by them have been guilty of the offences of bribery or treating, and have not been furnished by them with certificates of indemnity, such report, with the evidence taken by the commission, shall be laid before the attorney-general, with a view to his instituting a prosecution against such persons if the evidence should, in his opinion, be sufficient to support a prosecution.

Repeal.

10. There shall be repealed the several Acts of Parliament mentioned in the Schedule hereto to the extent specified in the third column of the said Schedule, but such repeal shall not affect the punishment of any offence or the recovery of any penalty or forfeiture incurred under any of the provisions hereby repealed.

11. The Corrupt Practices Prevention Acts shall continue in force for a period of five years from the date of the passing of this Act, and from thenceforth until the end of the then next session of Parliament.

The SCHEDULE.

The portions printed in Italics show the extent of repeal.

15 & 16 Vict., c. 57. A.D. 1852.—An Act to provide for more effectual inquiry into the existence of corrupt practices at elections for members to serve in Parliament.—*Sections 9 and 10.*

17 & 18 Vict., c. 102, A.D. 1854.—An Act to consolidate and amend the laws relating to bribery,

treating, and undue influence at elections of members of Parliament.—Sections 15, 16, 17, 18, 19, 20, 21, 22, 24, 25, 26, 27, 28, 29, 30, 31, 32, and 34.

21 & 22 Vict., c. 87, A.D. 1858.—An Act to continue and amend the Corrupt Practices Prevention Act, 1854.—*So much of section (1) as provides that a full, true, and particular account of all payments made for such conveyance, signed by the candidate or his agents, shall be delivered to the election auditor, with the names and addresses of the persons to whom such payments have been made, and the amount of such account shall be included in the general account of the expenses incurred at any election to be made out and kept by such election auditor. And sections, 2, 4.*

CAP. XXX.

An Act to authorize further Harbour Regulations for the Protection of Her Majesty's Ships, Dockyards, and Naval Stations. [22nd June, 1863.]

54 G. 3, c. 169.

- Sec. 1. *Rules, &c., made under recited Act may be extended for purposes herein named.*
 2. *Reasonable pecuniary penalties may be imposed for breach of rules.*
 3. *Penalties to be recoverable under this Act. This Act and recited Act, &c., to be construed together.*

‘WHEREAS AN Act, to which the term the Dockyards Protection Act when herein-after used refers, was passed in the fifty-fourth year of King George the Third, (chapter one hundred and fifty-nine,) “For the better Regulation of the several Ports, Harbours, Roadsteads, Sounds, Channels, Bays, and Navigable Rivers in the United Kingdom, and of His Majesty's Docks, Dockyards, Arsenals, Wharfs, Moorings, and Stores therein, and for repealing several Acts made for that purpose:”

‘And whereas by the said Act (among other things) authority was given for the making of rules, orders, and regulations for the preservation of his Majesty's moorings, and for the mooring, anchoring, and placing of private ships and craft in the ports, harbours, havens, roadsteads, sounds, channels, creeks, bays, and navigable rivers of the United Kingdom, so far as the tide flows and re-flows, where or near to which his Majesty then had, or where his Majesty, his heirs or successors, might thereafter have any docks, dockyards, arsenals, wharfs, or moorings for the purpose of ensuring free and safe ingress, egress, and regress unto, into, and from those ports and waters, and to and from his Majesty's docks and other property aforesaid therein, and for the ordering and marking out of such spaces near the same as should be judged necessary to be kept free and open, and for the appropriation of mooring places for his Majesty's ships, and for the specifying of distances from his Majesty's ships, hulks, docks, and other property aforesaid within which no private ship or craft should be moored, anchored, or placed, and for the altering from time to time of such rules, orders, and regulations as occasion should require for the purposes aforesaid; all which rules, orders, and regulations it was thereby enacted should, upon the making thereof,

and also whenever altered, be published in the *London Gazette*, and, being printed and put upon paste-board, should be constantly kept hung up in some open and conspicuous part of the custom house or other place of public resort for business in the port, harbour, or haven affected:

‘And whereas in the same Act provision was also made, by the imposition of pecuniary penalties and otherwise, for (among other things) the preventing of private ships or craft from being moored, anchored, or placed in the fairway or channel or across the stream in any such port, harbour, haven, or navigable river, so as obstruct the passage or entrance into the same, and to for the removal of private ships and craft from prohibited positions, and for confining the breaming of ships to particular parts of the shore, and for restricting the carrying of gunpowder and the keeping of fire on board ship, and the heating of pitch or other combustible matter on board ship within the specified distances of his Majesty's ships, dockyards, and other property, and the keeping of shotted guns and the firing of guns on board ship in such waters as aforesaid:

‘And whereas it may in some instances be also desirable, with a view to the better protection of her Majesty's ships and property in her dockyards and naval stations, and to the interests of her Majesty's naval service, that there should be authority for the making of rules, orders, and regulations in manner directed by the Dockyards Protection Act, for restricting the speed of steamers within harbours under particular circumstances or in particular positions, and for enforcing the constant attendance of shipkeepers on board vessels within harbours near her Majesty's dockyards and naval stations:’

Be it therefore enacted by the Queen's most excellent Majesty, by and with the advice and consent of the lords spiritual and temporal, and commons, in this present Parliament assembled, and by the authority of the same, as follows:

1. Any rules, orders, and regulations from time to time made under the Dockyards Protection Act may, where it seems expedient with a view to the better protection of her Majesty's ships, dockyards, or property, or to the requirements of her Majesty's naval service, extend, in addition to the purposes in that Act mentioned, to the following purposes, or either of them; namely,

(1.) To prohibit the navigating of steam vessels at a greater speed than five nautical miles an hour in any specified part of any port, harbour, haven, or navigable river for which under the Dockyards Protection Act rules, orders, and regulations may be made:

(2.) To require the presence of at least one person at all hours of the day and night on board every ship or vessel, lighter, barge, or other craft above a specified size, anchored, moored, or placed in any specified part of any such port, harbour, haven, or navigable river.

2. Any such rules, orders, and regulations may impose such reasonable pecuniary penalties as may seem fit, not exceeding five pounds for each breach thereof, but they shall be so framed as to allow the justices or other authority before whom any such penalty is

sought to be recovered to order part only of the penalty to be paid.

3. Every such penalty shall be recoverable and applicable as pecuniary penalties under the Dockyards Protection Act, and any Act amending the same, are recoverable and applicable. The provisions of the Dockyards Protection Act respecting the indemnity of persons acting in pursuance thereof shall apply to persons acting in pursuance of rules, orders, and regulations made under the authority of this Act; and generally, as far as may be, this Act shall be construed together with the Dockyards Protection Act, and any Act amending the same, as one Act.

CAP. XXXI.

An Act for the Government of the *Cayman Islands*.
[22nd June, 1863.]

CAP. XXXII.

An Act to confirm certain Provisional Orders under the Local Government Act (1858) relating to the Districts of *Basford, Teignmouth, Kingston-upon-Hull, Nottingham, Bradford, Ryde, Bedford, Croydon, Bailey, Berwick-upon-Tweed, Sheerness, and Bromsgrove*.
[29th June, 1863.]

CAP. XXXIII.

An Act for granting to her Majesty certain duties of Inland Revenue, and to amend the laws relating to the Inland Revenue.
[29th June 1863.]

Sect. 1. *Licensed beer dealers may take out additional licence to sell beer by retail not to be consumed on the premises.*

2. *Duty on retail beer licences taken out by licensed victuallers who do not sell spirits.*

3. *Penalty on persons selling beer by retail in Ireland without licence.*

4. *Excise duty on sugar made in United Kingdom continued to 1st August 1864.*

5. *Charging of excise duty on sugar used in brewing deferred until 1st August 1864.*

6. *Duty on stage carriages licensed to carry not more than eight persons reduced.*

7. *Penalty on persons keeping a stage carriage carrying a greater number of passengers than allowed by licence.*

8. *Occasional licences may be granted for carriages conveying passengers at separate fares.*

9. *Such occasional licences to be granted, and the carriages used under such regulations as the commissioners may prescribe.*

10. *Stage carriage licences to expire on the first Sunday in November in each year.*

11. *Stage carriage licences may be taken out for one quarter of a year.*

Not to supersede Sect. 17 of 6. G. 4. c. 81, as to granting licences for the remainder of a current year.

12. *Stage carriage licences may be transferred when the original holder discontinues business during the currency of the licence.*

13. *Accounts of sums received for the conveyance*

of passengers upon railways to be made up at the close of each calendar month.

14. *Restriction on exemption from duty on railway passengers granted by Sect. 9 of 7 & 8 Vict. c. 85.*

15. *Authority to exercise several trades may be contained in one excise licence.*

16. *Penalty for giving more than one shipping notice for the same goods exported and for claiming drawback more than once.*

17. *Goods shipped for exportation on drawback not to be brought on shore, or the packages opened or marks thereon altered.*

18. *Licences granted to refreshment house keepers to retail foreign wine to include the sale of sweets and made wines.*

19. *Alteration of duty on a victualler's occasional licence.*

20. *Alteration of the law relating to occasional licences.*

21. *Section 12 of 25 & 26 Vict. c. 22, not to prohibit persons licensed by the excise from selling beer, spirits, or wine at fairs or races.*

22. *Union assessment committee not to require the production of documents relating to the assessment of the Income Tax on concerns in the nature of trade.*

23. *Commissioners of taxes for any division of a county may hold their meetings within an adjoining city or other place of exclusive jurisdiction.*

24. *Income tax to be deducted from coupons on stock certificates, although the half yearly payment is under fifty shillings.*

25. *Innkeeper's tobacco licences to expire on the 10th of October.*

26. *Provisions of former Acts to apply to this Act.*

Most Gracious Sovereign,

WE, your Majesty's most dutiful and loyal subjects the commons of the United Kingdom of Great Britain and Ireland, in Parliament assembled, towards raising the necessary supplies to defray your Majesty's public expenses, and making an addition to the public revenue, have freely and voluntarily resolved to give and grant unto your Majesty the several rates and duties herein-after mentioned, and do therefore most humbly beseech your Majesty that it may be enacted; and be it enacted by the Queen's most excellent Majesty, by and with the advice and consent of the Lords spiritual and temporal, and Commons, in this present Parliament assembled, and by the authority of the same, as follows:

1. From and after the passing of this Act any person who, in *England or Ireland*, shall have taken out an excise licence to sell strong beer in casks containing not less than four and a half gallons or in not less than two dozen reputed quart bottles at one time, to be drunk or consumed elsewhere than on his premises, may take out an additional licence on payment of the excise duty of one pound one shilling, and five per cent. thereon; and the same shall authorize such person to sell beer in any less quantity, and in any other manner than as aforesaid, but not to be drunk or consumed on the premises where sold; and such

additional licence shall be granted without the production of any certificate or the possession of any other qualification than the licence herein first mentioned.

2. From and after the tenth day of *October* one thousand eight hundred and sixty-three there shall be charged and paid for and upon every excise licence to be taken out by any person who in *England* or *Ireland* shall be duly authorized by Justices of the Peace to keep a common inn, alehouse, or victualling house, and who shall sell beer, cider, or perry by retail, to be drunk or consumed in his, her, or their house or premises, and who shall not take out a licence to retail spirits, the excise duty of three pounds three shillings, and five *per cent.* thereon, in lieu of the duty now payable on such licence to retail beer.

3. Every person who shall in *Ireland* sell beer, cider, or perry by retail, that is to say, in any quantity less than four and a half gallons or in less than two dozen reputed quart bottles at one time, without having an excise retail licence in force authorizing him so to do, shall for every such offence forfeit the sum of twenty pounds, which said penalty may be sued for and recovered under the laws of excise, by and in the name of any superintendent or inspector of police within the police district of *Dublin* Metropolis, or by any sub-inspector, head or other constable, in any other part of *Ireland*, without any order of the Commissioners of Inland Revenue for that purpose, as well as by and in the name of an officer of excise, under the order of the said commissioners.

4. The duties of excise on sugar made in the United Kingdom, specified in Schedule (B.) of the Act passed in the twentieth and twenty-first years of her Majesty's reign, chapter sixty-one, shall be continued, and be levied and charged until the first day of *August* one thousand eight hundred and sixty-four.

5. 'And whereas by an Act passed in the nineteenth and twentieth years of her Majesty's reign, chapter thirty-four, a duty of excise was imposed on sugar used in the brewing or making of beer, and by an Act passed in the twenty-fifth and twenty-sixth years of her Majesty's reign, chapter twenty-two, the charging of the said duty was deferred until the first day of *July* one thousand eight hundred and sixty-three, and it is expedient to further defer the same:' Be it enacted, that the charging of the said duty of excise on sugar used as aforesaid shall be further deferred until the first day of *August* one thousand eight hundred and sixty-four.

6. From and after the passing of this Act the duties now payable by law for and in respect of the licences and stage carriages herein after in this clause described shall be reduced; and in lieu of the said duties now payable as aforesaid there shall be charged and paid in *Great Britain* for and in respect of every original licence, to be taken out yearly, to keep, use, or employ a stage carriage which shall be licensed to carry not more than eight passengers at one time, the duty of ten shillings; and for and in respect of every supplementary licence for the same carriage which shall be taken out in any case allowed by law during the period for which such original licence was granted, the duty of sixpence;

And for and in respect of every mile which any such stage carriage as aforesaid shall be licensed to travel, the duty of one halfpenny.

7. If any person who shall have obtained a licence under this Act to keep, use, and employ a stage carriage to carry not more than eight passengers at one time shall carry or convey in or upon such carriage more than eight passengers at one time, he shall for every such offence forfeit the sum of ten pounds; and every person who shall be carried or conveyed in or upon any such carriage (except the driver thereof) shall be deemed to be a passenger conveyed for hire at a separate fare.

8. It shall be lawful for the Commissioners of Inland Revenue, whenever they shall deem it to be necessary for the accommodation of the public, to grant to any person an occasional licence to use a carriage for the conveyance of passengers at separate fares for one day, or for any longer period not exceeding six days in the whole, on payment of the following duties for and in respect of such licence; (that is to say,)

For a Licence for one day only:	£	s.	d.
For a carriage drawn by one horse only	0	3	0
For a carriage drawn by two horses and no more	0	5	0
For a carriage drawn by more than two horses	0	10	0

And where any such licence shall be granted for a longer period than one day there shall be charged and paid for the same the further duty of one half of the before-mentioned rates respectively for every day after the first, in addition to the rate payable for one day.

9. Every such occasional licence to use a carriage for the purpose aforesaid shall be granted under and subject to such conditions, rules, and regulations as the Commissioners of Inland Revenue shall prescribe in that behalf, and the carriage for which such licence shall be granted shall be designated in such manner as the said commissioners shall require or direct; and in default of complying with any such rule, regulation or direction the person to whom such licence shall be granted shall forfeit the sum of ten pounds.

10. 'Whereas by the law in force licences to keep, use, and employ stage carriages expire on the first *Sunday* in the month of *October* in each year, and it is expedient to alter the time of the expiration thereof:' Be it enacted, that all such licences taken out after the passing of this Act shall (except in the cases herein-after provided for) expire on the first *Sunday* in the month of *November* in each year; and every licence which shall be taken out after the first *Sunday* in the month of *November* in any year, and before the first day of *December* in the same year, shall be dated on the first *Monday* in *November* in the year in which the same shall be granted; and if taken out on or at any time after the first day of *December* in any year, shall be dated on the day when the same shall be granted; and every licence to use a stage carriage in force at the time of the passing of this Act shall continue in force until the first *Sunday* in the month of *November* next after the passing hereof, and the holder of such licence shall be liable to and chargeable

with the payment of the same rate and amount of duties as are chargeable upon him according to the terms of such licence until the said first *Sunday* in the last-mentioned month of *November*, unless such licence shall be sooner discontinued.

11. Provided always, that it shall be lawful for any person to take out a licence to keep, use, and employ a stage carriage for the conveyance of passengers at separate fares for the period of three months only, commencing on any of the several quarter days following, (that is to say,) the first day of *April*, the first day of *July*, the first day of *October*, and the first day of *January* in any year, paying for such licence one fourth part of the duty which would be payable for the granting of such licence for one whole year; provided also, that nothing in this Act contained shall extend or be construed to repeal or supercede the provisions of the seventeenth section of the Act passed in the sixth year of King *George* the Fourth, chapter eighty-one, authorizing the granting of excise licences for the remainder of a current year, but that such provisions shall be deemed to apply and shall be observed with regard to stage carriage licences for the remainder of any year ending on the first *Sunday* in *November*; and the several quarters corresponding with the termination of such year shall be deemed to consist of ninety-one days.

12. When any person to whom any licence shall have been granted for or in respect of any stage carriage shall discontinue the business in relation to such stage carriage, it shall be lawful for the proper officer or officers of excise, upon payment of all duty in arrear due from the person to whom the licence was granted, to transfer such licence to any other person to whom the original holder thereof shall assign his interest therein; and the person to whom such licence shall be so transferred shall thereupon be liable to and chargeable with the payment of the duty which shall accrue or become payable under such licence, or in respect of the stage carriage to which the same shall relate, and shall also be liable to all other the provisions and regulations contained in any Act relating to stage carriages in the same manner as if such last-mentioned person had duly obtained a licence in his own name for the keeping, using, and employing of such stage carriage: Provided always, that the original holder of such licence shall indorse in writing upon the back thereof the name of the person to whom he assigns his interest therein, and shall sign his own name to such indorsement.

13. 'Whereas by the fourth section of the Act passed in the fifth and sixth years of her Majesty's reign, chapter seventy-nine, the proprietor or company of proprietors of every railway in *Great Britain*, and other persons therein named, are required to keep and render certain accounts as therein mentioned, and it is expedient to alter the period for which such accounts are directed to be made up, and the time of delivering the same:' Be it enacted, that the proprietor or company of proprietors of every railway in *Great Britain*, and the persons required by law to keep such accounts as aforesaid, shall deliver to the Commissioners of Inland Revenue or to the proper officer appointed for receiving the same, within twenty days after the termination of every calendar month, a true copy or

true copies of the accounts of all sums of money received or charged and paid or accounted for, as in the said Act is mentioned, during the whole of the calendar month last preceding; and all the provisions and regulations contained in the said Act with regard to the accounts therein directed to be rendered, and all bonds and securities entered into or given or to be entered into or given with relation thereto, shall apply, continue, and be in force as well with respect to any surety as to the principal in any such bond, and to the accounts to be kept and rendered at the time and in the manner by this Act directed, and the duties payable in respect thereof.

14. The exemption from duty granted by the ninth section of the Act passed in the seventh and eighth years of her Majesty's reign, chapter eighty-five, in respect of the conveyance of passengers by cheap trains shall not extend to any railway train which shall not be a train running on at least six days of the week, or else a train running to or from a market town on a market day, and approved of by the Lords of the Committee of Privy Council for Trade and plantations as a cheap train for the conveyance of passengers to or from market, or a train approved by the said Lords of the Committee of Privy Council as an ordinary train of the railway travelling on *Sunday* and conveying third-class passengers at fares not exceeding one penny per mile.

15. 'Whereas under the laws of excise now in force separate and distinct licences are granted to the same person to exercise several trades in the same house and premises, and it is expedient that the authority to exercise two or more of such trades should be combined in one licence:' Be it enacted, that whenever any person shall intend to carry on two or more trades under the excise laws in the same house or premises the licences for which several trades would expire by law at the same time, it shall be lawful for the Commissioners of Inland Revenue, in such cases as they shall think fit, to authorize the exercising of the said several trades by one licence for that purpose on payment of the amount of the several duties chargeable for several licences to exercise the same trades respectively.

16. If any person who shall have given notice of his intention to ship any goods or commodities for exportation on drawback shall give another such notice in respect of the same goods or commodities, or shall claim the drawback upon the same goods and commodities more than once, or shall pass any account or do any act for the purpose of obtaining any further or greater amount of drawback upon any such goods or commodities than the drawback payable by law thereon, or whereby or by means or colour whereof any such further or greater amount of drawback than as aforesaid may be obtained or claimed, he shall forfeit for every such offence the sum of one hundred pounds, and treble the amount of the drawback unlawfully obtained or claimed, or which might be obtained or claimed by means or under colour of any such unlawful act as aforesaid.

17. If any goods or commodities upon the exportation of which a drawback of excise is payable shall after the same shall have been shipped on board any vessel for exportation be brought on shore, or if the package

or packages in which any such goods or commodities shall be contained shall, after shipment thereof as aforesaid, be opened, or the marks, letters, or devices thereon be cancelled, obliterated, or altered without the sanction of the Commissioners of Inland Revenue first had and obtained all such goods and commodities and the packages containing the same shall be forfeited, and may be seized by any officer of customs or excise, and the person or persons who shall bring on shore such goods or commodities, or who shall open such packages, or cancel, obliterate, or alter the marks, letters, or devices thereon, or who shall be concerned in doing any of the said acts, shall forfeit the sum of one hundred pounds.

18. Every licence taken out under the provisions contained in the two several Acts passed in the twenty-third and twenty-fourth years of her Majesty's reign, chapter twenty-seven and chapter one hundred and seven respectively, by a licensed keeper of a refreshment house, to sell therein by retail foreign wine, to be consumed in such house or on the premises belonging thereto, shall authorize and include the sale of, sweets and made wines, mead, and metheglin, by retail to be consumed in the said house or on the said premises.

19. In lieu of the duty now chargeable on victualler's occasional licence, specified in schedule (B.) of the Act passed in the twenty-fifth and twenty-six years of her Majesty's reign, chapter twenty-two, there shall be charged and paid the following duty; (that is to say,)

For and upon every occasional licence to be granted to any person who shall be duly authorized to keep a common inn, alehouse, or victualling house, and licensed to sell therein beer, spirits, wine, or tobacco, to sell the like articles for which he shall be so licensed at any such other place, and for and during such space or period of time not exceeding six days as shall be specified in such occasional licence, the sum of two shillings and sixpence for every day so specified as aforesaid for which the same shall be granted:

Provided always, that when any person shall have taken out such an occasional licence for six successive days, and shall desire to take out another occasional licence for a time in immediate succession, or only separated by the intervention of *Sundays* and holidays, then the duty chargeable for every licence after the first, and for any number of days not exceeding six, shall not exceed ten shillings.

20. 'Whereas it is expedient to alter and amend the conditions and restrictions upon and under which occasional licences to sell beer, spirits, or wine may be granted and used, as provided by the thirteenth section of the Act passed in the twenty-fifth and twenty-sixth years of her Majesty's reign, chapter twenty two: Be it enacted as follows:

1. That the consent of one justice of the peace, as in the said section mentioned, only, shall be necessary:
2. That the hours during which such occasional licence shall authorise the sale of any beer, spirits, or wine shall extend from sun-rise to one hour after sunset:
3. That upon the occasion of any public dinner or ball it shall be lawful for the person who shall

have obtained an occasional licence under the provisions of the said Act to sell the said liquors during such hours before or after sun-rise or sunset as shall be allowed and specified in that behalf in the consent to be given by the justice of the peace for the granting of such occasional licence.

21. 'Whereas by the twelfth section of the Act passed in the last session of parliament, chapter twenty-two, so much of any Act as permits the sale of beer, spirits, or wine at fairs or races without any excise licence was repealed: Be it enacted, that from and after the passing of this Act nothing in the last-recited enactment contained shall extend to prohibit any person duly licensed by the excise to retail beer, spirits, or wine, as in the eleventh section of the Act passed in the sixth year of King *George the Fourth*, chapter eighty-one, is mentioned, from carrying on his trade or business for which he shall be so licensed in booths, tents, or other places at the time and place and within the limits of holding any lawful and accustomed fair by virtue of any law or statute in that behalf, or any public races, in like manner as such person might lawfully have done under the said last-mentioned Act if the said Act of the last session of parliament had not been passed.

22. 'Whereas the assessment committee provided for by "The county rates assessment Act," section fifty-two, and by "The union assessment committee Act, 1862," respectively, are thereby empowered to require assessors, collectors, and other persons therein mentioned to make and transmit copies of or extracts from the books of assessment of any taxes or rates in their custody, and to produce such books as therein mentioned: Be it enacted, that nothing in this Act contained shall extend to authorize or empower the said committee to require any assessor collector, or other person employed in the assessment or collection of the income tax to make or transmit or to permit any other person to make copies of or extracts from any assessment, rate, or rate book, or any document relating to the assessment or collection of the income tax upon profits of trade for or in respect of any quarries, mines, ironworks, gasworks, or other concerns in the nature of trade or manufacture chargeable under schedule (A.) of the income tax Acts, or to attend before the said committee to produce any such assessment, rate, or rate book, or other such document as aforesaid, or to be examined by or before such committee touching or concerning the same.

23. It shall be lawful for the commissioners acting in execution of the Acts relating to the land tax, the assessed taxes, and the income tax respectively, for any district or division of a county, to sit and hold their meetings, and do any Act in execution of the said Acts respectively as such commissioners as aforesaid, at any place within any city, town, or other precinct, being a county of itself, or otherwise having exclusive jurisdiction, and situated within, surrounded by, or adjoining to their respective districts or divisions; and all such acts, matters, and things to be so done by such commissioners, within such city, town, or precinct, as commissioners acting for such district or division, shall be as valid and effectual in law as if the same had been done within such district or division.

24. 'And whereas by an Act passed in the present session of parliament, intituled *An Act to give further facilities to the holders of the public stocks*, certificates of title to shares in the public stocks are authorized to be issued having annexed coupons entitling the bearer to the dividends payable in respect thereof, and by section eleven of the same Act it is enacted that the income tax shall be deducted from any coupons payable under the said Act in like manner as it may be deducted from the dividends payable at the bank in respect of the stock of proprietors inscribed in the books of the bank: Be it enacted, that the income tax shall be deducted from any such coupons as aforesaid, although the half-yearly payment thereon shall not amount to fifty shillings, anything in any former Act to the contrary notwithstanding.

25. Whereas by the law in force licences to deal in or sell tobacco or snuff expire on the fifth day of July in each year, and it is expedient to alter the time of the expiration of such licences taken out for the sale of tobacco or snuff in inns or houses licensed for the sale of beer by retail to be consumed upon the premises: Be it enacted, that all such licences aforesaid taken out by innkeepers or persons licensed to sell beer to be consumed upon the premises after the fifth day of July next after the passing of this Act, and before the eleventh day of October one thousand eight hundred and sixty-four, shall be and continue in force until the said last mentioned day; and all such licences which shall be taken out on or after the said last-mentioned day shall expire on the tenth day of October next after the granting thereof; and every such licence as aforesaid which shall be in force at the time of the passing of this Act, or which shall be taken out on or before the said fifth day of July, shall continue in force until the eleventh day of October next after the passing hereof; and in respect of every such licence as aforesaid which shall be in force between the fifth day of July and the eleventh day of October next after the passing of this Act there shall be charged and paid in respect of the said last-mentioned period, and in addition to the duty paid or payable thereon, the duty for one quarter of a year, and such additional duty shall be recoverable in like manner as any other duty of excise.

26. All the powers, provisions, clauses, regulations, forfeitures, pains, and penalties contained in or imposed by any Act or Acts relating to any duties of the same kind or description as the several rates or duties granted by this Act respectively, and in force at the time of the passing of this Act, and not hereby expressly repealed, shall respectively be in full force and effect with respect to the said rates and duties by this Act granted respectively, so far as the same are or shall be applicable, in all cases not hereby expressly provided for, and shall be observed, applied, enforced, and put in execution for and in the raising, levying, collecting, and securing of the said last-mentioned rates and duties, and otherwise in relation thereto, so far as the same shall not be superseded by and shall be consistent with the express provisions of this Act, as fully and effectually to all intents and purposes as if the same had been herein repeated and specially enacted, *mutatis mutandis*, with reference to the rates and duties by this Act granted respectively.

CAP. XXXIV.

An Act to carry into effect an additional article to the treaty of the seventh day of April one thousand eight hundred and sixty-two, between her Majesty and the United States of America, for the suppression of the African slave trade. [29th June 1863.]

- Sec. 1. *Where right of search may be exercised.*
 2. *Additional article to have the same force &c. as the treaty.*
 3. *This and Acts of 1862 to be read as one.*
 4. *Short title.*

'WHEREAS on the seventh day of April in the year of our Lord one thousand eight hundred and sixty-two a treaty was concluded and signed at Washington, between her Majesty the Queen of the United Kingdom of Great Britain and Ireland and the United States of America, for the suppression of the African slave trade: and whereas by the first article of such treaty it was stipulated and agreed that those ships of the respective navies of the two high contracting parties which shall be provided with special instructions for that purpose as therein-after mentioned may visit such merchant vessels of the two nations as may upon reasonable grounds be suspected of being engaged in the African slave trade, or of having been fitted out for that purpose, or of having, during the voyage on which they are met by the said cruisers, been engaged in the African slave trade, contrary to the provisions of the said treaty, and that such cruisers may detain and send or carry away such vessels in order that they may be brought to trial in the manner therein-after agreed upon: and whereas it was by the said article further stipulated and agreed that the reciprocal right of search and detention should be exercised only within the distance of two hundred miles from the coast of Africa, and to the southward of the thirty-second parallel of north latitude, and within thirty leagues from the coast of the Island of Cuba: and whereas the two high contracting parties have agreed that the reciprocal right of visit and detention as defined in the article aforesaid may be exercised also within thirty leagues of the Island of Madagascar, within thirty leagues of the Island of Puen to Rico, and within thirty leagues of the Island of San Domingo: and whereas the high contracting parties have further agreed that the present additional article shall have the same force and validity as if it had been inserted word for word in the treaty concluded between the two high contracting parties of the seventh of April one thousand eight hundred and sixty-two, and shall have the same duration as that treaty, and that it shall be ratified, and the ratifications shall be exchanged at London in six months from this date, or sooner if possible. In witness whereof the respective plenipotentiaries have signed the same, and have thereunto affixed the seal of their arms. Done at Washington the seventeenth day of February in the year of our Lord one thousand eight hundred and sixty-three.

(L.S.) LYONS.

(L.S.) WILLIAM H. SEAWARD.

And whereas ratifications were exchanged at London on the first day of April one thousand eight hundred and sixty-three: and whereas it is expedient that provision should be made for giving effect to the present

additional article: 'Be it therefore enacted by the Queen's most excellent Majesty by and with the advice and consent of the lords spiritual and temporal, and commons in this present parliament assembled, and by the authority of the same as follows:

1. The reciprocal right of search and detention as defined in the first article of the said treaty may be exercised also within thirty leagues of the Island of *Madagascar*, within thirty leagues of the Island of *Puerto Rico*, and within thirty leagues of the Island of *San Domingo*.

2. The present additional article shall have the same force and validity, as if it had been inserted in the treaty concluded between the two high contracting parties on the seventh of April one thousand eight hundred and sixty-two, and shall have the same duration as that treaty.

3. This Act and the *African slave trade treaty Acts*, Nos. 1 and 2, 1862, shall be read and construed as one Act.

4. This Act may for all purposes be cited as the "*African slave trade treaty Act, 1863.*"

CAP. XXXV.

An Act for the prevention and punishment of offences committed by her Majesty's subjects in *South Africa*.
[29th June 1863.]

CAP. XXXVI.

An Act for carrying into effect the report of the commissioners appointed to inquire into the state of the dioceses of *Canterbury*, *London*, *Winchester*, and *Rochester*; and for other purposes.
[29th June 1863.]

CAP. XXXVII.

An Act to defray the charge of the pay, clothing, and contingent and other expenses of the disembodied militia in *Great Britain* and *Ireland*; to grant allowances in certain cases to subaltern officers, adjutants, paymasters, quartermasters, surgeons, assistant surgeons, and surgeons mates of the militia; and to authorize the employment of the non-commissioned officers.
[29th June, 1863.]

- Sec. 1. *Secretary of State for War* to issue the money required for pay, &c. of regular militia, as herein stated.
2. *Adjutant*, &c. to reside where the *Secretary of State for War* shall appoint.
3. *Adjutants*, *quartermasters*, and *non-commissioned officers* of militia may be employed in their counties.
4. *Quartermaster*, &c. to have charge of the arms and clothing. *Adjutant* to issue the money for contingent expenses on an order signed by the colonel. Balance to form a stock purse. Power to *Secretary of State for War* to order arms, &c. to be deposited in *War Office* stores while disembodied.
5. In absence of the adjutant, the serjeants to be under the command of the quartermaster; and in his absence, of the serjeant major.

6. *Militia*, when called out for training or exercise, entitled to pay, &c. as herein stated.
7. *Volunteers* attached to regiments of the line to be subject to the *Mutiny Act*.
8. *Certain officers* unfit for duty entitled to an allowance, upon making the following declaration. Form of declaration.
9. *Out-pension* to reduced non-commissioned officers and drummers not to be received while serving.
10. *Persons on half pay*, or entitled to allowance as having served in the army or navy, empowered to receive pay, &c. during training.
11. *Adjutants*, &c. non-commissioned officers, or privates, not to lose their right to *Chelsea* or *Kilmainham* pensions, &c.
12. Allowance to be made for medicines.
13. *Reduced adjutants* to receive 4s. per day till 31st July, 1864. Right to half pay reserved.
14. Allowance to adjutants, surgeons, and quartermasters.
15. Allowances granted to adjutants on completion of certain periods of service.
16. Restrictions as to allowances to reduced adjutants of the local militia.
17. A declaration to be taken by adjutants of local militia claiming the said allowance.
18. Allowance to clerks of general meetings, &c.
19. Manner of granting allowances. Clerks, &c. to make declaration of the justness of their accounts.
20. *Deputy lieutenants* may require the attendance of any surgeon residing near the place of meeting for appeal. Declaration to be made by surgeon. Allowance to surgeon.
21. Pay, &c. to be issued under direction of the *Secretary of State for War*.
22. *Bills* drawn for pay, &c. may be on unstamped paper.
23. No fee to be taken.
24. All things in this Act relating to counties shall extend to ridings, &c.
25. Continuance of Act.

'WHEREAS it is necessary that provision should be made for defraying the charge of the pay, clothing, and contingent and other expenses of the regular militia, and of the miners of *Cornwall* and *Devon*, when disembodied, in *Great Britain* and *Ireland*; and for making in certain cases allowances of retired pay to subaltern officers and surgeons mates and assistant surgeons of the regular militia, and of the miners of *Devon* and *Cornwall*, also to adjutants, paymasters, surgeons and quartermasters of the regular militia who have been allowed to retire, and to adjutants disabled after long service: Be it therefore enacted by the Queen's most excellent Majesty, by and with the advice and consent of the lords spiritual and temporal, and commons, in this present Parliament assembled, and by the authority of the same, as follows:

1. The secretary of the state for war for the time being shall cause to be issued and paid the whole sum required for the regular militia of *Great Britain* and *Ireland* (when disembodied), in the manner and for the several uses hereinafter mentioned; (that is to

say,) for the pay of the said regular militia at the daily rates following; (that is to say)

	Infantry.			Artillery.		
	£	s.	d.	£	s.	d.
For each Adjutant -	0	10	0	0	10	0
„ Quartermaster, where one appointed in corps consisting of not less than 360 private men -	0	5	0	0	5	0
and of less than 360 private men -	0	3	6	0	3	6
„ Serjeant major, where one is appointed in corps consisting of two or more companies -	0	3	0	0	3	6
„ Quartermaster serjeant in corps whose establishment exceeds four companies -	0	2	6	0	2	10
and for the serjeant performing the duty of both quartermaster serjeant and paymaster serjeant (in corps consisting of four companies or less) -	0	2	6	0	2	10
„ Serjeant instructor of musketry or gunnery -	0	1	10	0	2	6
„ Paymaster serjeant (in corps whose establishment exceeds four companies) -	0	1	10	0	2	6
„ Serjeant, orderly room clerk, drum major, or bugle major -	0	1	10	0	2	6
Drummer, trumpeter, or bugler, above sixteen years of age -	0	1	1	0	1	3
and if under sixteen years of age -	0	0	10	0	0	10

Provided always, that when any non-commissioned officer, drummer, trumpeter, or bugler shall be absent on furlough or licence, he shall during such absence receive sixpence *per diem* less than the above mentioned rates respectively:

And also at rates varying from two shillings to sixpence *per annum* for each private man for defraying the contingent expenses of each regiment, battalion, or corps when enrolled:

And the secretary of state for war for the time being shall give the necessary instructions for the provision of clothing for each serjeant major, serjeant, and drummer, trumpeter, or bugler on the disembodied staff of the militia of *Great Britain and Ireland* who shall be resident at head quarters, and the said disembodied staff shall be entitled to be clothed once in two years.

2. Except when employed as hereinafter provided, every adjutant, quartermaster, non-commissioned officer, and drummer, trumpeter, or bugler on the staff of the regular militia, when disembodied, shall reside in such places as shall be sanctioned by the secretary of state for war, and every such adjutant, quartermaster, non-commissioned officer, and drummer, trumpeter, or bugler, shall forfeit his pay for any period during which he shall be absent, except when employed as hereinafter provided, or when absent by leave from the colonel or commanding officer of the regiment,

battalion, or corps, which leave shall not, except in case of certified sickness, extend beyond three calendar months in one year, nor to a greater proportion than one third of the non-commissioned officers, and drummers, trumpeters, or buglers at the same time:

3. Every adjutant, quartermaster, and non-commissioned officer of the regular militia, when disembodied, and not called out for training or exercise, shall be liable to be employed within the county to which the regiment, battalion, or company of the said militia staff belongs, under the officers appointed to pay and superintend the out pensioners of *Chelsea Hospital*, in such manner as one of her Majesty's principal secretaries of state may determine: Provided always, that the senior officer shall have the command of the force so employed.

4. The quartermaster of each regiment of militia in which a quartermaster is appointed and receives daily pay under the provisions of the first section of this Act, and when no quartermaster is appointed, then the adjutant of each regiment of Militia shall have the charge and care of the arms, accoutrements, great coats, clothing, necessaries, and other stores thereof, under the superintendence of the colonel or commandant; and the adjutant shall, out of the allowance directed by this Act to be issued and paid for defraying the contingent expenses of such regiment, battalion, or corps, from time to time issue and pay such sums of money as may be necessary for the repair of arms, and other usual contingent expenses, upon an order in writing signed by the colonel or other commandant; and after payment of such sums as aforesaid he shall three times in the year make up accounts of all such money, and of the expenditure thereof, showing the balance remaining in his hands (which said balance shall form a stock purse for the use of the regiment, battalion, or corps), and shall transmit same to the colonel or other commandant of such regiment, battalion, or corps, to be by him examined, allowed, and signed; and the said accounts, so allowed and signed, shall be the proper vouchers and acquittal of such adjutant for the application and disposal of such money: Provided always, that it shall and may be lawful for the secretary of state for war to order and direct that the arms, accoutrements, and other stores, or any part thereof, belonging to any regiment, battalion, or corps of militia of the United Kingdom, shall at any time, while such regiment, battalion, or corps shall not be embodied or in actual service, be conveyed to and deposited and kept in any of her Majesty's war office stores.

5. In the occasional and unavoidable absence of the adjutant from the city, town, or place where the disembodied staff is quartered, or during any vacancy in the appointment of adjutant, the serjeants and drummers, trumpeters, or buglers, shall be under the command of the quartermaster in cases in which one is appointed; and when no quartermaster is appointed or is present, then under the command of the serjeant major or of some serjeant who shall be appointed by the said adjutant, with the approbation of the colonel or other commanding officer, to act as serjeant major during the absence of such adjutant and quartermaster; and the said quartermaster and serjeant major or acting serjeant major shall render the same returns

and perform such other acts as are by law required from the adjutant.

6. The officers and volunteer non-commissioned officers and private men of the regular militia shall, for the period or periods during which they shall be called out for the purpose of exercise or training, be entitled to the following daily rates of pay and allowances:

	Infantry.			Artillery.		
	£	s.	d.	£	s.	d.
Colonel - - - -	1	2	6	1	2	6
Lieutenant-colonel - - -	0	15	11	0	15	11
Major - - - -	0	14	1	0	14	1
Captain (including non-effective allowance, - - - -)	0	10	6	0	10	6
Lieutenant - - - -	0	6	6	0	6	6
Ensign - - - -	0	5	3	0	5	3
Adjutant, if acting also as paymaster in corps consisting of four companies and upwards - -	0	3	9	0	3	9
„ if acting also as paymaster in corps consisting of less than four companies - -	0	2	6	0	2	6
„ if acting also as paymaster and quartermaster in corps consisting of four companies and upwards - -	0	7	0	0	7	0
„ if acting also as paymaster and quartermaster in corps consisting of less than four companies - -	0	4	6	0	4	6
Quartermaster (if not holding a subaltern's commission, nor on the permanent staff) - -	0	6	6	0	6	6
„ (if holding a subaltern's commission, and if not on the permanent staff) - -	0	3	6	0	3	6
Quartermaster (if on the permanent staff in corps not less than 360 private men) - -	0	1	6	0	1	6
„ (if on the permanent staff in corps of less than 360 private men) - -	0	3	0	0	3	0
Surgeon - - - -	0	11	4	0	11	4
Assistant surgeon - - -	0	7	6	0	7	6
Serjeant instructor of musketry or gunnery, in addition to the daily rate of pay granted by sec. 1 -	0	1	0	0	1	0
Serjeant (not on the permanent staff) - - - -	0	1	6½	0	2	6
Corporal - - - -	0	1	2½	0	1	4½
Private - - - -	0	1	0	0	1	2
Command allowance to the officer actually in command during training and exercise, if the pay of colonel is not drawn -	0	3	0	0	3	0
Beer-money to each non-commissioned officer, drummer, and private present at training and exercise - - - -	0	0	1	0	0	1

7. Volunteers shall with the sanction of the secretary of state for war, when attached to regiments of the line to qualify themselves for the permanent staff, either as serjeants or drummers, trumpeters or buglers, be allowed pay whilst so under instruction, but while

they remain so attached they will be under the command of the officer commanding the regiment of the line equally with the soldiers of that regiment, and will be subject to the provisions of the Mutiny Act

8. 'And whereas certain lieutenants, ensigns, and surgeons mates of the militia of *Great Britain*, or subaltern officers and assistant surgeons of the militia of *Ireland*, when unfit for further duty, have been placed upon a retired allowance equal to and instead of the allowance, granted to them on the disembodiment of the militia at the termination of the war in the year one thousand eight hundred and fifteen: And whereas certain paymasters, surgeons, and quartermasters, when unfit for duty, have also been placed on a retired allowance equal to and instead of their reduced allowances granted to them in pursuance of an Act passed in the tenth year of the reign of his Majesty king *George the fourth*:' All such paymasters, surgeons, quartermasters, subalterns, surgeons mates, and assistant surgeons to entitle them to the receipt of such retired allowances, shall make and subscribe the following declaration; (*videlicet*)

I do solemnly and sincerely declare, that I formerly served as a _____ in the militia; that I am not in holy orders; and that from the day of _____ to the day of _____ I did not hold or enjoy any place or employment of profit, civil or military, under her Majesty, or in the colonies or possessions of her Majesty beyond the seas, or under any other government, besides my allowance of per diem as a _____ of the said militia, except my half pay or civil pension as a _____.

9. 'And whereas certain non-commissioned officers and drummers of the militia of the United Kingdom of *Great Britain* and *Ireland* have, on the reduction of the establishment of the disembodied staff, been placed on the out-pension, although not unfit for further service:' No non-commissioned officer or drummer so placed on pension shall be entitled to receive the said pension for any period during which he shall be receiving pay in the militia.

10. Provided always, that any person, being on naval or military half-pay, or being entitled to any allowance as having served in any of her Majesty's regular forces or navy or marines, and serving in the militia, may receive the pay and allowances by this Act directed to be paid to the field officers, captains, lieutenants, ensigns, adjutants, quartermasters, surgeons, surgeons mates, and assistant surgeons, when assembled for annual training; and the receiving any such pay and allowances by any such field officer, captain, lieutenant, ensign, adjutant, quartermaster, surgeon, surgeon's mate, or assistant surgeon, shall not prevent such person on half pay, or being entitled to any such allowance, from receiving his half pay or such allowance: Provided also, that such person shall, in the declaration to be taken for the receipt of the half pay or such allowance, declare that he has received or is entitled to such militia pay and allowances, and shall specify the militia rank which entitles him to the same.

11. Provided always, that no adjutant, quartermaster, non-commissioned officer, drummer, trumpeter, or bugler, or private man, in the regular militia, entitled to receive any *Chelsea* or *Kilmainham* pen-

sion or allowance on account of service in the regular army, shall forfeit or lose his right to the same by reason of his serving and receiving pay in the regular militia; nor shall any quartermaster, subaltern officer, surgeon's mate, or assistant surgeon forfeit or lose his right to receive any such *Chelsea* or *Kilmainham* pension or allowance by reason of his receiving the allowance by this Act granted to him when disembodied.

12. There shall be granted for each regiment of regular militia, when disembodied, a sum of money after the rate of one guinea for every one hundred men of each such regiment, for the expense of necessary medicines for the sick non-commissioned officers, drummers, fifers, and private men of such regiment, and the wives and families of the non-commissioned officers, drummers, buglers, and trumpeters of the permanent staff, during the period or periods of assembly for exercise or training, and also an allowance of two pence per week for each of the non-commissioned officers and their families of each regiment on the disembodied staff at head quarters, for the expense of necessary medicines and attendance given to the said non-commissioned officers and their families while such regiment is not called out for training and exercise.

13. In case any regiment, battalion or corps of militia shall have already ceased and determined or been reduced in its establishment, or shall cease and determine or be reduced in its establishment, during the continuance of this Act, the sum of four shillings *per diem* shall be paid to such person as was or shall be actually serving as adjutant to such regiment, battalion, or corps at the time of reduction, from the thirty-first day of *July*, one thousand eight hundred and sixty-three, or from the time such regiment shall cease and determine or be reduced in its establishment (as the case may be), to the thirty-first day of *July* one thousand eight hundred and sixty-four, in like manner and subject to the same conditions and restrictions as the allowances granted by this Act to adjutants who shall by age or infirmity be rendered unfit for further service: Provided always, that no such reduced adjutant shall lose any right he may have to half-pay of the navy, army, marines, or provisional battalion formed from the militia by reason of receiving such allowance as last aforesaid, but shall be entitled to receive such half pay as well as such allowance.

14. 'And whereas certain allowances have been granted in pursuance of former Acts to adjutants, surgeons, and quartermasters of regular militia who have by age or infirmity been rendered unfit for further service:' Such allowances shall be issued and paid, during the continuance of this Act, in like manner and subject to the same restrictions as the allowances granted by this Act to adjutants who shall by age or infirmity be rendered unfit for further service: Provided always, that no person receiving such allowance shall by reason thereof forfeit his right to any half pay to which he may be entitled.

15. The following allowances shall be granted and paid, under the restrictions and limitations hereinafter expressed, to adjutants of the militia of *Great Britain* and *Ireland*, on the completion of the following periods of service in her Majesty's regular or *Indian* forces, or in the army of the *East India* Company, and in the

militia, if unfit, either by age or infirmity, for the performance of the duties of their commissions; (that is to say,)

To every adjutant who shall have completed in the service a period of (*videlicet*)

Fifteen years, of which five years as an adjutant of militia, an allowance of three shillings *per diem*:

Twenty years, of which seven years as an adjutant of militia, an allowance of four shillings *per diem*:

Twenty-five years, of which ten years as an adjutant of militia, an allowance of five shillings *per diem*:

Thirty years, of which fifteen years as an adjutant of militia, an allowance of six shillings *per diem*:

Provided, that such adjutants shall retain any right they may have to half pay or to out pension, notwithstanding the grant of such retired allowances as aforesaid; and all such allowances shall be granted upon the production to the secretary of state for war of a certificate of such service and disability; and upon the order of the secretary of state for war, founded upon such certificate, the paymaster general shall pay to such adjutant the above allowance: Provided always, that no person shall be entitled to receive such allowance as aforesaid who shall hold any military office or employment of profit under her Majesty or any other government; and that no person who before the first day of *June* one thousand eight hundred and twenty-nine, held any civil place or employment of profit under the Crown, or in the colonies or possessions of her Majesty beyond the seas, or under any other government, shall receive any part of the said allowance for any time during which he held such civil place or employment, except in the cases in which the emoluments of such civil place or employment shall not exceed three times the amount of the said allowance, and unless in such excepted cases the royal consent to the holding of such civil place or employment shall have been signified through the secretary of state for war; and that no person appointed on or after the first day of *June* one thousand eight hundred and twenty-nine to any civil place or employment of profit under her Majesty, or in the colonies or possessions of her Majesty beyond the seas, or under any other government, shall receive any part of the said allowance for any time during which he shall hold such civil place or employment.

16. 'And whereas certain allowances have been granted to reduced adjutants of the local militia:' The said allowances shall be issued and paid during the continuance of this Act, under the restrictions and in the manner hereinafter expressed: Provided always, that in the cases in which any such local militia adjutants have been permitted to receive the said allowances whilst holding any civil offices under the Crown, to which offices they had been appointed previously to the twenty-eighth day of *July* one thousand eight hundred and twenty-eight, it shall be lawful to continue the payment of the said allowances under the same regulations and restrictions as those under which the permission was originally granted.

17. Every adjutant of local militia who shall claim

under the authority of this Act to receive any part of the said allowance shall, previous to receiving the same, and in order to entitle himself thereto, take and subscribe a declaration before some one of her Majesty's justices of the peace in the United Kingdom, or notary public, or other officer now by law authorized to administer or receive such declaration, or before some one of her Majesty's ministers, secretaries of embassy, of legation, or consuls abroad, in the words or to the effect following; (that is to say,)

'I, A.B. do solemnly and sincerely declare that I was serving as adjutant in the of local militia at the reduction of the staff of the said militia in one thousand eight hundred and twenty-nine: and that I was not in holy orders during any part of the period for which I now claim to receive an allowance, that is to say, from the day of one thousand eight hundred and to the day of one thousand eight hundred and ; and that I did not hold or enjoy, nor did any person for me hold or enjoy, during any part of the said period, any place, office, or employment of profit, civil or military, under the Crown or any other government, besides the allowance of a day now claimed, except my half pay as a [of the army or navy or marines, or of a provisional battalion formed from the militia, as the case may be].'

Which declaration, so taken and subscribed, shall be produced to the paymaster general of her Majesty's forces by the adjutant claiming the allowance: Provided always, that any adjutant receiving such allowance, and being on naval or military half pay, or entitled to any allowance as having served in any of her Majesty's regular forces, or navy or marines, shall, notwithstanding such militia allowance, be entitled to receive such half pay or allowance.

18. Where the militia is raised by ballot in Great Britain allowances shall be made and issued to the clerks of general and subdivision meetings of lieutenantancy and others mentioned in Schedule A. to this Act for their trouble and expenses in the execution of the laws relating to the militia at the rates mentioned in the same schedule; and where the militia is raised in the United Kingdom otherwise than by ballot, allowances shall be made and issued to the clerks of general meetings for their trouble and expenses in the execution of such laws at the rates mentioned in the schedule B. to this Act.

19. The said allowances shall be granted as follows; (*videlicet*) the account shall be certified by the lieutenant of the county, stewardry, city, or place, or by two or more deputy lieutenants acting for such county, stewardry, city, or place, or by the lord warden of the stannaries of Cornwall and Devon, or by two or more deputy wardens of the stannaries of Cornwall and Devon; and the clerks of general and subdivision meetings in Great Britain, and the schoolmasters, constables, and other officers in Scotland, shall make a declaration as to the justness of the accounts in the following terms respectively, before some justice of the peace; (*videlicet*.)

Declaration of a clerk of general or subdivision meetings.

I, do solemnly declare, that the preceding account, so far as regards my interest therein, is a

just and true account of business performed by me for and in behalf of the public service according to the manner therein set forth; and the sums claimed as disbursed were actually paid by me.'

Declaration of a schoolmaster, constable, or other officer in Scotland.

'I do solemnly declare, that I am the parochial schoolmaster [or constable or other officer] of the district of in the subdivision of the county of ; and that the preceding account is a just and true account of business actually performed by myself for and in behalf of the public service according to the manner therein set forth; and that I was employed on such business the full time therein stated; and that the sums claimed as disbursed were actually paid by me.'

And the said accounts shall be transmitted to the secretary of state for war, who is hereby empowered to issue the allowances according to the rates specified in the respective tables to this Act annexed, or such sums as he shall think reasonable and proper.

20. 'And whereas it is expedient that the deputy lieutenants acting in any subdivision of any county, stewardry, city, or place in Great Britain, and the special deputy wardens acting in any subdivision in the stannaries of the counties of Cornwall and Devon, should be assisted by the advice of a surgeon in deciding upon the appeals of persons claiming to be exempt from compulsory service in the militia by reason of bodily infirmity, and upon the fitness for service of the persons presenting themselves for enrolment: It shall be lawful for any two deputy lieutenants, and they are hereby empowered and required to summon, by two day's previous notice in writing, any competent surgeon residing at or nearest to the place where any meeting for appeals or enrolment shall be held to attend at such meeting; and every such surgeon shall, before he begins any such examination, make the following declaration, which declaration any deputy lieutenant is hereby authorized to administer; (*videlicet*.)

'I do solemnly declare, that I will, to the best of my ability, faithfully and truly report as to the fitness for service of the man or men about to be submitted to my examination, and that I will not receive from any of them any fee or reward whatever for any such examination.'

And every such surgeon shall receive for each day's attendance at such meeting a sum not less than half a guinea nor exceeding two guineas, according to the extent of the duty performed: Provided always, that the accounts and vouchers upon which the said allowances shall be recommended by the deputy lieutenants of the respective subdivisions shall be transmitted to the secretary of state for war, with the accounts of the lieutenantancy clerks, for examination and payment.

21. All sums of money granted for the pay, contingent and other expenses, and for the allowances to the officers and men of the regular and local militia, when disembodied, shall be issued and paid under the direction of the secretary of state for war, by the acceptance of bills or otherwise, according to such regulations as have been or shall be established on that head.

22. All bills, drafts, and orders drawn for pay or allowances under this Act may be drawn upon un-

stamped paper; and no such bill, draft, or order shall be void by reason of being drawn or written on unstamped paper.

23. No fee or gratuity whatsoever shall be given or paid for or upon account of any warrant or sum of money which shall be issued in relation to or in pursuance of this Act.

24. All things in this Act contained relating to counties, and to regiments of militia respectively, shall be construed to extend to all ridings, shires, stewartries, cities, and places, and to all battalions, corps, and independent companies respectively, and to the corps of miners of *Cornwall* and *Devon*.

25. This Act shall take effect and continue in force from the thirty-first day of *July* one thousand eight hundred and sixty-three until the first day of *September* one thousand eight hundred and sixty-four.

SCHEDULES to which this Act refers.

SCHEDULE A.

SCALE OF RATES OF REMUNERATION to the clerks of general and subdivision meetings of lieutenancy in Great Britain, including the clerks of the tower hamlets and the stannaries of *Cornwall* and *Devon*, and to schoolmasters, constables, and other officers in Scotland, for carrying into execution the Acts relating to the militia when the militia are raised by ballot.

SCHEDULE B.

SCALE OF RATES OF REMUNERATION to the clerks of general meetings for any duty they may be required to perform under the Acts relating to the militia, or by her Majesty's secretary of state, or (in Ireland) by the Lord Lieutenant, in execution of the provisions of such Acts when the militia is raised otherwise than by ballot.

CLERKS OF GENERAL MEETINGS.

	Per Annum.		
For trouble in executing the duty required of them, including copyings, correspondence, and stationery:	£	s.	d.
In counties where the quota does not exceed 200	15	0	0
Where the quota is			
Above 200, and not exceeding 400	20	0	0
Above 400, and not exceeding 500	25	0	0
And where the quota exceeds 500, the following additions for every 100 or fractional part of 100:			
Above 500, and not exceeding 1,000	4	0	0
Above 1,000, and not exceeding 2,000	3	0	0
Above 2,000, and not exceeding 3,000	2	0	0
Above 3,000, and not exceeding 4,000	1	10	0
Above 4,000	1	0	0
For conveying and attending any general meeting summoned by the distinct order of the secretary of state, or (in Ireland) of the Lord Lieutenant	2	2	0

The actual expense incurred in printing or advertising, and for postage, may be charged.

CAP. XXXVIII.

An Act to amend the Act for placing the employment of Women, young Persons, and Children in Bleaching Works and Dyeing Works under the Regulations of the Factories Acts. [29th June, 1863.]

23 & 24 Vict. c. 78.

Sec. 1. *Meaning of the words "bleaching works" and "dyeing works" in recited Act. Not to extend to buildings defined by 7 & 8 Vict. c. 15.*

'WHEREAS it is expedient that the employment of women, young persons, and children in calendering works and finishing works should be regulated in the same manner as their employment is regulated in bleaching works and dyeing works by the provisions of the Act of the twenty-third and twenty-fourth years of *Victoria*, chapter seventy eight: And whereas such was the intention of Parliament in passing that Act: Be it therefore enacted by the Queen's most excellent Majesty, by and with the advice and consent of the lords spiritual and temporal, and commons, in this present Parliament assembled, and by the authority of the same:

1. That the words "bleaching works" and "dyeing works" in the said recited Act shall be further understood to mean any building, buildings, or premises in which females, young persons, and children are employed, and in any part of which buildings or premises any process previous to packing is carried on in the occupation of calendering or finishing of any yarn or cloth of cotton, wool, silk, or flax, or any of them, or any mixture of them, or any yarn or cloth of any other material or materials, or in any process incident to such calendering or finishing, and in one or more of which processes steam, water, or other mechanical power is used or employed: Provided always, that nothing in this Act contained shall extend to any building, buildings, or premises defined to be a "factory" by the Act of the seventh year of her present Majesty, intituled *An Act to amend the Laws relating to Labour in Factories*.

CAP. XXXIX.

An Act to authorize the Inclosure of certain lands in pursuance of a Special Report of the Inclosure Commissioners. [13th July, 1863.]

CAP. XL.

An Act for the Regulation of Bakehouses. [13th July, 1863.]

Sec. 1. *Short title.*
 2. *Interpretation of terms.*
 3. *Limitation of hours of labour of persons under 18 years of age.*
 4. *Regulations as to cleanliness of bakehouses.*
 5. *As to sleeping places near bakehouses.*
 6. *Power to local authority to enforce provisions of this Act.*
 7. *As to expenses of local authority acting under this Act.*

8. *Recovery of penalties.*9. *Jurisdiction of certain magistrates.*

‘WHEREAS it is expedient to limit the hours of labour of young persons employed in bakehouses, and to make regulations with respect to cleanliness and ventilation in bakehouses:’ be it enacted by the Queen’s most excellent Majesty, by and with the advice and consent of the lords spiritual and temporal, and commons, in this present Parliament assembled, and by the authority of the same, as follows:

1. This Act may be cited as “The Bakehouse Regulation Act, 1863.”

2. For the purposes of this Act the words herein-after mentioned shall be construed as follows; that is to say,

“Local authority” shall, as respects any place, mean the persons or bodies of persons defined to be the local authority in that place by the one hundred and thirty-fourth section of the Act passed in the session holden in the eighteenth and nineteenth years of the reign of her present Majesty, chapter one hundred and twenty, or by the Nuisances Removal Acts herein-after mentioned: that is to say, as to *England*, by the Act passed in the session holden in the eighteenth and nineteenth years of the reign of her present Majesty, chapter one hundred and twenty-one, as amended by the Act passed in the session holden in the twenty-third and twenty-fourth years of the reign of her present Majesty, chapter seventy-seven; as to *Scotland*, by the Act passed in the session holden in the nineteenth and twentieth years of the reign of her present Majesty, chapter one hundred and three; and as to *Ireland*, by the Acts passed, the one in the session holden in the eleventh and twelfth years of the reign of her present Majesty, chapter one hundred and twenty-three, and the other in the session holden in the twelfth and thirteenth years of the reign of her present Majesty, chapter one hundred and eleven:

“Bakehouse” shall mean any place in which are baked bread, biscuits, or confectionery, from the baking or selling of which a profit is derived:

“Employed,” as applied to any person, shall include any person working in a bakehouse, whether he receives wages or not:

“Occupier” shall include any person in possession:

“The Court” shall include any justice or justices, sheriff or sheriff substitute, magistrate or magistrates, to whom jurisdiction is given by this Act.

3. No person under the age of eighteen years shall be employed in any bakehouse between the hours of nine of the clock at night and five of the clock in the morning.

If any person is employed in contravention of this section the occupier of the bakehouse in which he is employed shall incur the following penalties in respect of each person so employed; that is to say,

For the first offence, a sum not exceeding two pounds:

For a second offence, a sum not exceeding five pounds:

For a third and every subsequent offence, a sum not exceeding one pound for each day of the continuance of the employment in contravention of this Act, so that no greater penalty be imposed than ten pounds.

4. The inside walls and ceiling or top of every bakehouse situate in any city, town, or place containing according to the last census a population of more than five thousand persons, and the passages and staircase leading thereto, shall either be painted with oil or be limewashed, or partly painted and partly limewashed: Where painted with oil there shall be three coats of paint, and the painting shall be renewed once at least in every seven years, and shall be washed with hot water and soap once at least in every six months: Where limewashed the limewashing shall be renewed once at least in every six months.

Every bakehouse wherever situate shall be kept in a cleanly state, and shall be provided with proper means for effectual ventilation, and be free from effluvia arising from any drain, privy, or other nuisance.

If the occupier of any bakehouse fails to keep the same in conformity with this section he shall be deemed to be guilty of an offence against this Act, and to be subject in respect of such offence to a penalty not exceeding five pounds.

The Court having jurisdiction under this Act may, in addition to or instead of inflicting any penalty in respect of an offence under this section, make an order directing that within a certain time to be named in such order certain means are to be adopted by the occupier for the purpose of bringing his bakehouse into conformity with this section; the Court may upon application enlarge any time appointed for the adoption of the means directed by the order, but any non-compliance with the order of the Court shall, after the expiration of the time as originally limited or enlarged by subsequent order, be deemed to be a continuing offence, and to be punishable by a penalty not exceeding one pound for every day that such non-compliance continues.

5. No place on the same level with a bakehouse situate in any city, town, or place containing according to the last census a population of more than five thousand persons, and forming part of the same building, shall be used as a sleeping place, unless it is constructed as follows; that is to say,

Unless it is effectually separated from the bakehouse by a partition extending from the floor to the ceiling:

Unless there be an external glazed window of at least nine superficial feet in area, of which at the least four and a half superficial feet are made to open for ventilation:

And any person who lets, occupies, or continues to let, or knowingly suffers to be occupied, any place contrary to this Act, shall be liable for the first offence to a penalty not exceeding twenty shillings, and for every subsequent offence to a penalty not exceeding five pounds.

6. It shall be the duty of the local authority to enforce within their district the provisions of this Act,

and in order to facilitate the enforcement thereof any officer of health, inspector of nuisances, or other officer appointed by the local authority, herein-before referred to as the inspector, may enter into any bakehouse at all times during the hours of baking, and may inspect the same, and examine whether it is or not in conformity with the provisions of this Act; and any person refusing admission to the inspector, or obstructing him in his examination, shall for each offence incur a penalty not exceeding twenty pounds; and it shall be lawful for any inspector who is refused admission to any bakehouse, in pursuance of this section, to apply to any justice for a warrant authorizing him, accompanied by a police constable, to enter into any such bakehouse for the purpose of examining the same, and to enter the same accordingly.

7. All expenses incurred by any local authority in pursuance of the provisions of this Act may be paid out of any rate leviable by them, and applicable to the payment of the expenses incurred by the local authority under the said Nuisances Removal Acts, and the said authority may levy such rate accordingly.

Penalties.

8. All penalties under this Act may be recovered summarily before two or more justices; as to *England*, in manner directed by an Act passed in the session holden in the eleventh and twelfth years of the reign of her Majesty Queen *Victoria*, chapter forty-three, intituled *An Act to facilitate the Performance of the Duties of Justices of the Peace out of Sessions within England and Wales, with respect to summary Convictions and Orders*, or any Act amending the same; as to *Ireland*, in manner directed by the Act passed in the session holden in the fourteenth and fifteenth years of the reign of her Majesty Queen *Victoria*, chapter ninety-three, intituled *An Act to consolidate and amend the Acts regulating the Proceedings of Petty Sessions and the Duties of Justices of the Peace out of Quarter Sessions in Ireland*, or any Act amending the same; and as to *Scotland*, upon summary conviction, with power for the justices having cognizance of the case to sentence the offender to imprisonment for a period not exceeding three months until the penalty and the expenses of conviction are paid.

9. Any act, power, or jurisdiction hereby authorized to be done or exercised by two justices may be done or exercised by the following magistrates within their respective jurisdictions: that is to say, as to *England*, by any metropolitan police magistrate or other stipendiary magistrate sitting alone at a police court or other appointed place, or by the Lord Mayor of the city of *London*, or any alderman of the said city sitting alone or with others at the *Mansion House* or *Guildhall*; as to *Ireland*, by any one or more divisional magistrates of police in the police district of *Dublin*, and elsewhere by one or more justices or justices of the peace in petty sessions; and as to *Scotland*, by the sheriff or sheriff substitute, or by any police magistrate of a burgh.

CAP. XLI.

An Act to amend the Law respecting the Liability of Innkeepers, and to prevent certain Frauds upon them. [19th July, 1863.]

Sec. 1. *Innkeeper not to be liable for loss, &c. beyond 30L., except in certain cases.*

2. *Obligation to receive property of guests for safe custody.*

3. *Notice of law, &c., to be conspicuously exhibited.*

4. *Interpretation of terms.*

‘WHEREAS it is expedient to amend the law concerning the liability of innkeepers in respect of the goods of their guests in manner herein-after mentioned:’ Be it therefore enacted by the Queen’s most excellent Majesty, by and with the advice and consent of the lords spiritual and temporal, and commons, in this present Parliament assembled, and by the authority of the same, as follows; (that is to say,)

1. No innkeeper shall, after the passing of this Act, be liable to make good to any guest of such innkeeper any loss of or injury to goods or property brought to his inn, not being a horse or other live animal, or any gear appertaining thereto, or any carriage, to a greater amount than the sum of thirty pounds, except in the following cases; (that is to say,)

(1.) Where such goods or property shall have been stolen, lost, or injured through the wilful act, default, or neglect of such innkeeper or any servant in his employ:

(2.) Where such goods or property shall have been deposited expressly for safe custody with such innkeeper:

Provided always, that in the case of such deposit it shall be lawful for such innkeeper, if he think fit, to require, as a condition of his liability, that such goods or property shall be deposited in a box or other receptacle, fastened and sealed by the person depositing the same.

2. If any innkeeper shall refuse to receive for safe custody as before mentioned, any goods or property of his guest, or if any such guest shall, through any default of such innkeeper, be unable to deposit such goods or property as aforesaid, such innkeeper shall not be entitled to the benefit of this Act in respect of such goods or property.

3. Every innkeeper shall cause at least one copy of the first section of this Act, printed in plain type, to be exhibited in a conspicuous part of the hall or entrance to his inn, and he shall be entitled to the benefit of this Act in respect of such goods or property only as shall be brought to his inn while such copy shall be so exhibited.

4. The words and expressions herein-after contained, which in their ordinary signification have a more confined or a different meaning, shall in this Act, except where the nature of the provision or the context of the Act shall exclude such construction, be interpreted as follows; that is to say, the word “inn” shall mean any hotel, inn, tavern, public house, or other place of refreshment, the keeper of which is now by law responsible for the goods and property of his guests; and the word “innkeeper” shall mean the keeper of any such place.

CAP. XLII.

An Act to amend the Act of the Twentieth and Twenty-first Years of *Victoria*, authorizing the Sale of Mill Sites and Water Powers by the Commissioners of Public Works in *Ireland*.

[13th July, 1863.]

20 & 21 *Vict.*, c. 23.

Sec. 1. *Limit of five years, as fixed by sect. 2 of recited Act, for sale of mill sites repealed.*

‘WHEREAS by an Act passed in the session of Parliament holden in the twentieth and twenty-first years of her Majesty, chapter twenty-three, section two, it is amongst other things enacted, that it should be lawful for the Commissioners of Public Works in *Ireland*, at any time within five years after the making of any final award or awards in any district as therein referred to, wherein certain mill sites were situate, to sell and dispose of such site or sites or water powers, or other premises connected therewith, for such price or prices as to them should seem reasonable: and whereas it is expedient that the time by the said Act limited, and within which it is thereby lawful for the said commissioners to sell and dispose of the said mill sites and water powers should be repealed:’ be it therefore enacted by the Queen’s most excellent Majesty, by and with the advice and consent of the lords spiritual and temporal, and commons, in this present Parliament assembled, and by the authority of the same, as follows:

1. That the limit of five years fixed by the second section of the said Act is hereby repealed, and it shall be lawful for the Commissioners of Public Works at any time hereafter to sell and dispose of the mill sites and water powers and other premises connected therewith by the said recited Act authorized to be sold.

CAP. XLIII.

An Act to enable Her Majesty’s Postmaster General to sell and otherwise dispose of Land.

[13th July, 1863.]

3 & 4 *Vict.*, c. 96.

Sec. 1. *Postmaster general empowered to sell or exchange lands.*

2. *Rights of way.*

3. *Purchaser not to be bound to inquire into authority of postmaster general to execute deed.*

4. *Monies payable to postmaster general under this Act to be paid into the bank of England.*

5. *Former leases confirmed.*

6. *On appointment of postmaster general, contracts, &c., vested in his predecessor transferred.*

7. *Short title.*

‘WHEREAS by an Act passed in the session of Parliament held in the third and fourth years of the reign of her present Majesty, intituled *An Act for the Regulation of the Duties of Postage*, in order to enable her Majesty’s postmaster general for the time being to hold and take conveyances and leases of messuages, tenements, lands, and hereditaments for the service of

the post office, and to transmit the same to his successors, it was enacted that her Majesty’s postmaster general and his successors should be and were thereby made a body corporate, and should have a seal, and that all messuages, tenements, lands, and hereditaments, of whatsoever tenure, then vested in her Majesty’s then present postmaster general, his heirs, executors, administrators, and assigns, in trust for her Majesty and her successors, should, immediately on the passing of the said Act, be and become vested in him, in his corporate capacity, and his successors for ever, in trust as aforesaid: and whereas it is expedient that her Majesty’s postmaster-general and his successors should be invested with such powers of sale, exchange, leasing, and other disposition over lands held by him and them, and that such further and other powers should be conferred on her Majesty’s postmaster general for the time being, as are herein-after in that behalf contained:’ Be it enacted by the Queen’s most excellent Majesty, by and with the advice and consent of the lords spiritual and temporal, and commons, in this present Parliament assembled, and by the authority of the same, as follows:

1. It shall be lawful for her Majesty’s postmaster general for the time being from time to time, with the consent and approbation of the commissioners of her Majesty’s treasury, or any two of them, (such consent and approbation to be certified by one of the secretaries or assistant secretaries of the treasury by writing under his hand,) to sell or to exchange for other lands, or to lease or to surrender on any terms, any lands for the time being vested in him in trust as aforesaid, and upon any such exchange to give or receive any money for equality of exchange; and any such sale as aforesaid may be made either by public auction or private contract, and the postmaster general may make any stipulations as to title or otherwise, in any conditions of sale or contract for sale or exchange, and may buy in, rescind, or vary any contract for sale or exchange, and may re-sell, or re-exchange any such lands as aforesaid; and it shall be lawful for the postmaster general or his successors, for the purposes aforesaid, or any of them, to execute and do all such assurances and things as he or they shall think fit.

2. In all sales, exchanges, and leases respectively to be made by her Majesty’s postmaster general under the authority of this Act, it shall be lawful for him to stipulate for, create, or reserve all such rights of way or road as shall be deemed right.

3. No purchaser, lessee, or other person claiming under any deed or instrument purporting to be executed by the postmaster general under the authority of this Act shall be bound to inquire whether the postmaster general shall have been duly authorized by the commissioners of her Majesty’s treasury to execute the same or not, or whether any sale or exchange or lease or surrender purporting to be made by the postmaster general under the authority of this Act shall have been in fact authorized by this Act or not, or whether it shall or shall not have been within the provisions or within the true intent and meaning of this Act.

4. All monies, except rents reserved on leases, which shall become payable to the postmaster general under the provisions of this Act shall be paid into

the Bank of *England*, and shall be there placed to the account of her Majesty's postmaster general, or to such other account at the Bank of *England* as the postmaster general for the time being and the commissioners of her Majesty's treasury for the time being, or any two of them, shall direct; and the receipt of the receiver and accountant general for the time being of her Majesty's post office for such monies shall effectually discharge the person or persons by whom or on whose account the same shall be paid into the Bank of *England*, and no such person shall be bound to see to the application, or be answerable for the nonapplication or misapplication thereof.

5. All leases and underleases, and agreements for leases and underleases, heretofore made or entered into by her Majesty's present postmaster general or any of his predecessors in office are hereby confirmed.

6. Upon and by virtue of the appointment of any person to be her Majesty's postmaster-general, the benefit of all contracts, bonds, securities, and things in action, which shall have been vested in his predecessor at the time when such predecessor ceased to hold office, shall be transferred to and vested in and enure for the benefit of the postmaster general so appointed, in the same manner as if he had been contracted with instead of his predecessor, and as if his name had been inserted in all such contracts, bonds, and securities, instead of the name of his predecessor.

7. This Act may be cited for all purposes as "The Post Office Lands Act, 1863."

CAP. XLIV.

An Act for the further Security of the Persons of her Majesty's Subjects from personal Violence.

[13th July, 1863.]

24 & 25 Vict., c. 96. 24 & 25 Vict., c. 100.

Sec. 1. *Power to award punishment of whipping in cases herein named.*

'WHEREAS by the forty-third section of the Act of the session of the twenty-fourth and twenty-fifth years of the reign of her present Majesty, chapter ninety-six, it is provided that "whosoever shall, being armed with any offensive weapon or instrument, rob or assault with intent to rob any person, or shall together with one or more other person or persons rob or assault with intent to rob any person, or shall rob any person, and at the time of or immediately before or immediately after such robbery shall wound, beat, strike, or use any other personal violence to any person;" and by the twenty-first section of the Act of the same session, chapter one hundred, that "whosoever shall by any means attempt to choke, suffocate, or strangle any person, or by any means calculated to choke, suffocate, or strangle, attempt to render any person insensible, unconscious, or incapable of resistance, with intent in any of such cases thereby to enable himself or any other person to commit, or with intent in any of such cases to assist any other person in committing, any indictable offence, shall be guilty of felony, and being convicted thereof shall be liable, at the discretion of the Court, to be kept in penal servitude for life, or for any term not less than three years, or to be imprisoned for any term not exceed-

ing two years, with or without hard labour, and with or without solitary confinement:" and whereas the punishment awarded in the said sections is insufficient to deter from crimes of violence: be it enacted by the Queen's most excellent Majesty, by and with the advice and consent of the lords spiritual and temporal, and commons, in this present Parliament assembled, and by the authority of the same, as follows:

1. Where any person is convicted of a crime under either of the said sections, the Court before whom he is convicted may, in addition to the punishment awarded by the said sections or any part thereof, direct that the offender, if a male, be once, twice, or thrice privately whipped, subject to the following provisions:

1. That in the case of an offender whose age does not exceed sixteen years the number of strokes at each such whipping do not exceed twenty-five, and the instrument used shall be a birch rod:
2. That in the case of any other male offender the number of strokes do not exceed fifty at each such whipping:
3. That in each case the Court in its sentence shall specify the number of strokes to be inflicted and the instrument to be used:

Provided that in no case shall such whipping take place after the expiration of six months from the passing of the sentence; provided also, that every such whipping to be inflicted on any person sentenced to penal servitude shall be inflicted on him before he shall be removed to a convict prison with a view to his undergoing his sentence of penal servitude.

CAP. XLV.

An Act for making a new Street from *Blackfriars* to the *Mansion House* in the City of *London* in connexion with the Embankment of the River *Thames* on the Northern Side of that River; and for other Purposes.

[13th July, 1863.]

CAP. XLVI.

An Act for further continuing and appropriating the *London Coal and Wine Duties*.

[13th July, 1863.]

CAP. XLVII.

An Act for removing Doubts as to the Powers of the Courts of the Church of *Scotland*, and extending the Powers of the said Courts.

[13th July, 1863.]

CAP. XLVIII.

An Act to repeal the Act of the Twentieth and Twenty-first Years of Her Majesty, Chapter Sixty-six, for punishing Mutiny and Desertion of Officers and Soldiers in the Service of the *East India Company*, and for regulating in such Service the Payment of Regimental Debts and the Distribution of the Effects of Officers and Soldiers dying in the Service.

[13th July, 1863.]

CAP. XLIX.

An Act giving Power to sell and dispose of Lands, Parcel of the Possessions of the Duchy of Cornwall, and to purchase other Lands to be annexed thereto, and to regulate future Grants, of Leases of the Possessions of the said Duchy; and for other Purposes. [13th July 1863.]

CAP. L.

An Act to continue the Powers of the Commissioners under the Salmon Fisheries (Scotland) Act until the First Day of January One thousand eight hundred and sixty-five, and to amend the said Act. [13th July 1863.]

CAP. LL

An Act to amend the Passengers Act, 1855. [13th July 1863.]

18 & 19 Vict., c. 119.

Sec. 1. *Short title.*

2. *Commencement of Act.*

3. *Definition of "Passenger Ship" in section 3 of recited Act repealed, and other provisions made.*

4. *Mail steamers carrying other than cabin passengers to be subject to the Act.*

5. *Repeal of tonnage check on number of passengers to be carried in a passenger ship.*

6. *Cabin passengers to be included in passenger lists.*

7. *Limit of penalty on stowaways extended from £5 to £20.*

8. *Horses and cattle may be carried in passenger ships, under conditions herein named. Definition of the term "large cattle." Dogs and pigs.*

9. *Issue of lime juice.*

10. *Substitution of soft bread for other bread stuffs.*

11. *Section 46 of recited Act to apply to cabin passengers, and passage money made recoverable immediately on re-landing.*

12. *Sections 12, 51, 53, and 54 of recited Act repealed, and other provisions substituted.*

13. *Forfeiture of ship if master proceeds to sea without certificate of clearance, &c. Such ship to be dealt with as if seized under custom laws. Power to secretary of state to release ships on payment of a sum of money.*

14. *In case of wreck or damage in or near United Kingdom, passengers to be provided with a passage by some other vessel, and maintained in the meantime. Power to remove passengers from damaged ship; penalty on passengers refusing.*

15. *Governors or consuls may send on passengers if the master of the ship fail to do so.*

16. *Expenses incurred under the two preceding sections to be a debt due to the Crown. Passengers forwarded by governor, &c. not entitled to return of passage money.*

17. *Bond to repay expenses of rescuing and for-*

warding shipwrecked passengers, where owners and charterers of vessel reside abroad.

18. *Recited Act and this to be as one.*

‘WHEREAS it is expedient to amend “The Passengers Act, 1855,” in the particulars herein-after mentioned:’ Be it therefore enacted by the Queen’s most excellent Majesty, by and with the advice and consent of the Lords spiritual and temporal, and Commons, in this present Parliament assembled, and by the authority of the same, as follows:

1. This Act may be cited for all purposes as “The Passengers Act Amendment Act, 1863.”

2. This Act shall come into operation on the first day of October one thousand eight hundred and sixty-three.

3. The definition in the third section of “The Passengers Act, 1855,” of the term “Passenger Ship,” is hereby repealed, and for the purposes of the said Act and of this Act the term “Passenger Ship” shall signify every description of sea-going vessel, whether British or Foreign, carrying, upon any voyage to which the provisions of the said “Passengers Act, 1855,” shall extend, more than fifty passengers, or a greater number of passengers than in the proportion of one statute adult to every thirty-three tons of the registered tonnage of such ships, if propelled by sails, or than one statute adult to every twenty tons if propelled by steam.

4. So much of the fourth section of the said “Passengers Act, 1855,” as exempts from the operation of the Act any steam vessel carrying mails under contract with the Government of the state or colony to which such vessel may belong, is hereby repealed, and every steam vessel, whether British, foreign, or colonial, which shall carry passengers other than cabin passengers in sufficient number to bring such vessel within the definition of a passenger ship, as set forth in the third section of this Act, shall be subject to the provisions of the said Act and of this Act in like manner as any passenger ship not carrying a mail.

5. The first rule of the fourteenth section of the said “Passengers Act, 1855,” which limits the number of persons to be carried in a passenger ship by her registered tonnage, together with so much of the concluding portion of the same section as relates to such rule, is hereby repealed, except so far as relates to any penalty incurred or legal proceedings taken thereunder.

6. In the passenger lists required by the sixteenth and seventeenth sections of “The Passengers Act, 1855,” to be delivered by the master of every ship before demanding a clearance, there shall be set forth, in addition to the other particulars required by “The Passengers Act, 1855,” the names of all cabin passengers on board such ships, specifying whether they respectively are under or over twelve years of age, and at what place the passengers and cabin passengers respectively are to be landed, and the Schedule B. to the said Act shall be altered accordingly.

7. The limit of the penalty imposed by the eighteenth section of the said “Passengers Act, 1855,” on persons convicted of getting on board any passen-

ger ship with intent to obtain a passage therein without the consent of the owner, charterer, or master thereof, and on persons aiding or abetting in such fraudulent attempt, shall be extended from five pounds to twenty pounds.

8. Notwithstanding the prohibition contained in the twenty-ninth section of the said "Passengers Act, 1855," horses and cattle may be carried as cargo in passenger ships, subject to the following conditions:

- (1.) That the animals be not carried on any deck below the deck on which passengers are berthed, nor in any compartment in which passengers are berthed, nor in any adjoining compartment, except in a ship built of iron, and of which the compartments are divided off by water-tight bulkheads extending to the upper deck:
- (2.) That clear space on the spar or weather deck be left for the use and exercise of the passengers, at the rate of at least ten superficial feet for each statute adult:
- (3.) That no greater number of passengers be carried than in the proportion of fifteen to every one hundred tons of the ships registered tonnage:
- (4.) That in passenger ships of less than five hundred tons registered tonnage not more than two head of large cattle be carried, nor in passenger ships of larger tonnage more than one additional head of such cattle for every additional two hundred tons of the ships registered tonnage, nor more in all in any passenger ship than ten head of such cattle: The term "large cattle" shall include both sexes of horned cattle, deer, horses, and asses; four sheep of either sex, or four female goats, shall be equivalent to, and may, subject to the same conditions, be carried in lieu of one head of large cattle:
- (5.) That proper arrangements be made, to the satisfaction of the emigration officer at the port of clearance, for the housing, maintenance, and cleanliness of the animals, and for the stowage of their fodder:
- (6.) Not more than six dogs, and no pigs or male goats, shall be conveyed as cargo in any passenger ship: For any breach of this prohibition, or of any of the above conditions, the owner, charterer, and master of the ship, or any of them, shall be liable for each offence to a penalty not exceeding three hundred pounds nor less than five pounds.

9. The requirements of the thirty-fifth section of the said "Passengers Act, 1855," that six ounces of lime juice should be issued weekly to each statute adult on voyages exceeding eighty-four days in duration for sailing vessels, or fifty days for steamers, shall be confined to the period when the ship shall be within the tropics; during the other portions of the voyage the issue of lime juice shall be at the discretion of the medical practitioner on board; or, if there be no such practitioner on board, at the discretion of the master of the ship.

10. In addition to the substitutions in the dietary

scale specified in the thirty-fifth section of the said "Passengers Act, 1855," soft bread baked on board may be issued, at the option of the master of any passenger ship, in lieu of the following articles, and in the following proportions: (that is to say,) one pound and a quarter of a pound of such soft bread may be issued in lieu of one pound of flour, or of one pound of biscuit, or of one pound and a quarter of a pound of oatmeal, or of one pound of rice, or of one pound of peas.

11. The 46th section of the said "Passengers Act, 1855," shall be applicable to cabin as well as to other passengers landed on account of sickness; and the passage money of all cabin or other passengers so landed may be recovered in the manner pointed out in the said Act, upon the delivery up of their contract tickets, and notwithstanding that the ship may not have sailed: Provided always, that in the case of cabin passengers so landed one half only of their passage money shall be recoverable.

12. The twelfth, fifty-first, fifty-third, and fifty-fourth sections of the said "Passengers Act, 1855," shall be and the same are hereby repealed, except as to the recovery and application of any penalty for any offence committed against the said Act, and except so far as may be necessary for supporting or continuing any proceeding heretofore taken or hereafter to be taken thereunder; and in lieu of the enactments contained in such sections the enactments in the four next following sections shall respectively be substituted; (that is to say,)

13. If any passenger ship shall clear out or proceed to sea without the master having first obtained such certificate of clearance, or without his having joined in executing such bond to the Crown as by the said "Passengers Act, 1855," are required, or if such ship, after having put to sea, shall put into any port or place in the United Kingdom in a damaged state, and shall leave or attempt to leave such port or place with passengers on board without the master having first obtained such certificate of clearance as is required by section fifty of the said "Passengers Act, 1855," such ship shall be forfeited to the use of her Majesty, and may be seized by any officer of customs, if found, within two years from the commission of the offence, in any port or place in her Majesty's dominions; and such ship shall thereupon be dealt with in the same manner as if she had been seized as forfeited for an offence incurring forfeiture under any of the laws relating to the customs: Provided that it shall be lawful for one of her Majesty's principal Secretaries of State to release, if he shall think fit, any such forfeited ship from seizure and forfeiture, on payment by the owner, charterer, or master thereof to the use of her Majesty, of such sum not exceeding two thousand pounds as such Secretary of State may, by any writing under his hand specify.

14. If any passenger ship shall be wrecked, or otherwise rendered unfit to proceed on her intended voyage, while in any port of the United Kingdom, or after the commencement of the voyage, and if the passengers or any of them, shall be brought back to the United Kingdom, or if any passenger ship shall put into any port or place in the United Kingdom in a damaged state, the master, charterer, or owner

shall, within forty-eight hours thereafter, give to the nearest emigration officer, or in the absence of such officer to the chief officer of customs, a written undertaking to the following effect; that is to say, if the ship shall have been wrecked, or rendered unfit as aforesaid to proceed on her voyage, that the owner, charterer, or master thereof shall embark and convey the passengers in some other eligible ship, to sail within six weeks from the date thereof, to the port or place for which their passages respectively had been previously taken; and if the ship shall have put into port in a damaged state, then that she shall be made seaworthy, and fit in all respects for her intended voyage, and shall, within six weeks from the date of such undertaking, sail again with her passengers; in either of the above cases the owner, charterer, or master shall, until the passengers proceed on their voyage, either lodge and maintain them on board in the same manner as if they were at sea, or pay to them subsistence money after the rate of one shilling and sixpence a day for each statute adult, unless the passengers shall be maintained in any hulk or establishment under the superintendence of the emigration commissioners mentioned in the said Passengers Act, 1855 in which case the subsistence money shall be paid to the emigration officer at such port or place. If the substituted ship or damaged ship, as the case may be, shall not sail within the time prescribed as aforesaid, or if default shall be made in any of the requirements of this section, such passengers respectively or any emigration officer on their behalf, shall be entitled to recover, by summary process, as in the said Passengers Act, 1855, is mentioned, all monies which shall have been paid by or on account of such passengers or any of them for such passage, from the party to whom or on whose account the same may have been paid, or from the owner, charterer, or master of such ship, or any of them, at the option of such passenger or emigration officer: Provided that the said emigration officer may, if he shall think it necessary, direct that the passengers shall be removed from such damaged "passenger ship," at the expense of the master thereof; and if after such direction any passenger shall refuse to leave such ship, he shall be liable to a penalty not exceeding forty shillings, or to imprisonment not exceeding one calendar month.

15. If any passenger or cabin passenger of any passenger ship shall, without any neglect or default of his own, find himself within any colonial or foreign port or place other than that for which the ship was originally bound, or at which he or the emigration commissioners, or any public officer or other person on his behalf, may have contracted that he should land, it shall be lawful for the governor of such colony, or for any person authorized by him for the purpose, or for her Majesty's consular officer at such foreign port or place, as the case may be, to forward such passenger to his intended destination, unless the master of such ship shall, within forty-eight hours of the arrival of such passenger, give to the governor or consular officer, as the case may be, a written undertaking to forward or carry on, within six weeks thereafter, such passenger or cabin passenger to his original destination, and unless such master shall accordingly forward or carry him on within that period.

16. All expenses incurred under the last preceding section or under the fifty-second section of "The Passengers Act, 1855," or either of them, by or by the authority of such secretary of state, governor, or consular officer, or other person, as therein respectively mentioned, including the cost of maintaining the passengers until forwarded to their destination, and of all necessary bedding, provisions, and stores, shall become a debt to her Majesty, and her successors from the owner, charterer, and master of such ship, and shall be recoverable from them, or from any one or more of them, at the suit and for the use of her Majesty, in like manner as in the case of other crown debts; and a certificate in the form in schedule (A.) hereto annexed, or as near thereto as the circumstances of the case will admit, purporting to be under the hand of any such secretary of state, governor, or consular officer, (as the case may be,) stating the total amount of such expenses, shall in any suit, or other proceeding for the recovery of such debt be received in evidence without proof of the handwriting or of the official character of such secretary of state, governor, or consular officer, and shall be deemed sufficient evidence of the amount of such expenses, and that the same were duly incurred, nor shall it be necessary to adduce on behalf of her Majesty any other evidence in support of the claim, but judgment shall pass for the crown, with costs of suit, unless the defendant shall specially plead and duly prove that such certificate is false or fraudulent, or shall specially plead and prove any facts showing that such expenses were not duly incurred under the provisions of this Act, and of the said "Passengers Act, 1855," or either of them: Provided nevertheless, that in no case shall any larger sum be recovered on account of such expenses than a sum equal to twice the total amount of passage money received or due to and recoverable by or on account of the owner, charterer, or master of such passenger ship, or any of them, for or in respect of the whole number of passengers and cabin passengers who may have embarked in such ship, which total amount of passage money shall be proved by the defendant, if he will have the advantage of this limitation of the debt: but if any such passengers are forwarded or conveyed to their intended destination under the provisions of the last preceding section, they shall not be entitled to the return of their passage money, or to any compensation for loss of passage under the provisions of the said "Passengers Act, 1855."

17. In the case of a passenger ship, of which neither the owners nor charterers reside in the United Kingdom, the bond required to be given to the crown by the sixty-third section of the "Passengers Act, 1855," shall be for the sum of five thousand pounds instead of two thousand pounds; and an additional condition shall be inserted in such bond to the effect that the obligors therein shall, subject to the provisions and limitations herein before contained, be liable for and shall pay to her Majesty and her successors, as a crown debt, all expenses which may be incurred under the provisions herein-before and in the "Passengers Act 1855," contained, in rescuing, maintaining and forwarding to their destination any passengers of such ships who by reason of shipwreck or any other cause, except their own neglect or default, may not be con-

veyed to their intended destination by or on behalf of the owner, charterer, or master of such ship.

18. The said "Passengers Act, 1855," and this Act, shall be construed together as one Act.

SCHEDULE (A.)

Form of Governor's or Consul's certificate of expenditure in the case of passengers shipwrecked, &c.

I hereby certify, that, acting under and in conformity with the provisions of the British "Passengers Act, 1855," and of the "Passengers Act Amendment Act, 1863," I have defrayed the expenses incurred in rescuing, maintaining, supplying with necessary bedding, provisions, and stores (a) and in forwarding to their destination passengers [including cabin passengers (b)], who were proceeding from to in the passenger ship, which was wrecked at sea, &c. (c.)

And I further certify, for the purposes of the tenth section of the said "Passengers Amendment Act, 1863," that the total amount of such expenses is pounds, and that such expenses were duly incurred by me under the said Acts or one of them.

Given under my hand this day of 18
 Governor of &c., (or, as the case
 may be,) her Britannic Ma-
 jesty's Consul at

(a.) N.B.—1. If more passengers were rescued than forwarded, or if bedding, &c., was not supplied, alter the certificate to suit the facts of the case.

(b.) N.B.—2. Omit words in brackets when necessary.

(c.) N.B.—3. State generally the nature of the disaster and where it occurred. But if the passengers were only left behind without any default of their own, state the fact accordingly.

OAP. LII.

An Act to further extend and make compulsory the Practice of Vaccination in Ireland.

[13th July 1863.]

14 & 15 Vict. c. 68. 21 & 22 Vict. c. 64.

- Sec. 1. *Parents and Guardians of children born after 1st January 1864 to have such children vaccinated within six months after birth.*
2. *Children to be taking for inspection by medical officer on eighth day after the operation.*
3. *Certificate of successful vaccination to be delivered.*
4. *If the child be not in a fit state for vaccination the medical officer to deliver a certificate to that effect, to be in force for two calendar months.*
5. *Section two of 21 & 22 Vict. c. 64. repealed. Rate of payment for successful cases of vaccination.*
6. *Child's incapacity to receive the vaccine disease to be certified.*
7. *Registrars of births and deaths to keep a register of cases of successful vaccination of which searches and extracts may be made.*
8. *Notice to be given of the requirement of vaccination, and on failure of parent or guardian to comply therewith, penalty.*
9. *Fee to registrar.*

10. *Penalty for omitting to register vaccination.*
11. *Registrar-general to provide books and forms for carrying out the provisions of this Act.*
12. *Recovery of penalties.*
13. *Power to guardians of poor to direct proceedings to be instituted.*

'WHEREAS by an Act passed in the fourteenth and fifteenth years of the reign of her Majesty, intituled *An Act to provide for the better Distribution, Support, and Management of Medical Charities in Ireland, and to amend an Act of the Eleventh Year of Her Majesty, to provide for the Execution of the Laws for Relief of the Poor in Ireland*, it is provided that the medical officer of every district constituted under the said Act shall and he is thereby required to vaccinate all persons who may come to him for that purpose, subject to such regulations as may be issued by the poor law commissioners in that behalf; and by another Act, passed in the twenty-first and twenty-second years of her said Majesty, intituled *An Act to make further Provision for the Practice of Vaccination in Ireland*, it is provided that the committee of management of every dispensary district in Ireland shall, subject to the approbation of the commissioners, divide such dispensary district into so many vaccination districts as they may deem advisable and necessary, and shall report such districts to the commissioners for their approval, and shall require the medical officer of such district to attend at some convenient place within each vaccination district, to be approved of by the said committee, at such times as the said committee may fix or approve; and the said medical officer is thereby required to vaccinate all persons resident in his district, who may come to him for that purpose, or whom he may be requested to vaccinate, being fit subjects for vaccination, subject to such regulations as may be issued by the commissioners in that behalf: and whereas it is expedient that the practice of vaccination in Ireland should be still further extended: be it therefore enacted by the Queen's most excellent Majesty, by and with the advice and consent of the lords spiritual and temporal, and commons, in this present Parliament assembled, and by the authority of the same:

1. The father or mother of every child born in Ireland after the first day of January one thousand eight hundred and sixty-four, or in the event of the death, illness, absence, or inability of the father and mother, then the person who shall have the care, nurture, or custody of the said child, shall, as soon as may be practicable, and within six calendar months after the birth of such child, take or cause to be taken the said child to the medical officer of the dispensary district in which the said child is resident for the purpose of being vaccinated, unless he shall have been previously vaccinated by some duly qualified medical practitioner, and the vaccination duly certified; and the said medical officer shall, and he is hereby required thereupon, or as soon after as it may conveniently and properly be done, to vaccinate the said child: provided that in the vaccination of children who are inmates of the workhouse or other public or charitable institution, the master, matron, or chief officer of the workhouse or other such institution shall

take the steps required to be taken under the provisions of this Act by the father or mother of the child, or other person having the care, nurture, or custody thereof.

2. Upon the eighth day following the day on which any child has been vaccinated as aforesaid, the father or mother, or other person having the care, nurture, or custody of the said child, shall again take or cause to be taken the said child to the medical officer by whom the operation was performed, in order that such medical officer may ascertain by inspection the result of such operation.

3. Upon and immediately after the successful vaccination of any child, the medical officer or practitioner who shall have performed the operation shall deliver to the father or mother of the said child, or to the person who shall have the care, nurture, or custody of the said child, a certificate under his hand, according to the form of schedule hereinafter inserted marked (A.), that the said child has been successfully vaccinated, and shall also transmit a duplicate of the said certificate to the registrar of births and deaths of the district in which the operation was performed; and such certificate shall, without further proof, be admissible as evidence of the successful vaccination of such child in any information or complaint which shall be brought against the father or mother of the said child, or against the person who shall have had the care, nurture, or custody of such child as aforesaid, for non-compliance with the provisions of this Act: provided that if the medical officer of any dispensary district is also the registrar of that district, it shall be sufficient for him to sign one certificate, to be delivered to the father or mother, or other person as aforesaid, and to register the fact of such vaccination, in the manner herein-after provided.

4. If any medical officer or practitioner shall be of opinion that any child is not in a fit and proper state to be successfully vaccinated, he shall thereupon and immediately deliver, without fee or reward to the father or mother of such child, or the person having the care, nurture, or custody of the said child, a certificate under his hand, according to the form of schedule herein-after inserted marked (B.), that the child is in an unfit state for successful vaccination, and such certificate shall remain in force for two calendar months from its delivery as aforesaid; and the father and mother of the said child, or the person having the care, nurture, or custody of the said child, shall, unless they shall within each succeeding period of two months have obtained from a medical officer or practitioner a renewal of such certificate, within two months next after the delivery of the said certificate as aforesaid, and if the said child be not vaccinated at or by the termination of such period of two months then during each succeeding period of two calendar months until such child has been successfully vaccinated, take or cause to be taken to the said medical officer or practitioner such child to be vaccinated by him; and if the said medical officer or practitioner deem the said child to be then in a fit and proper state for successful vaccination, he shall forthwith vaccinate it accordingly, and shall deliver to the father or mother of such child, or person having the care, nurture, or custody of such child, a cer-

tificate under his hand, according to the form of schedule herein-after inserted marked (A.), that such child has been successfully vaccinated; but if the said medical officer or practitioner be of opinion that the child is still in an unfit state for successful vaccination, then he shall again deliver to the father or mother of such child, or person having the care, nurture, or custody of the said child, a certificate under his hand according to the said form of Schedule (B.), that the child is still in an unfit state for successful vaccination; and the said medical officer or practitioner, so long as such child remains in an unfit state for vaccination, and unvaccinated, shall at the expiration of every succeeding period of two calendar months deliver, if required, to the said father or mother of such child, or person having the care, nurture, or custody of such child, a fresh certificate under his hand, according to the said form of schedule; and the production of such certificate shall be a sufficient defence against any complaint which shall be brought against the said father or mother, or person having the care, nurture, or custody of such child, for non-compliance with the provisions of this Act.

5. 'And whereas by the second section of the said Act of the twenty-first and twenty-second years of her Majesty it is provided that the board of guardians shall pay to the medical officer of each dispensary district, in addition to any salary or allowance payable to him, the sum of one pound for every twenty cases of successful vaccination performed by him in each year: be it enacted, that the said section shall be and is hereby repealed from and after the said first day of January; and the board of guardians shall pay to every such medical officer, for every person successfully vaccinated by him within his dispensary district, after the said first day of January, the sum of one shilling, provided that the said medical officer shall have made the report to the committee of management, regarding the persons so successfully vaccinated, which is required by the said Act.

6. In the event of any medical practitioner being of opinion that any child that has been vaccinated by him is insusceptible of the vaccine disease, he shall deliver to the father or mother, or person having the care, nurture, or custody of such child, a certificate under his hand, according to the form of schedule herein-after inserted marked (D.); and the production of such certificate shall be a sufficient defence against any complaint which may be brought against the said father, mother, or person having the care, nurture, or custody of such child for noncompliance with the provisions of this Act.

7. The registrar of births and deaths in the district in which the operation has been performed shall register the same in a register which he shall keep of the persons of whose successful vaccination a certificate shall have been transmitted to him as above provided by any medical practitioner, and of the persons whom he himself may have successfully vaccinated, as herein-before mentioned, and shall at all reasonable times allow searches to be made of any such register book in his keeping, and shall give a copy, certified under his hand, of any entry or entries in the same, on payment of the fee of one shilling for each search, and sixpence for each certificate.

8. The registrar of births and deaths in every district shall, at or immediately after the registration of the birth of any child who shall not have been certified to him as having been vaccinated within six calendar months after the birth thereof, give notice in writing in manner herein-after directed, and according to the form of schedule herein-after inserted marked (C.), to the father or mother of such child, or in the event of the death, illness, absence, or inability from sickness or otherwise of the father or mother, then to the person upon whom the care, nurture, or custody of such child shall have devolved, that it is the duty of such father or mother, or person having the care, nurture, or custody of such child as aforesaid, to take care that the said child shall be vaccinated in the manner directed by this Act, and shall together therewith deliver to such person a notice of the days, hours, and places within the district of such registrar at which the medical officer will attend for the purpose of vaccination, and shall enter in a book, to be provided as herein-after directed, a minute of his having duly given such notice; and if after such notice the father or mother of the said child, or the person so having as aforesaid the care, nurture, or custody of the said child, shall not cause such child to be vaccinated, or shall not on the eighth day after the vaccination has been performed take or cause to be taken such child for inspection according to the provisions in this Act respectively contained, without any reasonable excuse for such failure or omission, then such father or mother, or person having the care, nurture, or custody of such child as aforesaid, so offending, shall forfeit a sum not exceeding ten shillings.

9. A fee of threepence shall be paid to such registrar for each child vaccinated in respect of which he shall have performed the duties required in this Act; excepting only those cases in which he himself shall have performed the operation, and thereby entitled himself to the payment of a fee under this Act; and the said fee of threepence shall be payable in the same manner as the fee now payable to such registrar for registering the birth of such child as aforesaid is paid.

10. Every registrar who shall fail to register as aforesaid the vaccination of any child successfully vaccinated, and duly certified to him to have been so vaccinated within his district, or who shall register the vaccination of any child which shall not have been successfully vaccinated, or certified to him to have been so vaccinated, shall forfeit a sum not exceeding twenty shillings for each such case.

11. The registrar general for *Ireland* shall cause to be provided from time to time a sufficient number of books from her Majesty's stationery office, upon the application of the registrar general for *Ireland*, all such books, forms, and regulations as he may deem requisite for carrying into full effect the provisions of this Act, and such registrar general shall transmit the same to the registrars of births and deaths in each district in *Ireland*, who shall deliver to the duly qualified medical practitioners in the said district such of the said books, forms, and regulations as they may require for the performance of the duties imposed upon them by this Act, and the expenses to be incurred by the registrar general, under the provisions of this Act,

shall be defrayed in the like manner as the general expenses of his office.

12. Any penalty recoverable under the provisions of this Act shall be recoverable in a summary way, with respect to the police district of *Dublin* metropolis, subject and according to the provisions of any Act regulating the powers and duties of justices of the peace for such district or of the police of such district, and with respect to other parts of *Ireland*, before a justice or justices of the peace sitting in petty sessions, subject and according to the provisions of "The Petty Sessions (*Ireland*) Act, 1851," and any Act amending the same.

13. The guardians of any union in *Ireland* may direct proceedings to be instituted for the purpose of enforcing obedience to the provisions of this Act; and as to all expenses incurred in such proceedings, if the justice or justices before whom such proceedings are had certify that such expenses ought to be allowed, such justice or justices shall ascertain the amount thereof, and such amount shall be payable out of the poor rates of the union in which the neglect or default shall have arisen; and such proceedings on account of neglect to have a child vaccinated may be taken at any time during the continuance of the neglect.

SCHEDULES referred to by this Act.

SCHEDULE (A.)

I, the undersigned, hereby certify, that the child of _____ of _____ aged _____ in the county of _____ has been successfully vaccinated by me.

Dated this _____ day of _____ 186 _____.

(Signed) A.B.,

Medical officer of the _____ dispensary district
(or other medical practitioner, as the case may be.)

SCHEDULE (B.)

I, the undersigned, hereby certify, that I am of opinion that the child of _____ of _____ in the county of _____ aged _____ is not now in a fit and proper state to be successfully vaccinated, and I do hereby postpone the vaccination until the _____ day of _____.

Dated this _____ day of _____ 186 _____.

(Signed) A.B.

Medical officer of the _____ dispensary district
(or other medical practitioner, as the case may be.)

SCHEDULE (C.)

I, the undersigned, hereby give you notice, and require you to have C.D. vaccinated within six months after the birth, pursuant to the provisions and directions of the Act of the _____ Victoria, cap. _____. As witness my hand, this _____ day of _____ 186 _____.

J.B.

Registrar of births and deaths for the district.

SCHEDULE (D.)

I, the undersigned, hereby certify, that I am of opinion that the child of _____ of _____ in the county of _____ is insusceptible of the vaccine disease.

Dated this _____ day of _____ 186 _____.

(Signed) A.B.

Medical officer of the _____ dispensary district
(or other medical practitioner, as the case may be.)

OAP. LIIL.

An Act to suspend the making of lists and the ballots for the militia of the United Kingdom.

[13th July 1863.]

- Sec. 1. *Meetings relating to the militia of the United Kingdom, and ballots for such militia suspended.*
2. *Proceedings may be had during such suspension by order in council.*
3. *So long as lists are suspended, not necessary to transmit extracts, &c. as required by sec. 3 of 7 G. 4, c. 58.*
4. *Not to extend to prevent the holding of certain meetings relating to the militia.*

‘WHEREAS it is expedient to suspend for a further period the ballots for the militia of the United Kingdom:’ Be it therefore enacted by the Queen’s most excellent Majesty, by and with the advice and consent of the Lords Spiritual and Temporal, and Commons, in this present parliament assembled, and by the authority of the same, as follows:

1. All general and subdivision meetings relating to the militia of the United Kingdom, and all proceedings relating to procuring any returns or preparing or making out lists of such militia, or any part thereof, for the purpose of a ballot, or relating to balloting for any militiamen or supplying any vacancies in such militia by ballot, as are or may be directed or authorised by or under any Act of Parliament now in force, shall cease and remain suspended until the first day of *October* one thousand eight hundred and sixty-four.

2. Provided always, that it shall be lawful for her Majesty by any order in council to direct that any proceedings shall be had at any time before the expiration of such period as aforesaid, either for the giving of notices and making returns and preparing lists, and also for the proceeding to ballot and enrol men for the filling up vacancies in the militia, as her Majesty shall deem expedient; and upon the issuing of any such order all such proceedings shall be had for carrying into execution all the provisions of the Acts in force in the United Kingdom relating to the giving notices for and returns for lists, and for the balloting and enrolling of men to supply any vacancies in the militia, and holding general and subdivision meetings for such purpose, at such times respectively as shall be expressed in any such order in council, or by any directions given in pursuance thereof to lords lieutenants, or deputy lieutenants acting for lords lieutenants, of the several counties, shires, cities, and places in the United Kingdom; and all the provisions of the several Acts in force in the United Kingdom relating to the militia shall, upon any such order and direction given in pursuance thereof, become and be in full force and be carried into execution at the periods specified in such order or direction as aforesaid, with all such penalties and forfeitures for any neglect thereof, as fully as if such periods had been fixed in the Acts relating to such militia.

3. So long as the making of lists and the ballots for the militia of *Great Britain* are suspended it shall not be necessary for the clerks of general meetings of the several counties therein to transmit to the clerks

of the subdivision meetings, or to her Majesty’s principal secretary of state for the war department, the extracts and abstracts mentioned and referred to in section three of seventh *George the Fourth*, chapter fifty-eight.

4. Provided also, that nothing herein contained shall extend to prevent the holding before the expiration of such period as aforesaid of such general or other meetings relating to the militia of the United Kingdom as may be called in *Great Britain* under the authority of one of her Majesty’s principal secretaries of state, or in *Ireland* under the authority of the Lord Lieutenant or other chief governor or governors of *Ireland*, or of any meeting which may be called for the purpose of altering, enlarging, or providing any place for the reception of the arms, accoutrements, clothing, or other stores belonging to the militia.

CAP. LIV.

An Act for vesting in her Majesty’s principal secretary of state for the war department certain lands and hereditaments at *Walmer*, in the county of *Kent*.
[13th July, 1863.]

OAP. LV.

An Act to continue the poor law board for a limited period.
[21st July, 1863.]

CAP. LVI.

An Act to make perpetual an Act to amend the laws relating to loan societies.
[21st July, 1863.]

OAP. LVII.

An Act to consolidate and amend the Acts relating to the Payment of Regimental Debts, and the Distribution of the Effects of Officers and Soldiers in case of Death, and to make like provision for the Cases of Desertion and Insanity, and other Cases.
[21st July, 1863.]

- Sec. 1. *Short title.*
2. *Interpretation of terms.* 21 & 22 Vict., c. 106.
3. *Repeal of enactments in schedule,*
4. *Definition of preferential charges on property, military debts, &c.*
5. *Surplus only of personal estate to be deemed personal estate.*
6. *Questions respecting amount, payment, &c., of preferential charges to be decided by secretary of state, or in India by military secretary to government of presidency.*
7. *On death of officer or soldier on service, committee of officers to secure effects.*
8. *If preferential charges not paid, power to committee to sell and convert effects, and to get in credits, and after payment of expenses, to secure surplus.*
9. *In India, power for committee to deliver over effects to administrator general.*
10. *Remittance of surplus by committee.*
11. *As to the payment of surplus where deaths occur in India or elsewhere.*

12. *Provision where death occurs in India, the deceased not being a soldier.*
13. *On receipt of surplus at war or India office, notices to be published in Gazette, &c. as to amount to credit of deceased, and other particulars.*
14. *Residue exceeding 100*l.* to be paid to representative of deceased.*
15. *Residue not exceeding 100*l.* to be paid to representative, if any.*
16. *Where residue does not exceed 100*l.*, and no representation, war or India office empowered to pay it over for benefit of widow, &c., or to invest it for benefit of children, &c.*
17. *Provision in last-mentioned case for payment of debts out of residue.*
18. *Residues undisposed of for six years to be applied towards compassionate fund.*
19. *Medals and decorations excepted; to be disposed of according to royal warrant.*
20. *Special provision for case of death of regimental paymaster.*
21. *Restriction on interposition of official administrators. Duties of administrators.*
22. *Money remitted not to be assets in place where remitted to.*
23. *Deduction of arrears of subscription to military and orphan funds.*
24. *Exemptions from duty.*
25. *Creditor administering not entitled to claim property.*
26. *Deposit in Court of Probate, &c., of original wills in hands of secretary of state and declarations of intestacy.*
27. *On desertion of committee of officers to sell effects, and pay expenses.*
28. *Application of surplus.*
29. *Absence without leave.*
30. *Act to apply to apprentices and felons.*
31. *In case of insanity, committee of officers to secure effects.*
32. *Liability of effects to be applied as for payment of preferential charges.*
33. *If preferential charges not paid, power for committee to sell and apply proceeds.*
34. *Power to war or India office to apply officer's half pay, in case of insanity, for his benefit.*
35. *Validity of payments, sales, &c., under this Act. Indemnity to officers and others acting under it.*
36. *Further regulations by royal warrant.*
37. *Commencement of Act.*

‘WHEREAS it is expedient to consolidate and amend the provisions now in force relating to the payment of regimental debts, and the distribution of the effects of officers and soldiers dying on service, and those provisions having been found beneficial, it is also expedient to make like provision for the security and applications of the effects of deserters and others, and of officers and soldiers becoming insane on service:’

Be it therefore enacted by the Queen's most excellent Majesty, by and with the advice and consent of the lords spiritual and temporal, and commons, in this

present Parliament assembled, and by the authority of the same, as follows:

Preliminary.

1. This Act may be cited as *The Regimental Debts Act, 1868.*

2. In this Act—

The term “*officer*” means (except where it is otherwise expressed) a commissioned officer of her Majesty's army, or of her Majesty's Indian army:

The term “*soldier*” means (except where it is otherwise expressed) a soldier of her Majesty's army, or a *European* soldier of her Majesty's Indian army, including a warrant and a non-commissioned officer:

The term “*representation*” includes probate, and letters of administration, with or without will annexed, and the corresponding documents or Acts in use according to the law of *Scotland*, or other law in force in any place where this Act operates:

The term “*representative*” means any person taking out representation:

The term “*the secretary of state for war*” means such one of her Majesty's principal secretaries of state for the time being as her Majesty thinks fit to intrust with the seals of the war department:

The term “*India*” means the territories for the time being vested in her Majesty under the Act of the year 1858, “*for the better Government of India:*”

The term “*the secretary of state for India in council*” means one of her Majesty's principal secretaries of state acting with the council of *India* under that Act:

The term “*person*” includes a corporation and any body of persons.

3. The enactments described in the schedule to this Act shall be repealed; but this repeal shall not affect the past operation of any such enactment, or anything already done, or any right, title, obligation, or liability already accrued thereunder, or any remedy or proceeding for the enforcement thereof.

PART I.—DEATH ON SERVICE.

Preferential Charges.

4. Where an officer or soldier dies on service, the following classes of expenses and debts incurred and owing by him or on his account shall, for the purposes of this Act, be considered preferential charges on his personal property, and be payable thereout in preference to all other debts and liabilities, and, as among themselves, in the following order:

(1.) *Expenses of last illness and funeral:*

(2.) *Military debts, namely, sums due in respect of—*
Quarters;
Meat, band, and other regimental accounts;
Military clothing, appointments, and equipments, not exceeding a sum equal to six months pay of the deceased, and having become due within eighteen months before his death;

including sums due to any agent or to any paymas-

ter, quartermaster, or other officer, on any such account, or on account of any advance made for any such purpose;

to which shall be added, where the death occurs out of the United Kingdom,—

(3.) Servant's wages, not exceeding two months wages to each servant:

(4.) Household expenses incurred within a month before the death or after the last issue of pay to the deceased, whichever is the shorter period.

5. The surplus only of the personal property of an officer or soldier dying on service, remaining over after payment of preferential charges, shall be considered personal estate of the deceased, with reference to the calculation of probate duty, or of any other tax or per-centage, or for any of the purposes of administration or distribution.

6. If, in any case, a doubt or difference arises as to any particular expense or debt being a preferential charge or not,—or as to any alleged preferential charge having been in fact incurred, or being due, in the whole or in part, or not,—or as to the priority among or payment of any preferential charges, where the property is insufficient to pay all in full, or where those of one class exceed the amount allowed for that class,—or otherwise in relation to any preferential charge or the payment thereof,—the decision of the secretary of state for war, where the death occurs elsewhere than in *India*, and of the military secretary to the government of the presidency in which the deceased was quartered, where the death occurs in *India*, or of such officer or person as the secretary of state or military secretary respectively deposes by writing under his hand to act for him in this behalf, shall be final, and shall be binding on all persons for all purposes.

Collection and Disposal of Effects.

7. Immediately on the death of an officer or soldier on service, such committee of officers as may be prescribed by royal warrant, according to the circumstances of different cases, herein-after called the committee of adjustment, shall secure all such of his effects as—

Where the death occurs in the United Kingdom, are in camp or quarters; and

Where the death occurs out of the United Kingdom, are within the station, colony, or command.

8. Provided that if the representative of the deceased, or his widow (if any), or any of his next of kin, pays in full the preferential charges, the committee of adjustment shall not further interfere in relation to the property.

If such payment is not made, then, within one month after the death, the committee of adjustment may and shall, without any representation taken out, and as if they were the representatives of the deceased, and to the exclusion of all other authorities and persons whomsoever, sell or convert into money such parts of the effects of the deceased as do not consist of money,—and also where the death occurs out of the United Kingdom get in, and give receipts (which shall be effectual discharges) for, all or any of the credits forming part of the estate

of the deceased, and being payable or recoverable in *India* or in the colony or possession in which the deceased was quartered (as the case may be), and, if they think fit, sue for and recover any of such credits,—and, after paying thereout the expenses attending the discharge of their duties, shall pay thereout the preferential charges, and secure the surplus of the effects, or effects and credits, as the case may be, remaining over after all such payments.

9. Where the death occurs in *India*, the committee of adjustment may, in such cases, under such circumstances, and at such time or times, as may be prescribed by royal warrant, according to the circumstances of different cases, deliver over the effects secured by them to the administrator general for the presidency in which the deceased was quartered.

Disposal of Surplus.

10. The committee of adjustment shall, according to the circumstances of the case, remit or lodge the surplus aforesaid to or in the hands of such paymaster or other officer or person, at such time or times, in such manner, and together with such accounts, vouchers, reports, and information, as may be prescribed by royal warrant.

11. Where the death occurs elsewhere than in *India*, or the death occurs in *India*, the deceased being (in the latter case) a soldier of her Majesty's army, then the paymaster or other officer or person aforesaid shall dispose of the surplus as follows:—

(1.) Where the amount exceeds one hundred pounds, he shall pay it over to the representative of the deceased, if present at head quarters, and if there is none, shall forthwith remit it to the secretary of state for war:

(2.) Where the amount does not exceed one hundred pounds, it shall not be necessary for any purpose that representation to the deceased be taken out, but if representation is taken out, such paymaster or other officer or person shall pay the amount over to the representative, if present at head quarters:

(3.) Where the amount does not exceed one hundred pounds, and representation is not taken out, then such paymaster or other officer or person shall dispose of the amount, or part thereof, (in such manner as may be prescribed by royal warrant for such cases,) for the benefit of the widow and of the children or other near relatives (if any) of the deceased, or of some of such persons, being present at head quarters; and if there are no such persons, or any part of the amount aforesaid is not so disposed of for their benefit, he shall forthwith remit the whole amount, or the part thereof not so disposed of, (as the case may be,) to the secretary of state for war.

12. Where the death occurs in *India*, the deceased not being a soldier of her Majesty's army, the following provisions shall take effect:—

(1.) The paymaster or other officer or person aforesaid shall, as soon as may be after receiving the surplus aforesaid, publish such

notice (stating the amount of the surplus, and other particulars respecting the deceased and his property), as may be prescribed by royal warrant, together with a notice stating that all claims by creditors against the property of the deceased are to be lodged with such paymaster or other officer or person, who shall retain the surplus for two months after the first publication of such Gazette notice as aforesaid, and shall receive and record all claims lodged with him accordingly:

- (2.) If claims are so lodged, not exceeding in the whole such absolute amount, or such proportion of the surplus, as may be prescribed by royal warrant, according to the circumstances of different cases, then such paymaster or other officer or person shall, at the expiration of the said two months, proceed to discharge the demands of the claimants who have lodged claims with him, unless under the special circumstances of the case of the deceased it appears to him inexpedient or unjust to do so:
- (3.) In that case, or in case the claims lodged exceed in the whole the absolute amount or the proportion aforesaid, then such paymaster or other officer or person shall, without discharging those claims, or any of them, transfer the surplus aforesaid to the administrator general for the presidency:
- (4.) Where such paymaster or other officer or person does not so transfer the surplus, he shall dispose thereof, or of so much thereof as remains after the discharge of any claims, as follows:

Where the amount exceeds one hundred pounds, he shall pay it over to the representative of the deceased in *India*, if any;

Where the amount does not exceed one hundred pounds, it shall not be necessary for any purpose that representation to the deceased be taken out in *India*; but if representation is taken out there, such paymaster or other officer or person shall pay the amount over to the representative in *India*;

Where the amount does not exceed one hundred pounds, and representation in *India* is not taken out, such paymaster or other officer or person shall dispose of the amount, or part thereof, in *India*, (in such manner as may be prescribed by royal warrant for such cases,) for the benefit of the widow and of the children or other near relatives (if any) of the deceased, or of some of such persons, being in *India*;

- (5.) Subject to the foregoing provisions, such paymaster or other officer or person shall, at the expiration of such time, not exceeding in any case six months, as may be prescribed by royal warrant, remit the surplus, or so much thereof as remains in his

hands after discharging any claims, from *India* to *England*, as follows,—

In the cases of officers of her Majesty's army constituting the staff corps of the three presidencies, and in the cases of officers and *European* soldiers of her Majesty's *Indian* army, to the secretary of state for *India* in council,—

In other cases, to the secretary of state for war.

Disposal of Residue by Secretary of State.

13. The secretary of state for war, or the secretary of state for *India* in Council, as the case may be, on receiving any such surplus or part of a surplus as is herein-before directed to be remitted, shall cause an account to be made up, as soon as may be, of the total amount to the credit of the deceased, including the amount of the surplus or part of a surplus so remitted, together with all arrears of pay, batta, grants, and other allowances in the nature thereof, and thereupon shall cause to be published, as soon as conveniently may be, in the *London Gazette*, and also in any newspaper or otherwise as may seem fit, a notice stating the total amount to the credit of the deceased as aforesaid, herein-after called the residue, and such other particulars respecting the deceased and his property as may seem fit, together with a notice stating the mode in which any application respecting the residue is to be made to the secretary of state for war, or to the secretary of state for *India* in council, as the case may be.

14. Where the residue exceeds one hundred pounds, the secretary of state for war, or the secretary of state for *India* in council, as the case may be, shall dispose of the residue by paying it over to the representative of the deceased.

15. Where the residue does not exceed one hundred pounds, it shall not be necessary for any purpose that representation to the deceased be taken out, but in any case the secretary of state for war, or the secretary of state for *India* in council, as the case may be, may, if it seems fit, require representation to be taken out; and if, on that requisition or otherwise, representation is taken out, then he shall dispose of the residue by paying it over to the representative.

16. Where the residue does not exceed one hundred pounds, and representation is not taken out, then, after the expiration from the first publication of the required notice in the *London Gazette*, of three months in the case of an officer, and of one month in the case of a soldier, the secretary of state for war, or the secretary of state for *India* in council, as the case may be, shall dispose of the residue as follows:—

- (1.) He shall, if he thinks fit, pay the residue over to any person showing herself or himself, to the satisfaction of the secretary of state for war, or the secretary of state for *India* in council, as the case may be, to be the widow of the deceased, or to be the child or any relative of the deceased, or to be entitled to take out representation to the deceased,—to the end that the residue may be applied by the person to whom it is so paid over in a due course of administration,

and the same shall be so applied accordingly (for which application the secretary of state for war, or the secretary of state for *India* in council, as the case may be, may require such security as seems fit):

- (2.) Or else, where the deceased leaves any child or near relative him surviving, the secretary of state for war, or the secretary of state for *India* in council, as the case may be, shall retain the residue in his hands on behalf of such child, or near relative, and shall invest the residue, or any part thereof, in such manner as may be prescribed by royal warrant, and shall apply the sums invested, and the income thereof, or any part thereof respectively, from time to time, for the maintenance, education, or advancement, or otherwise for the benefit, of such child or near relative, in such manner as may seem fit, subject to such regulations as may be laid down by royal warrant.

Debts.

17. Notwithstanding anything herein-before contained, where the residue does not exceed one hundred pounds, and representation to the deceased is not taken out, the secretary of state for war, or the secretary of state for *India* in council, as the case may be, shall, before disposing of the residue or any part thereof, in manner aforesaid,—or after so disposing of the residue or any part thereof, if and so far as the disposition thereof is capable of revocation,—apply the residue, or so much as may be requisite, in or towards payment of any debt of the deceased of which he has notice, subject to the following conditions:

First.—That the debt accrued due within three years before the death:

Second.—That payment of it is claimed within two years after the death:

Third.—That the claimant proves the debt to the satisfaction of the secretary of state for war, or of the secretary of state for *India* in council, as the case may be.

Any person claiming to be a creditor of the deceased shall not be entitled to obtain payment of his debt out of any money that may, under this Act, be in the hands of the secretary of state for war, or of the secretary of state for *India* in council, by any means or proceedings whatever except by means of a claim lodged with such secretary of state, and proceedings thereon, under and according to this Act.

Nothing in the present section shall prejudicially affect the claim of any creditor in respect of a debt incurred before the commencement of this part of this Act.

Undisposed-of Residues.

18. If, in any case, the residue or any part thereof remains, for one year after the first publication of the required notice in the *London Gazette*, in the hands of the secretary of state for war, or of the secretary of state for *India* in council, as the case may be, undisposed of or unappropriated, then as soon as conveniently may be after the end of that year the secretary of state for war, or the secretary of state for

India in council, as the case may be, shall cause to be published in the *London Gazette* a notice similar to the original required notice, *mutatis mutandis*, and so for six successive years from the publication of the original notice; and if, in any case, the residue, or any part thereof, remains in the hands of the secretary of state for war, or the secretary of state for *India* in council, as the case may be, undisposed of or unappropriated for six months after the publication of the last of such required notices in the *London Gazette*, then at the expiration of the said six months, he shall apply the same, together with any income or accumulations of income accrued therefrom, in such manner in or towards the creation or maintenance of such compassionate or other fund for the benefit of widows and children or other near relatives of soldiers dying on service, as may be prescribed by royal warrant.

Provided, that the application under the present section of any residue, or part of a residue, undisposed of or unappropriated as aforesaid, shall not be deemed to bar any claim of any person to the same, or any part thereof, that may be established at any time after such application.

Medals and Decorations.

19. Medals and decorations belonging to an officer or soldier dying on service shall not be considered to be comprised in the personal estate of the deceased with reference to the claims of creditors or for any of the purposes of administration under this Act or otherwise; and, notwithstanding anything in this or any other Act contained, the same, when secured by the committee of adjustment, shall be held and disposed of according to regulations laid down by royal warrant.

Exception as to Regimental Paymasters.

20. The case of a regimental paymaster dying on service shall, notwithstanding anything herein-before contained, be provided for as follows:—

- (1.) That case shall be deemed wholly excepted out of the foregoing provisions of this Act, save so far as they define and give preference to and regulate the payment of and provide for decisions respecting preferential charges, and as they relate to the duties and powers of the committee of adjustment, and to medals and decorations:
- (2.) The duties and powers of the committee of adjustment in relation to the property shall, nevertheless, in the case of a regimental paymaster, be deemed to arise in full immediately and unconditionally on the death, and to continue notwithstanding the payment of the preferential charges by any person:
- (3.) Money in the possession or under the control of a regimental paymaster at his death shall not be considered to be comprised in his effects for the purposes of this Act:
- (4.) The surplus in the hands of the committee of adjustment shall, in the case of a regimental paymaster, be dealt with by them as may be prescribed by royal warrant, and not according to the foregoing provisions of this Act.

Administrators general and other official administrators.

21. An administrator general for a presidency in *India*, or a registrar of any court in *India* or in any of her Majesty's colonies or possessions abroad, or any other official administrator, notwithstanding any law regulating his office independently of this Act, shall not interpose in any manner in relation to any property of an officer or soldier dying on service, except in the cases expressly provided for in this Act, or unless expressly required to do so by a committee of adjustment, or some other officers or persons acting under this Act.

Where, under this Act, any property comes to the hands of any such administrator general, registrar, or other official administrator, he shall administer the same in accordance with the provisions of this Act relating to preferential charges, and the other provisions of this Act, and subject thereto according to the law regulating his office independently of this Act.

Where any money coming, under this Act, to the hands of any such administrator general remains in his hands after discharge of all debts and liabilities, he shall remit the same to the secretary of state for *India* in council, at such time and in such manner as he directs, to be retained or to be paid over to the secretary of state for war, as the case may require, and to be disposed of according to the provisions of this Act, as the residue or part of the residue of the property of the deceased.

An administrator general shall not be entitled to take, and it shall not be lawful for him to take, a percentage on the property of an officer or soldier dying on service, exceeding three *per centum* on the gross amount coming to his hands if preferential charges have been previously paid, or on the gross amount remaining in his hands after payment by him of preferential charges, as the case may be.

Miscellaneous.

22. Any property of an officer or soldier dying on service, coming, under this Act, to the hands of any paymaster or other officer or person, shall not, by reason of so coming, be deemed assets or effects at the place in which that paymaster or other officer or person is stationed or resides, and it shall not be necessary by reason thereof that representation should be taken out in respect of that property for that place.

Where, under this Act, any such property is to be paid or delivered over to the representative of a deceased officer or soldier or other person entitled to receive the same,—

if such payment or delivery is to be made in *India*, then the military secretary to the government of the presidency in which the deceased was quartered,—

and if such payment is to be made elsewhere than in *India*, then the secretary of state for war, or the secretary of state for *India* in council, as the case may be,—

may order that such property be transmitted to any other place where the same can be more conveniently paid or delivered over as aforesaid; and the obedience to any such order by any paymaster or other officer or person in whose hands such property is, shall be a

sufficient discharge to him, and he shall not be liable in any manner by reason of such property having been in his hands and having been transmitted under any such order.

23. Nothing in this Act shall be deemed to prevent the secretary of state for *India* in council, on the death of an officer of her Majesty's *Indian* army, from deducting in the pay office from any arrear of pay due to the deceased the amount of any arrears of subscription due by the deceased to the military and orphan funds, or either of them.

24. The personal estate of an officer or soldier dying on service in *India*, not exceeding one hundred pounds after payment of preferential charges, and administered and disposed of under this Act without representation being taken out, shall not be liable to the payment of any duty either in *India* or in the United Kingdom; but this provision shall not affect any exemption from duty existing independently hereof.

25. A creditor, as such, shall not be deemed a person entitled to take out representation to the deceased within the meaning of this part of this Act; nor shall a creditor taking out representation as such be entitled by virtue of such representation to claim from the secretary of state for war, or the secretary of state for *India* in council, any part of the property of the deceased.

26. Where any original will of an officer or soldier dying on service comes to the hands of the secretary of state for war, or of the secretary of state for *India* in council, and representation under the same is not taken out, then the secretary of state for war, or the secretary of state for *India* in council, as the case may be, may cause the same to be deposited as follows:

Where the domicile of the testator was in *England*, or in *India*, or in any of her Majesty's colonies or possessions abroad, or in any foreign country, then in the place for the time being appointed in *London* or *Middlesex* for the deposit of original wills brought into the court of probate:

Where the domicile of the testator was in *Ireland*, then in the place for the time being appointed in *Dublin* for the deposit of original wills brought into the court of probate:

Where the domicile of the testator was in *Scotland*, then in the office of the commissary clerk of the commissary court of the county of *Edinburgh*.

Where an officer or soldier dies on service intestate, and under this Act any residue of his property comes to the hands of the secretary of state for war, or of the secretary of state for *India* in council, for disposal, and representation to the deceased is not taken out, then the secretary of state for war, or the secretary of state for *India* in council, as the case may be, may, if it seems fit, cause a declaration of the intestacy of such officer or soldier to be deposited in the place or office where the original will of such officer or soldier (if any) would be deposited as aforesaid.

In every such case the secretary of state for war, or the secretary of state for *India* in council, as the case may be, may cause to be deposited together with such original will or declaration of intestacy an inventory showing the personal property of the deceased,

and the application thereof, as far as the same may be known.

Where the original will of any officer or soldier who has before the commencement of this part of this Act, died on service is in the hands of the secretary of state for war, or of the secretary of state for India in council, he may, if it seems fit, at any time cause the same to be deposited in the place or office where the original will of such officer or soldier would be deposited as aforesaid if he had died after the commencement of this part of this Act.

Every such original will, declaration of intestacy, and inventory shall be preserved and dealt with, and may be inspected, subject and according to any general or other rules or orders for regulating such preservation, dealing, and inspection, and for fixing any fees to be payable in respect thereof, as may be from time to time made in that behalf by the court, judge, or other authority empowered to make general or other rules or orders for like purposes in relation to other documents deposited in the same place or office.

PART II.—DESERTION AND OTHER CASES.

27. In every case of desertion, such committee of officers as may be prescribed by royal warrant, according to the circumstances of different cases, hereinafter called the committee of adjustment, shall immediately secure all such of the deserter's effects as—

Where the desertion occurs in the United Kingdom, are in camp or quarters; and

Where the desertion occurs out of the United Kingdom, are within the station, colony, or command;

and shall forthwith make an inventory thereof, and shall, within three months after the desertion, sell or convert into money such parts of the deserter's effects as do not consist of money, and thereout pay the expenses attending the execution of the provisions of the present section.

28. The surplus remaining after such payment shall be liable to be applied in or towards payment of any such expenses and debts incurred and owing by the deserter as would, under Part I. of this Act, be preferential charges on his personal property in case he had died on service, with the like preference, in the like order, and subject to the like provisions for decision of doubt or difference, as would in that case apply, as nearly as may be, *mutatis mutandis*.

The committee of adjustment shall apply the same accordingly, and then shall dispose of any property remaining in their hands according to regulations laid down by royal warrant.

29. For the purpose of this part of this Act absence without leave for twenty-one days shall be deemed included in the term "desertion."

30. The provisions of this part of this Act shall apply, as nearly as may be, *mutatis mutandis*, in the case of a soldier delivered up as an apprentice, or convicted of felony.

PART III.—INSANITY.

31. Where an officer or soldier is removed, put on half pay, or discharged, on the ground of insanity, such committee of officers as may be prescribed by royal warrant, according to the circumstances of dif-

ferent cases, hereinafter called the committee of adjustment, shall immediately secure all such of his effects as—

Where the insanity occurs during service in the United Kingdom, are in camp or quarters; and

Where the insanity occurs during service out of the United Kingdom, are within the station, colony, or command.

32. The effects of such an officer or soldier shall be liable to be applied in or towards payment of any such expenses and debts occurred and owing by him as would, under part I. of this Act, be preferential charges on his personal property in case he had died on service, with the like preference, in the like order, and subject to the like provision for decision or doubt or difference, as would in that case apply, as nearly as may be, *mutatis mutandis*.

33. If any person who would, if such officer or soldier were dead, be entitled to take out representation to him (otherwise than as a creditor), or his wife (if any), or any near relative, pays in full the expenses and debts aforesaid, the committee of adjustment shall not further interfere in relation to the property.

If such payment is not made, then, within one month after the removal, putting on half pay, or discharge, is known at the quarters where the effects are, the committee of adjustment may and shall sell or convert into money such parts of the effects as do not consist of money, and, after paying thereout the expenses attending the discharge of their duties, shall pay thereout the expenses and debts aforesaid, and shall dispose of any property then remaining in their hands as may be prescribed by royal warrant, to the end that the same may be applied for the benefit of the officer or soldier to whom it belongs.

34. Where an officer is put on half pay on the ground of insanity, the secretary of state for war, or the secretary of state for India in council, as the case may be, may, if it seems fit, pay to the person charged with the care and maintenance of such officer, all or any part of his half pay, to be applied for his care and maintenance.

PART IV.—GENERAL PROVISIONS.

35. Every payment or application of money, and every sale or disposition of property, made by the secretary of state for war, or by the secretary of state for India in council, or by any committee of adjustment, or by any paymaster or other officer or person, in pursuance of this Act, or of any royal warrant for carrying this Act into effect, shall be good and valid as against all persons whomsoever; and every such secretary of state, and every officer belonging to any such committee, and every such paymaster, officer, or person as aforesaid shall be, by virtue of this Act, absolutely discharged from all liability in respect of the money or other property so paid, applied, or disposed of.

36. Her Majesty may from time to time, by warrant under the royal sign manual, do all such things as are hereinbefore directed or authorized to be done by royal warrant, and also prescribe such regulations as may seem fit, for the better execution of any of the purposes of this Act.

Every royal warrant made under this Act shall be

laid before both Houses of Parliament within fourteen days after the making thereof, if Parliament is then sitting, and if not, then within fourteen days after the commencement of the next sitting of Parliament.

37. This Act shall, with respect to the making of any royal warrant under it, take effect from its passing, and in all other respects shall take effect from the time appointed for its commencement in the royal warrant first made under it.

SCHEDULE.

ENACTMENTS REPEALED.

58 Geo. 3, c. 73.—An Act for regulating the payment of regimental debts and the distribution of the effects of officers and soldiers dying in service, and the receipt of sums due to soldiers.—*Sections, one, two, and three.*

6. Geo. 4, c. 61.—An Act to amend two Acts, of the fifty-eighth year of his late Majesty, for regulating the payment of regimental debts and the distribution of the effects of officers and soldiers dying in service, and the receipt of sums due to soldiers; and of the fourth year of his present Majesty, for punishing mutiny and desertion of officers and soldiers in the service of the East India Company.—*The whole.*

11 Geo. 4, & 1 Wm. 4, c. 41.—An Act to make further regulations with respect to army pensioners.—*Section five, except as to pension or prize money.*

20 & 21 Vict. c. 66.—An Act for punishing mutiny and desertion of officers and soldiers in the service of the East India Company, and for regulating in such service the payment of regimental debts, and the distribution of the effects of officers and soldiers dying in the service.—*Sections sixty-one to sixty-six, both inclusive.*

26 & 27 Vic. c. 8.—An Act for punishing mutiny and desertion, and for the better payment of the army and their quarters.—*Sections ninety-eight to one hundred and two, both inclusive.*

CAP. LVIII.

An Act for confirming a scheme of the charity commissioners for the management of the charity of Sir Robert Hucham, knight, king's serjeant, for the benefit of Framlingham, Debenham, and Levington, in the county of Suffolk, and of Coggeshall in the county of Essex. [21st July, 1863.]

CAP. LIX.

An Act for confirming a scheme of the charity commissioners for the management of the charities in the borough of Ruthin in the county of Denbigh, comprising the hospital of Christ and its subsidiary endowments, the grammar school, Edward Lloyd's foundation, and Bishop Goodman's charity. [21st July, 1863.]

CAP. LX.

An Act to confirm a certain provisional order under the General Police and Improvement (Scotland) Act, 1862, relating to the burgh of Leith. [21st July, 1863.]

CAP. LXI.

An Act to prevent waywardens contracting for works within their own district. [21st July, 1863.]

CAP. LXII.

An Act to amend the law relating to the seizure of growing crops in Ireland. [21st July, 1863.]

Sec. 1. *To extend to Ireland only.*

2. *Growing crops not to be seized under civil bill decrees or justices orders.*

'WHEREAS it is expedient to amend the law relating to the seizure of growing crops in Ireland: Be it therefore enacted by the Queen's most excellent Majesty, by and with the advice and consent of the lords spiritual and temporal, and commons, in this present Parliament assembled, and by the authority of the same, as follows:

1. This Act shall extend to Ireland only.

2. It shall not be lawful to seize or take in execution under any civil bill decree or order of the civil bill court, or under any decree, order, or warrant of a justice of the peace, any growing crops, trees, shrubs, plants, or vegetable matters which are not severed from the land and soil, save and except under any such decree, order, or warrant which shall have been pronounced or issued before the passing of this Act.

CAP. LXIII.

An Act to confirm certain provisional orders under The Land Drainage Act, 1861. [21st July, 1863.]

CAP. LXIV.

An Act to confirm certain provisional orders under the Local Government Act (1858), relating to the districts of Plymouth, Holywell, Llanelly, West Ham, Worthing, Aberavon, and Wallasey. [21st July, 1863.]

CAP. LXV.

An Act to consolidate and amend the Acts relating to the volunteer force in Great Britain. [21st July, 1863.]

CAP. LXVI.

An Act to amend the law relating to prisons in Ireland. [21st July, 1863.]

19 & 20 Vict. c. 68.

Sec. 1. *Commencement of Act.*

2. *This and recited Act to be as one.*

3. *Part of section 19 of recited Act repealed.*

'WHEREAS by the nineteenth section of an Act passed in the nineteenth and twentieth years of the reign of her Majesty, chapter sixty-eight, intituled *An Act to further amend the laws relating to prisons in Ireland*, it is amongst other things enacted, that the appointment by any board of superintendence, under the provisions of the said Act, of any officer of any such prison other than the chaplains or medical officer shall be probationary only, and shall not be or become absolute until the same shall be confirmed at a meeting of the board of superintendence duly summoned and held for that purpose, not sooner than three months after the meeting at which such probationary appoint-

ment shall have been made, and that no such confirmation of the appointment of any officer of any such prison, save as aforesaid, shall be made at such last-mentioned meeting unless two thirds of the members of such board and the majority of the members present shall concur in such ratification or confirmation: And whereas it has been found inconvenient to require the presence of two thirds of the members of such boards of superintendence at meetings summoned and held to confirm such probationary appointments made by a former board: Be it enacted by the Queen's most excellent majesty, by and with the advice and consent of the lords spiritual and temporal, and commons, in this present Parliament assembled, and by the authority of the same, as follows:

1. This Act shall commence and take effect from and after the first day of *October* next after the passing of this Act.

2. This Act and the said recited Act shall be incorporated and construed together as one Act.

3. So much of the said recited Act (section nineteen) as provides that two thirds of the members of any board of superintendence shall be present at any meeting of such board duly summoned and held to confirm probationary appointments made by a former board shall be repealed, and the presence of six members only shall be sufficient for that purpose, the majority of whom shall be required to concur in the ratification or confirmation of such probationary appointments.

CAP. LXVII.

An Act to enable provision to be made out of the funds of *Greenwich Hospital* for the widows of seamen and marines slain, killed, or drowned in the sea service of the Crown. [21st July, 1863.]

Sec. 1. *Appropriation out of revenues of hospital for provision for widows.*

2. *Widows fund to be created by accumulation of unexpended balances.*

3. *Admiralty to make rules to be approved by order in council.*

4. *Short title.*

‘WHEREAS among the objects intended to be provided for by the endowment of *Greenwich Hospital* was the sustentation of the widows of seamen happening to be slain, killed, or drowned in the sea service of the Crown, as far as the resources of the hospital would extend, and according to the rules, orders, and constitutions to be provided in that behalf:

‘And whereas it is expedient that a portion of the revenues of the hospital should now be applied as hereinafter provided for the relief of such widows, and of the widows of marines:’

Be it therefore enacted by the Queen's most excellent Majesty, by and with the advice and consent of the lords spiritual and temporal, and commons, in this present Parliament assembled, and by the authority of the same, as follows:

1. The commissioners of *Greenwich Hospital* shall, under the control and direction of the lord high admiral of the United Kingdom, or of the commissioners for executing the office of lord high admiral, annually

appropriate out of the income of *Greenwich Hospital* such sum, not exceeding in any year five thousand pounds, as may from time to time appear sufficient for the purposes of this Act, and as the finances of the hospital may from time to time allow, which sum shall be applied in making provision, in manner hereinafter directed, for widows of petty officers and seamen and of non-commissioned officers and privates of the royal marines, who, after the passing of this Act, may be killed or drowned in the service of the Crown.

2. If in any year it happens that the sum of five thousand pounds or other less sum appropriated is not wholly expended in making such provision as aforesaid, the Commissioners of *Greenwich Hospital* shall, under the control and direction aforesaid, dispose of the unexpended balance as follows; namely, by forming and maintaining, by way of accumulation, a fund, to be called *The Greenwich Hospital Seamen's Widows Fund*, by investing such unexpended balance in or upon some of the government stocks, funds, or securities of the United Kingdom, and by from time to time investing in like manner the proceeds of such stocks, funds, or securities, and the income from time to time resulting therefrom, and from like successive investments, and by applying from time to time in any subsequent year the accumulations of previous years, or the income resulting therefrom, or any part of such accumulations or income, in making such provision for such widows as aforesaid, in like manner as if the accumulations or income so applied in any year were part of the sum of five thousand pounds or other sum originally appropriated in that year.

3. The lord high admiral of the United Kingdom, or the commissioners for executing the office of lord high admiral, shall from time to time make such rules as may seem fit for determining the nature and amount of the provisions to be made for such widows as aforesaid, according to the circumstances of different cases, and for governing the selection of the persons to receive the benefit of this Act, and for regulating the formation and maintenance of the said widows fund, and generally for regulating the application to the purposes of this Act of the yearly sum to be appropriated as aforesaid, and of the said widows fund; but any such rules shall not have effect until they are approved by her Majesty in council.

Every order in council under this Act shall be laid before both Houses of Parliament within one month after the making thereof, if Parliament is then sitting, and if not, then within one month after the beginning of the next sitting of Parliament.

4. This Act may be cited as *The Greenwich Hospital (Provision for Widows) Act, 1863.*

CAP. LXVIII.

An Act to extend the powers of the Act relating to the main drainage of the metropolis.

[21st July, 1863.]

CAP. LXIX.

An Act to establish officers of the royal naval reserve.

[21st July, 1863.]

Sec. 1. *Power to her Majesty to accept services of masters, &c. of merchant service.*

2. *Power to admiralty to enrol officers of reserve to the royal navy.*
3. *As to pay, allowances, and pensions of officers of reserve, and pensions of widows of such officers.*
4. *As to continuance of officers already enrolled*
5. *Provisions as to existing and future regulations.*
6. *On passing of this Act, 24 & 25 Vict. c. 129, repealed.*
7. *Short title.*

‘WHEREAS her Majesty is now empowered to avail herself of the services of certain officers of the merchant service of the United Kingdom, and of the colonies and dependencies thereof, as officers of reserve to the royal navy; and it is expedient to extend such power so as to enable her Majesty to accept the services in the like capacity of other qualified persons; and it is also expedient that the provisions relating to such acceptance of services should be comprised in one Act:’ Be it therefore enacted by the Queen’s most excellent Majesty, by and with the advice and consent of the Lords spiritual and temporal, and Commons, in this present Parliament assembled, and by the authority of the same, as follows:

1. It shall be lawful for her Majesty to accept from time to time the offers of any persons who have been, are, or shall be masters, mates, or engineers of ships in the merchant service aforesaid, or of other *British* ships not belonging to her Majesty, or of any persons who have been commissioned officers, masters, or engineers in the *Indian* naval force of her Majesty or in the naval force of the *East India* Company, to serve as officers of reserve to the royal navy, upon such terms and conditions as to her Majesty may from time to time seem fit.

2. The lord high admiral, or the commissioners for executing his office, hereinafter called the admiralty, may enrol as officers of reserve to the royal navy so many of such persons as aforesaid as the admiralty may from time to time deem expedient, under and subject to such rules, orders, and regulations as the admiralty may, with the consent of her Majesty in council, from time to time establish; and such persons so enrolled shall bear such rank in respect to the officers of the royal navy as the admiralty may from time to time direct, and shall, when called out for training or exercise, or on actual service, be subject to all the laws, regulations, and customs for the time being in force for the government and discipline of the royal navy.

3. Such persons so enrolled as officers of reserve shall be entitled to receive such pay and allowances as the admiralty, with the consent of her Majesty in council, may from time to time appoint; and if any such person is disabled or receives any hurt or wound in actual service he shall be entitled to the same allowance or pension in respect thereof as an officer of the royal navy of corresponding rank would be entitled to under similar circumstances; and if any such person is killed in action, or dies from any wound or accident resulting from the performance of his duty, his widow (if any) shall be entitled to the same pension as the widow of an officer of the royal navy of corresponding rank would be entitled to under similar circumstances.

4. It shall be lawful for her Majesty to continue the services of all persons who have been enrolled as officers of reserve to the royal navy before the passing of this Act, and the services of all such persons shall be deemed to be continued by her Majesty as if this Act had not been passed, unless and until her Majesty thinks fit to discontinue the same.

5. All rules, orders, and regulations relating to persons enrolled as officers of reserve to the royal navy made before the passing of this Act by the admiralty, with the consent of her Majesty in council, shall, with respect to all persons enrolled before the passing of this Act, continue in force as if this Act had not been passed, and shall also extend and apply, as far as may be, *mutatis mutandis*, to all persons so enrolled after the passing of this Act, but so that any rules, orders, and regulations made as aforesaid from time to time under this Act may repeal or alter all or any part of any rules, orders, and regulations made before the passing of this Act, and shall, unless otherwise expressed, extend and apply as well to persons so enrolled before the passing of this Act as to persons so enrolled after the passing of this Act.

6. On the passing of this Act the Act of the session of the twenty-fourth and twenty-fifth years of her Majesty, (chapter one hundred and twenty-nine) “to enable her Majesty to accept the services of officers of the merchant service as officers of reserve to the royal navy,” shall be repealed; but this repeal shall not affect the past operation of the said Act, or the validity of anything already done, or any right, title, obligation, or liability already accrued thereunder.

7. This Act may be cited as “The officers of Royal Navy Reserve Act, 1863.”

CAP. LXX.

An Act to facilitate the execution of public works in certain manufacturing districts; to authorize for that purpose advances of public money to a limited amount upon security of local rates; and to shorten the period for the adoption of The Local Government Act, 1858, in certain cases.

[21st July, 1863.]

CAP. LXXI.

An Act for the preservation and improvement of *Harwich* harbour.

[28th July, 1863]

CAP. LXXII.

An Act for the further improvement of the harbour of *Howth*.

[28th July, 1863.]

6 & 7 Wm. 4, c. 35.

Sec. 1. *Commissioners of public works to advance and expend a sum not exceeding £5,000 for improvement of the said harbour.*

2. *Power to levy tolls and rates.*

3. *A list of the rates, tolls, &c. to be affixed in conspicuous places.*

4. *Power to commissioners to let the tolls.*

5. *Application of tolls, &c. and rents of lands.*

6. *Power to enforce payment of tolls, &c.*

7. *Power to commissioners to make bye-laws. Bye-laws to be approved by Lord Lieutenant, &c.*
8. *Copies of bye-laws to be evidence.*

'WHEREAS by a certain Act of Parliament of the session held in the sixth and seventh years of his late Majesty King William the Fourth, chapter thirty-five, the harbour of *Howth*, with the appurtenances thereof, as in the said Act set forth, were respectively transferred to and made over and became vested in the commissioners of public works in *Ireland*, and it was thereby enacted that the same should be repaired, maintained, and supported by the said commissioners so far as should from time to time be authorized by the commissioners of her Majesty's treasury: And whereas by a certain Act of Parliament of the session held in the ninth and tenth years of her present Majesty, chapter three, being an Act to encourage the sea fisheries in *Ireland* by promoting and aiding with grants of public money the construction of piers, harbours, and other works, the commissioners of public works, being the commissioners for the execution of that Act, were empowered, with the consent of the commissioners of her Majesty's treasury, to make advances by way of grant to an amount not exceeding the sum of fifty thousand pounds, to be applied for the purposes of that Act in the manner therein provided, and subject to the conditions therein mentioned: And whereas by a certain other Act of Parliament of the session held in the tenth and eleventh years of her said Majesty, chapter seventy-five, the said commissioners of public works were enabled to make further advances by way of grant for the purposes of the said Act of the session in the ninth and tenth years of her Majesty, chapter three, not exceeding the sum of forty thousand pounds: And whereas the said harbour of *Howth* has become an important station and place of refuge for vessels engaged in prosecuting the sea fisheries on the east coast of *Ireland*, but the said harbour has of late years been gradually silting up, whereby its value and usefulness have been materially injured and lessened: And whereas it is expedient that the said harbour of *Howth* should be deepened and otherwise improved, and that the said commissioners, out of any balance unapplied and available of the said sums of fifty thousand pounds and forty thousand pounds, should be empowered to expend on the improvement of the said harbour a sum of money not exceeding the sum of five thousand pounds, and that provision should be made for the making of bye-laws for the regulation of the said harbour, and also for the imposition of tolls and harbour dues on vessels frequenting and goods imported into the same: Be it therefore enacted by the Queen's most excellent Majesty, by and with the advice and consent of the lords spiritual and temporal, and commons, in this present Parliament assembled, and by the authority of the same, as follows:

1. It shall be lawful for the commissioners of public works in *Ireland* with the consent of the commissioners of her Majesty's treasury (anything in the said Acts of the sessions held in the ninth and tenth and tenth and eleventh years of her said Majesty to the contrary notwithstanding), out of the balance

available of the said sums of fifty thousand pounds and forty thousand pounds, to advance and expend upon the deepening and improving the said harbour of *Howth*, and such other works appertaining to the same as the said commissioners of the treasury may approve, any sum of money not exceeding the sum of five thousand pounds.

2. It shall and may be lawful for the commissioners of public works and they are hereby authorized to levy or cause to be levied and paid for the use of the said harbour such tolls and rates, licence duties and charges, as the commissioners of her Majesty's treasury shall from time to time approve of.

3. The said commissioners shall cause a list, printed or painted in legible characters, of the several rates and tolls which the said commissioners shall from time to time direct and appoint to be taken, and which shall be payable by virtue of this Act, to be fixed on boards in some conspicuous place within the limits of the said harbour.

4. It shall be lawful for the said commissioners, if they shall so think fit, by public bidding, from time to time to let or relet all or any of the tolls or rates payable under the provisions of this Act, for terms not exceeding ten nor less than five years, on such conditions and with such security for payment of the rent reserved on such lease as the said commissioners shall think fit, and the commissioners of her Majesty's treasury shall from time to time approve.

5. The tolls, rates, and charges payable under the provisions of this Act, or the rent payable upon any lease thereof, shall be applied by the said commissioners from time to time in repairing and maintaining the said harbour as the said commissioners may think right.

6. It shall be lawful for the said commissioners, in cases in which such tolls, rates, or charges shall not be leased or let, and for the lessees or lessee of such tolls or rates if leased or let, from time to time to appoint sufficient collectors and officers or agents for the purpose of receiving the tolls and rates payable under this Act; and in case any person liable to pay such tolls or rates shall refuse or neglect to pay the same, it shall be lawful for the said commissioners, or for the lessees or lessee of the said tolls and rates, or their officer or agent, or other person to whom such toll or rate ought to have been paid, to seize the vessels, goods, articles, and things in respect of which such tolls or rates ought to have been paid wherever the same may be found, and to detain the same until such tolls or rates, together with the reasonable costs and expenses of such seizure and detention shall be paid; and if such vessels, goods, articles, and things shall not be redeemed within twenty one days after the seizure thereof, the same shall be appraised and sold, and after deducting the costs of such seizure, detention, and sale, all such sums as shall be due in respect of such toll or rates shall be satisfied thereout, and the overplus paid to the owner in like manner as the law directs in cases of distress for rent in arrear.

7. It shall and may be lawful for the said commissioners, and they are hereby authorized and empowered, in addition to the powers already vested in them, from time to time to make such bye-laws, rules, orders, and regulations not being contrary to any

law or statute in force in *Ireland*, as to them shall seem meet and proper, according to the circumstances of every case, for better carrying into effect the purposes of this Act, or in any manner relating thereto, and from time to time to alter or repeal all or any of such bye laws, rules, orders, or regulations, and to make others, and to impose such fines and penalties, not exceeding the sum of five pounds, upon all persons offending against any of such bye laws, rules, orders, or regulations, as to the said commissioners shall seem reasonable; and all such bye-laws, rules, orders, and regulations shall be reduced into writing, and signed by the said commissioners, or any two or more of them; and a copy thereof, signed by the said commissioners, shall be deposited with the clerk of the peace of the county of *Dublin*, and the same shall be kept with the records of the said county; and a printed or painted copy of such of the said bye-laws, rules, orders, or regulations as shall subject any person, not being an officer or servant of the said commissioners, to any fine or penalty, shall be exhibited on boards or otherwise within the limits of the said harbour; and such bye-laws, rules, and orders shall be binding upon and shall be observed by all persons whomsoever: Provided, that all such bye-laws, rules, orders, and regulations be approved of and confirmed by the Lord Lieutenant or other chief governor or governors of *Ireland* in council, by writing under his or their hands.

8. Provided always, that in all cases of prosecution for any offence or offences against any of the bye-laws, rules, orders, and regulations of the said commissioners, the production of a book or document purporting to contain the bye-laws, rules, orders, or regulations of the said commissioners, and authenticated by the signatures of any two or more of the said commissioners, or by the signature of their secretary for the time being, shall be conclusive evidence of the existence of such bye-laws, rules, orders or regulations.

CAP. LXXIII.

An Act to give further facilities to the holders of *India* stock. [28th July, 1863.]

22 & 23 *Vict. c. 39.* 23 & 24 *Vict. c. 130.*
24 & 25 *Vict. c. 25.*

- Sec. 1. *Short title.*
2. *Definition of terms.*
3. *Right to certificate of title to India stock.*
4. *Restriction as to trustees taking certificates of title.*
5. *General provisions as to certificates of title.*
6. *Reconversion of the certificate to stock.*
7. *Fees in respect of dealings with stock under this Act.*
8. *Remuneration to the bank.*
9. *General regulations with respect to certificates of title.*
10. *Income tax.*
11. *Unclaimed dividends.*
12. *Shares in India stock outstanding to cease to be transferable, &c.*
13. *Punishment of forgery.*
14. *Punishment of personation.*

15. *Punishment of engraving, &c.*

16. *As to the signature and counter-signature of documents in the department of the secretary of state for India.*

‘WHEREAS the secretary of state in council of *India* is empowered, under the provisions of certain Acts of Parliament passed in the sessions holden in the twenty-second and twenty-third, twenty-third and twenty-fourth, twenty-fourth and twenty-fifth years of the reign of her Majesty respectively, to raise money in the United Kingdom, not exceeding such amount as is in the said Acts prescribed, and is further empowered, upon or for the repayment of any principal money secured under the authority of the said Acts respectively, to borrow or raise by the like method all or any part of the amount of principal money so repaid or to be repaid: And whereas capital stock has been and may be from time to time created and issued under the authority of the said Acts respectively, and it is expedient to give further facilities to the holders of such stock in respect of the transfer thereof, and the receipt of the dividends thereon:’ Be it enacted by the Queen’s most excellent Majesty, by and with the advice and consent of the lords spiritual and temporal, and commons, in this present Parliament assembled, and by the authority of the same, as follows:

1. This Act may be cited for all purposes as “The *India* Stock Certificate Act, 1863.”

2. In this section and elsewhere in this Act the following expressions have the meanings here assigned to them:

“The bank” shall with reference to the stocks created and issued under the said Acts transferable at the bank of *England*, and certificates issued under this Act in respect thereof, and the coupons of such certificates, mean the governor and company of the bank of *England*, and shall, with reference to the said stocks transferable at the bank of *Ireland*, and certificates issued under this Act in respect thereof, and the coupons of such last mentioned certificates, mean the governor and company of the bank of *Ireland*:

“*India* stock” shall mean any stocks which have been or may be created and issued under the Acts aforesaid, transferable in the books of the bank, and “Share in *India* Stock” shall include any part of a share:

“Person” shall include corporation.

3. With the exception and subject to the conditions hereinafter mentioned, every person who now is or may hereafter be inscribed in the books of the bank of *England* or of the bank of *Ireland* as proprietor of a share in *India* stock may obtain a certificate or certificates of title to the said share or to any part thereof, having annexed coupons entitling the bearer to the dividends payable in respect of that share or part of a share.

4. No trustee of any share in the said stock shall apply for or hold a certificate of title to that share, unless he is authorized so to do by the terms of his trust; and any contravention of this section by a trustee shall be deemed to be a breach of trust, and be

punishable accordingly; nevertheless, this section shall not impose on the bank any obligation to inquire whether a person applying for a certificate of title under this Act is or not a trustee, nor subject them to any liability in the event of their granting a certificate of title to a trustee, nor invalidate any certificate of title if granted.

5. No certificate shall be granted in respect of any sum of stock being other than one hundred, or five hundred, or one thousand pounds.

The coupons annexed to an *India* stock certificate shall comprise the dividends payable in respect of the stock described in the certificate. At the expiration of the period for which the coupons shall have been issued fresh coupons shall be issued for further successive periods during the continuance in force of the stock certificate; but the bank may, if they think fit, in lieu of issuing fresh coupons in respect of a certificate, give in exchange a fresh certificate with coupons attached thereto.

Coupons shall be payable at the chief establishment of the bank at the expiration of three clear days from the day of presentation.

The payment to the bearer of any coupon of the amount expressed therein shall be a full discharge to the bank of all liability in respect of that coupon, and the dividend represented thereby.

If any *India* stock certificate or coupon issued under this Act is lost or destroyed, and such loss or destruction proved in such manner as may from time to time be directed by the bank, the bank shall grant a new certificate or coupon, on receiving indemnity to their satisfaction against the claims of all persons deriving title under the certificate or coupon so lost or destroyed.

No notice of any trust in respect of any stock certificate or coupon issued under this Act shall be receivable by the bank.

An *India* stock certificate shall entitle the bearer to the stock therein described, and shall be transferable by delivery.

6. The bearer of an *India* stock certificate may, on delivery up to the bank of his certificate and of all unpaid coupons belonging thereto, and on compliance with any regulation made in pursuance of this Act, require to be registered in the books of the bank as a holder of the stock described in the certificate under which he derives title, and thereupon the stock shall be re-entered in the books kept by the bank for the entry of transferable stock, and become transferable, and the dividends payable, as if no certificate had been issued in respect of such stock.

7. No fees shall be charged on the grant of a stock certificate to bearer in exchange for a like certificate, but there shall be charged with respect to the several other proceedings in relation to stock authorized by this Act the fees specified in the schedule hereto, or such less fees as may be determined by the secretary of state in council.

All fees received in pursuance of this Act shall be paid to the "account of the secretary of state for *India* in council of *India*."

No stamp duty shall be payable in respect of any certificate or coupon issued in pursuance of this Act.

8. There shall be paid to the Bank of *England*, by

the secretary of state in council, on account of the additional trouble, expense, and responsibility, if any, imposed on it by this Act, in addition to the remuneration otherwise paid to it in respect of the management of the *Indian* debt, such remuneration as may be agreed upon between the Bank of *England* and the said secretary of state in council.

9. The Bank of *England* and the Bank of *Ireland*, with the sanction of the secretary of state in council, may from time to time issue any forms that may be required for carrying into effect the provisions of this Act, and also from time to time make any regulations that are not inconsistent with this Act relative to the following things:

1. The time for which coupons are to be given:

2. The authority under which and the mode in which the bank is to act in issuing *India* stock certificates, or registering in their books the holders of such stock certificates, or taking any other proceedings in relation to *India* stock authorized to be taken under this Act:

3. The mode of proving the title of or identifying any person applying for an *India* stock certificate, or deriving any title under a stock certificate issued under this Act:

4. With respect to any other matter necessary to carry this Act into effect:

And any regulation so made shall be deemed to be part of this Act in the same manner as if it were herein enacted.

10. The income tax shall be deducted from any coupons payable under this Act in the same manner and subject to the same regulations in and subject to which it may, in pursuance of any law for the time being in force, be deducted from the dividends payable at the bank in respect of the stock of proprietors inscribed in the books of the bank: provided always, that such deduction of income tax shall be made, although the half-yearly payment on any coupon shall not amount to fifty shillings, anything in any former Act to the contrary notwithstanding.

11. All sums due and not demanded on any coupons issued under this Act shall for all purposes be dealt with as if they were dividends due and not demanded in respect of the stock of proprietors inscribed in the books of the bank.

12. When any certificate of title issued under this Act in respect of any share in *India* stock is outstanding, the stock represented thereby shall cease to be transferable in the books of the bank.

Save in so far as relates to the mode of transfer and payment of dividends thereon, any *India* stock described in a stock certificate issued under this Act shall be deemed to be charged on the same securities, and to be subject to the same powers of redemption and to the same incidents in all respects, including the remuneration payable to the bank, as if it had continued registered in the books of the bank as stock transferable therein.

13. Whosoever shall forge or alter, or offer, utter, dispose of, or put off, knowing the same to be forged or altered, any *India* stock certificate or coupon, or any document purporting to be any *India* stock certificate or coupon, issued in pursuance of this Act, or shall demand or endeavour to obtain or receive any

share or interest of or in *India* stock, or to receive any dividend or money payable in respect thereof, by virtue of any such forged or altered certificate or coupon, or document purporting as aforesaid, knowing the same to be forged or altered, with intent in any of the cases aforesaid to defraud, shall be guilty of felony, and being convicted thereof shall be liable, at the discretion of the Court, to be kept in penal servitude for life, or for any term not less than three years, or to be imprisoned for any term not exceeding two years, with or without hard labour, and with or without solitary confinement.

14. Whosoever shall falsely and deceitfully personate any owner of any share or interest of or in *India* stock, or of any *India* stock certificate or coupon, is sued in pursuance of this Act, and shall thereby obtain or endeavour to obtain any such *India* stock certificate or coupon, or receive or endeavour to receive any money due to any such owner, as if such offender were the true and lawful owner, shall be guilty of felony, and being convicted thereof shall be liable, at the discretion of the Court, to be kept in penal servitude for life, or for any term not less than three years, or to be imprisoned for any term not exceeding two years, with or without hard labour, and with or without solitary confinement.

15. Whosoever, without lawful authority or excuse, the proof whereof shall lie on the party accused, shall engrave or make upon any plate, wood, stone, or other material any *India* stock certificate or coupon purporting to be an *India* stock certificate or coupon issued or made under and in pursuance of this Act, or to be a blank *India* stock certificate or coupon issued or made as aforesaid, or to be a part of such a stock certificate or coupon, or shall use any such plate, wood, stone, or other material for the making or printing any such *India* stock certificate or coupon, or any such blank *India* stock certificate or coupon, or any part thereof respectively, or knowingly have in his custody or possession any such plate, wood, stone, or other material, or shall knowingly offer, utter, dispose of, or put off, or have in his custody or possession, any paper upon which any such blank *India* stock certificate or coupon, or part of any such *India* stock certificate or coupon, shall be made or printed, shall be guilty of felony, and being convicted thereof shall be liable, at the discretion of the Court, to be kept in penal servitude for any term not exceeding fourteen years and not less than three years, or to be imprisoned for any term not exceeding two years, with or without hard labour, and with or without solitary confinement.

16. 'And whereas it is expedient that there should be uniformity of practice in respect of the signature and counter-signature of documents by the secretary and under secretaries of state and members of the council of *India*:' be it enacted, that wherever by reason of the provisions of any Act of Parliament or otherwise, it is required that any deeds, contracts, bonds, debentures, cheques, drafts, or orders for money, or other documents, shall be signed by any number of members of the council of *India*, and countersigned by the secretary of state or one of his under secretaries, any such deed, contract, bond, debenture, cheque, draft, or order for money, or other document,

may be signed by two members of the said council, and countersigned by the secretary of state or one of his under secretaries, or by his assistant under secretary.

SCHEDULE.

Schedule of Fees.

On the issue of an *India* stock certificate, a fee not exceeding five shillings on every hundred pounds of stock included in the certificate.

On the registration in the books of the bank of the stock included in an *India* stock certificate, a fee not exceeding five shillings.

CAP. LXXIV.

An Act to enable her Majesty to declare gold coins to be issued from her Majesty's branch mint at *Sydney, New South Wales*, a legal tender for payments; and for other purposes relating thereto.

[28th July, 1863.]

56 G. 3, c. 68.

Sec. 1. *Power to her Majesty to declare gold coins made at the branch mint at Sydney a legal tender in the United Kingdom.*

2. *Power to her Majesty to impose a charge on coining gold.*

3. *Short title.*

'WHEREAS by an Act of the fifty-sixth year of the reign of his late Majesty, King George the Third, chapter sixty-eight, intituled *An Act to provide for a new silver coinage, and to regulate the currency of the gold and silver coins of this realm*, it is amongst other things provided, that after the date of the passing of that Act the gold coin of the realm should be the only legal tender for payments (except the silver coin of the realm to the extent of forty shillings) within the United Kingdom of *Great Britain and Ireland*: And whereas by the same Act it is declared that the gold coin of the realm should hold such weight and fineness as are prescribed by an indenture therein referred to, and made with his Majesty's master and worker of the mint for making gold monies at his Majesty's mint in *London*, and with such allowance called the remedy as is given to the said master by the said indenture, which weight and fineness are by the said Act declared to be the standard of the lawful gold coin of the realm, so far as relates to the gold coins of the denominations in use at the time of the passing of the said Act and specified in the said indenture: And whereas gold coins of the weight and fineness and of the denominations mentioned in the said Act, and specified in the said indenture, have from the date of the said Act up to the present time continued to be issued from her Majesty's mint in *London*, and to be the only legal tender for payments, except as aforesaid, within the United Kingdom: And whereas her Majesty has by proclamation established at *Sydney, in New South Wales*, a branch of the royal mint for making gold coins of the same weight and fineness and of the same denominations as the gold coin issued by her Majesty's mint in *London*, and has appointed a deputy master of the said branch mint: and it is expedient that power should be given to her Majesty to make the gold coin so issued by her Majesty's mint at *Sydney* a legal tender for payments in the United Kingdom:' Be it therefore enacted by

the Queen's most excellent Majesty, by and with the advice and consent of the lords spiritual and temporal, and commons, in this present Parliament assembled, and by the authority of the same, as follows:

1. It shall be lawful for her Majesty, by proclamation, issued with the advice of her privy council, to declare that, after a date specified in such proclamation, gold coins made at the said branch mint, of designs approved by her Majesty at *Sydney* aforesaid, and being of the same weight and fineness as are required by law with respect to gold coins of the same denominations made at her Majesty's mint in *London*, are to be a legal tender for payments within the United Kingdom of *Great Britain* and *Ireland*; and upon such proclamation being issued, gold coins made of such designs, and being of such weight and fineness as aforesaid, shall be a legal tender for payments accordingly.

2. It shall be lawful for her Majesty, by proclamation issued with such advice as aforesaid, from time to time to impose on the coinage of gold at the said branch mint at *Sydney* a charge sufficient to defray the expenses of coinage, over and above the expenses of assay and refining; and it shall be incumbent on the said deputy master to coin gold at the charge so imposed.

3. This Act may be cited for all purposes as "The *Sydney Branch Mint Act, 1863*."

CAP. LXXV.

An Act for the embankment of part of the river *Thames*, on the south side thereof, in the parish of *Saint Mary, Lambeth*, and for other purposes. [28th July, 1863.]

CAP. LXXVI.

An Act to determine the time at which letters patent shall take effect in the colonies. [28th July, 1863.]

CAP. LXXVII.

An Act to amend the Law relating to the jurisdiction of Justices residing or being out of the County for which they are Justices. [28th July, 1863.]

CAP. LXXVIII.

An Act to amend the Acts relating to the Turnpike Roads in the Neighbourhood of the Metropolis North of the River *Thames*. [28th July, 1863.]

CAP. LXXIX.

An Act for the Amendment of the Law relating to the Religious Instruction of Prisoners in County and Borough Prisons in *England* and *Scotland*. [28th July, 1863.]

CAP. LXXX.

An Act for providing a further Sum towards defraying the Expenses of constructing Fortifications for the Protection of the Royal Arsenals and Dockyards and the Ports of *Dover* and *Portland*, and of creating a Central Arsenal. [28th July, 1863.]

CAP. LXXXI.

An Act to amend, so far as regards Advances for the Purposes of "The Harbours and Passing Tolls, &c. Act, 1861," certain of the Acts authorizing the Advance of Money out of the Consolidated Fund for carrying on Public Works and Fisheries and Employment of the Poor. [28th July, 1863.]

3 G. 4, c. 86. 1 & 2 W. 4, c. 24.

Sec. 1. *Public works loan commissioners empowered to grant priority of security in respect of loans to harbour authorities by other persons.*

2. *Such priority not to give validity to any security which could not have been given if this Act had not passed.*

3. *How priority may be granted.*

4. *Harbour authorities empowered to borrow money to pay off debts having priority over security for loans by Public Works Loan Commissioners.*

5. *Short title.*

'WHEREAS by an Act passed in the third year of his late Majesty King *George the Fourth*, chapter eighty-six, intituled *An Act to amend two Acts of the fifty-seventh year of his late Majesty, and the first year of his present Majesty, for authorising the issue of Exchequer bills and the advance of money for carrying on public works and fisheries and employment of the poor, and to authorise a further issue of exchequer bills for the purposes of the said Acts*, the commissioners acting in execution of the said Act, or of any of the Acts therein mentioned, or of any Act or Acts amending or continuing the same Act or Acts, and now usually called "the public works loan commissioners," were authorised to make advances on mortgage; and it was provided that mortgages so made should have certain priorities: And whereas by another Act passed in the Session of Parliament held in the first and second years of the reign of his late Majesty King *William the Fourth*, intituled *An Act to amend several Acts passed for authorising the issue of exchequer bills and the advance of money for carrying on public works and fisheries and employment of the poor, and to authorise a further issue of exchequer bills for the purposes of the said Acts*, further provision was made as to the priorities of mortgages for securing advances made by the public works loan commissioners: And whereas by "The Public Works Loan Act, 1853," further provision was made as to the priorities of such mortgages: And whereas by "The Harbours and Passing Tolls, &c., Act, 1861," the commissioners were authorised with the approval of the board of trade to make advances on mortgage to harbour authorities in manner therein provided: Be it enacted by the Queen's most excellent Majesty, by and with the advice and consent of the Lords spiritual and temporal, and commons, in this present parliament assembled, and by the authority of the same, as follows:

1. Notwithstanding any provision to the contrary contained in the Acts herein-before mentioned, or in any other Act or Acts passed or to be passed relating to the public works loan commissioners, it shall be lawful for the commissioners from time to time to grant priority of security, as well for principal as interest

in respect of any loan made or to be made to any harbour authority by any person or persons other than the commissioners over any security which has been or shall be given to the commissioners by such harbour authority; provided that the grant of such priority will not, in the opinion of the said commissioners, affect the sufficiency of the security given or to be given to the commissioners.

2. Such grant of priority shall not give any force or validity to any security which could not have been legally given if this Act had not been passed: Provided nevertheless, that where any harbour authority has, independently of "The Harbours and Passing Tolls, &c. Act, 1861," the power to borrow and secure money to a limited amount only, it shall be lawful for the commissioners, if they think proper, to cause to be inserted in any deed or other instrument made or executed to secure an advance by them to such harbour authority a declaration that such advance shall not be taken as part of such limited amount; and thereupon, and notwithstanding such advance, money to the full extent of such limited amount may be borrowed and secured in addition to the sum secured by the deed or instrument containing the declaration aforesaid, and the fact of the secretary for the time being of the commissioners being a party to such deed or instrument, and being the person to whom the security is made, shall be conclusive evidence that any such declaration as aforesaid was inserted therein by the authority of the commissioners.

3. The priority by the first section of this Act authorised to be granted may be granted either by the deed or instrument whereby the security to the public works loan commissioners is made, or from time to time by any other deed or instrument in writing under the hand of the secretary for the time being of the commissioners, and such priority may be so granted either absolutely or subject to any terms and conditions which the commissioners may think proper to impose.

4. Where any debt due from a harbour authority has or shall have priority over any security, made or to be made for any loan by the public works loan commissioners to the same harbour authority, then notwithstanding any provision to the contrary contained in the Acts herein-before mentioned, or in any other Act or Acts passed or to be passed relating to the public works loan commissioners, it shall be lawful for the same harbour authority from time to time to borrow money to be applied in paying off any debt for the time being having such priority as aforesaid, and to grant and give security for such money similar to the security which had previously existed for the debt paid off; and all securities for money so borrowed and applied shall have the like priority as the security for the debt paid off thereout previously had.

5. This Act may be cited as "The Public Works and Fisheries Acts Amendment Act, 1863."

CAP. LXXXII.

An Act to empower the Bishops of *Welsh* Dioceses to facilitate the making provision for *English* Services in certain Parishes in *Wales*. [28th July 1863.]

CAP. LXXXIII.

An Act to define the boundaries of the colony of *British Columbia*, and to continue an Act to provide for the government of the said colony. [28th July 1863.]

CAP. LXXXIV.

An Act to confirm certain Acts of Colonial Legislatures. [28th July 1863.]

CAP. LXXXV.

An Act to give relief to persons who may refuse or be unwilling, from alleged conscientious motives, to be sworn in criminal proceedings in *Scotland*. [28th July 1863.]

CAP. LXXXVI.

An Act to authorise the taking of Harbour dues at *Port Erin* in the *Isle of Man*, in order to provide a fund for the improvement of the Harbour; and for other purposes. [28th July 1863.]

CAP. LXXXVII.

An Act to consolidate and amend the laws relating to Savings Banks. [28th July 1863.]

- Sec. 1. *After 20th November, 1863, the Acts and parts of Acts specified in Schedule to this Act, marked A., repealed. Not to invalidate appointments, &c., under former Acts. Proviso as to certain savings banks in Scotland established under 59 G. 3, c. 62.*
2. *What institutions shall be entitled to the privileges and benefits of this Act. No new banks to be formed unless approved by commissioners of National Debt.*
3. *Rules of savings bank to be entered in a book and be open to the inspection of depositors. Not to prevent alterations of rules. Alterations to be entered in like manner.*
4. *Two written or printed copies of rules, &c., to be submitted to barrister for his certificate. Fee payable to barrister. Barrister to return one copy to savings bank and transmit the other copy to commissioners.*
5. *As to title of savings banks certified under this Act. Penalty on using or adopting titles of other banks.*
6. *No savings bank, subject to proviso hereinafter contained with respect to branch offices, &c., shall have benefit of this Act unless in rules, &c., it shall be expressly provided as herein specified. Proviso with respect to branch offices and local receivers of banks.*
7. *Weekly returns to be made by savings banks to the commissioners.*
8. *Treasurer and other officers intrusted with receipt or custody of money to give security.*
9. *Punishment of actuary, &c., receiving deposits and not paying over same to managers, &c.*
10. *Effects of savings bank vested in trustees for the time being.*
11. *Liability of trustees, &c.*

12. *Power to trustees and managers of savings banks in Ireland to limit such responsibility.*
13. *Treasurer and trustees, &c., to account and deliver up effects when required.*
14. *Executors, &c., of officers of savings banks to pay money due to savings banks before any other debts.*
15. *Trustees of savings banks shall invest all money in the Banks of England or Ireland and not in any other security. Not to prevent depositors withdrawing their money from savings banks for investment in other securities. Trustees empowered to pay into the Banks of England or Ireland any sum not less than £50 to the account of the commissioners for the reduction of the National Debt. Previous to payments an order of two trustees to be produced.*
16. *Not to prevent trustees from receiving money to be applied in any other manner.*
17. *Central banks may invest the money of branch banks.*
18. *Penalties on false declaration to obtain receipts.*
19. *How monies paid in on savings banks account are to be invested by commissioners.*
20. *Quorum of commissioners.*
21. *On payment of money into the bank to the account of National Debt Commissioners, their officer shall give a receipt for the same, carrying interest at £3 5s. per cent. per annum.*
22. *Interest due on money mentioned in receipt to be calculated half-yearly up to 20th November and 20th May and carried to account of savings bank as additional principal. No interest to be allowed on any fractional part of a pound.*
23. *Interest arising to depositors may be calculated yearly or twice a year and carried to their credit as principal. Interest to depositors not to exceed £3 0s. 10d. per cent. per annum.*
24. *Before drawing for money trustees shall sign appointment of agent to receive the same, which appointment shall be deposited with commissioners. Appointments may be revoked and others granted from time to time.*
25. *Trustees may draw for the whole or any part of any sum placed to their account by drafts on commissioners, which shall be endorsed by their officer and paid with the interest added thereto by cashiers of the bank.*
26. *Draft exceeding £5,000 to be signed by four trustees and attested by separate witnesses. Draft for £10,000 not to be paid until after 14 days.*
27. *Officer not to issue in one day orders for more than £10,000 for the same bank.*
28. *Trustees appearing in person may receive payments of drafts, instead of their agents. Such receipt of money by trustees not to affect any previous appointment of agents.*
29. *From 20th November, 1863, surplus to be paid over to commissioners for reduction of national debt. Trustees of savings banks may upon a certificate draw on such surplus fund for the purposes of the savings banks.*
30. *How deposits of minors may be made and paid.*
31. *How deposits by married women may be made and paid.*
32. *How funds of charitable societies, &c. and penny savings banks may be invested.*
33. *How friendly societies duly enrolled, &c. may invest.*
34. *Receipt of trustee, &c. of any charitable society, penny savings bank, or friendly society deemed sufficient discharge.*
35. *Members of friendly or charitable societies or penny savings banks not liable to disability in those societies by subscribing to any savings bank under this Act. Proviso for depositors belonging to societies, &c.*
36. *No sum to be subscribed without the name and profession, &c. of the depositor.*
37. *Persons allowed to deposit as trustees on behalf of others. How repayment on trust accounts is to be made.*
38. *Depositors in one savings bank shall not deposit in any other savings bank. Declaration to be made at the time of deposit. Penalty on false declaration, forfeiture of deposit to the sinking fund. Declaration shall be filed, and notice thereof and of the penalty attached thereto to be placed in deposit book.*
39. *Trustees not to receive from any one depositor more than 30l. in any one year, nor more than 150l. in the whole. When deposit and interest amount to 200l. interest to cease. Not to affect deposits of 200l. on the 28th July 1828. Depositors not prevented from becoming new depositors.*
40. *How depositors may transfer their deposits to any other savings bank.*
41. *Depositor dying leaving any sum exceeding 50l., the same not to be paid until after administration. No duty to be paid on probate when the estate is under 50l. Certificate of amount and value of depositor's interest to be produced on claiming probate &c.*
42. *Administration bonds, &c. for effects under 50l. exempted from stamp duty.*
43. *When deposits and interest do not exceed 50l. exclusive of interest, if will, &c. not proved within a month, money may be paid to widow or to party entitled to effects of deceased.*
44. *Payment to persons appearing to be the next of kin declared valid. Remedy for next of kin.*
45. *Payments under probates of will, &c. appearing to be in force shall be valid.*
46. *Payment on death of depositor being illegitimate and intestate.*
47. *Adaptation of the provisions of this Act to the law of Scotland.*

48. *Settlement of disputes.*
49. *On reference, barrister may inspect books and administer oath to witnesses.*
50. *Powers of attorney given by trustees or depositors and other documents not liable to stamp duty.*
51. *Appointment of auditors in Ireland.*
52. *Depositor's book in Ireland to contain copy of rules. Duplicate copy to be exhibited in the office.*
53. *Rules in Ireland to provide for production and inspection of books.*
54. *Commissioners may close accounts with savings banks in Ireland in certain cases; and re-open them if they think fit.*
55. *Trustees of savings banks shall make up annually accounts of their progress, &c. and transmit the same to the commissioners for reduction of the National Debt. If trustees neglect to transmit such accounts, or to obey any orders given pursuant to this Act, commissioners may close their accounts, &c.*
56. *If annual returns are not made, name of savings banks neglecting to be published in Gazette, &c.*
57. *Statement of expenses may be required from trustees or managers.*
58. *When money is in the hands of a treasurer, &c. his certificate to accompany the statement.*
59. *A duplicate of such account shall be affixed in the office of the savings bank.*
60. *What accounts shall be made by the National Debt Commissioners to the Commissioners of her Majesty's treasury, and laid before Parliament.*
61. *A distinct account to be shown in parliamentary returns of separate surplus funds of savings banks in hands of commissioners.*
62. *Savings banks shall compute interest on 20th May and 20th November, half-yearly or yearly.*
63. *Commissioners for the reduction of the National Debt may keep a balance in the Bank of Ireland for drafts which may be drawn on account of savings banks there.*
64. *Receipts, &c. shall be in the form approved by commissioners.*
65. *Indemnity to commissioners and Banks of England and Ireland.*
66. *Power to commissioners to appoint and employ barrister, clerks, &c. Power to treasury to pay them and discharge incidental expenses.*
67. *Act to extend to all savings banks in Great Britain and Ireland.*
68. *Act not to affect Post Office Savings Banks or powers of Commissioners for Reduction of National Debt.*

‘WHEREAS numerous banks for savings have been established under the authority of the Acts now in force for the safe custody and increase of small savings: And whereas it is expedient to amend such laws and to consolidate the same in one Act:’ Be it therefore enacted by the Queen's most excellent Majesty, by

and with the advice and consent of the Lords spiritual and temporal, and Commons in this present Parliament assembled, and by the authority of the same:

1. That the Acts and parts of Acts set forth in the Schedule to this Act marked A., to the extent to which they are herein expressed, and all other Acts and parts of Acts which are inconsistent with this Act, relating to Savings Banks established under such Acts, are repealed from and after the twentieth day of November one thousand eight hundred and sixty-three, except in so far as is provided by the last section of this Act: Provided nevertheless, that nothing herein contained shall invalidate or annul any payments, receipts, or appointments made, or proceedings had, or bonds or securities taken or entered into, or drafts, powers of attorney, certificates, orders, or other instruments whatsoever executed, under the authority of any of the said Acts or parts of Acts hereby repealed: Provided also, that the provisions of an Act passed in the fifty-ninth year of the reign of King George the Third, intitled *An Act for the protection of banks for savings in Scotland*, shall continue in force as to all Savings Banks established under it before the passing of this Act, unless and until they shall conform to and be established under the provisions of this Act.

2. ‘And whereas it is expedient to give protection to such Savings Banks already established as aforesaid and the funds thereof, and to afford encouragement to the formation and establishment of like institutions:’ Be it therefore enacted, that if any number of persons have formed or shall form any society in any part of the United Kingdom of *Great Britain and Ireland* for the purpose of establishing and maintaining any institution in the nature of a bank to receive deposits of money for the benefit of the persons depositing the same, to accumulate the produce of so much thereof as shall not be required by the depositors, their executors, or administrators, at compound interest, and to return the whole or any part of such deposit and the produce thereof to the depositors, their executors or administrators (deducting out of such produce so much as shall be required for the necessary expenses attending the management of such institution), but deriving no benefit whatsoever from any such deposit or the produce thereof, and shall be desirous of having the benefit of the provisions of this Act, such persons shall cause the rules and regulations established or to be established for the management of such institution to be entered, deposited, and filed in manner herein-after directed, and thereupon shall be deemed to be entitled to and shall have the benefit of the provisions contained in this Act: Provided always, that the privilege of paying money into the banks of *England or Ireland*, and of receiving receipts for the same, shall be and the same is hereby declared to be extended to all such savings banks as may have formed or may hereafter form their rules and regulations according to the provisions of this Act; and it shall and may be lawful for the trustees of such savings banks respectively to invest any funds already accumulated by such savings banks, and which shall not have been invested at the time of the passing of this Act, and to receive receipts for the same in manner authorised by this Act: Provided nevertheless, that no such savings bank to be hereafter formed

shall have or be entitled to the benefits of the provisions in this Act contained, unless the formation of the same shall have been sanctioned and approved of by the Commissioners for the Reduction of the National Debt, or on their behalf by the Comptroller General or assistant Comptroller acting under the said commissioners.

3. No such savings bank as aforesaid shall have the benefit of this Act unless the rules and regulations for the management thereof shall be entered in a book or books to be kept by an officer of such savings bank or be appointed for that purpose, and which book or books shall be open at all reasonable times for the inspection of the persons making deposits in the funds of such savings bank. But, nevertheless, nothing herein contained shall extend to prevent any alteration in or amendment of any such rules or regulations, or repealing or annulling the same or any of them in the whole or in part, or making any new rules or regulations for the management of such savings banks in such manner as by the rules and regulations of such savings bank shall from time to time be provided, but such new rules or regulations, or such alterations in or amendments of former rules or regulations, or any order annulling or repealing any former rule or regulation in the whole or in part, shall not be in force until the same respectively shall be entered in such book or books as aforesaid.

4. Two written or printed copies of all rules or alterations of rules made for the management of any savings bank requiring the benefits of this Act, signed by two trustees, shall with all convenient speed after the same shall be made, altered, or amended, and so from time to time, after every making, altering, or amending thereof, be submitted by the trustees and managers for the time being of such savings bank to the barrister-at-law appointed by the commissioners for the reduction of the national debt, for the purpose of ascertaining whether the said rules, or alterations, or amendments thereof, are in conformity to law and with the provisions of this Act; and the said barrister shall give a certificate on each of the said written or printed copies that the same are in conformity to law, and point out in what part or parts the said rules, alterations, or amendments are repugnant thereto; and the fee to be paid to such barrister for perusing the rules, alterations, or amendments of the rules of such savings bank, and giving such certificate as aforesaid, shall not at any one time exceed the sum of one guinea; and one of such written or printed copies when certified by the said barrister, shall be returned to the trustees of the said savings bank, and the other of such written or printed copies shall be transmitted by such barrister to the commissioners for the reduction of the national debt; and all rules, alterations, and amendments thereof from the time when the same shall have been certified by the said barrister shall be binding on the trustees, managers and officers of the said savings bank and the depositors therein, and their representatives, and the copy of such rules deposited with the said commissioners, or a true copy thereof examined with the original and proved to be a true copy, shall be received as evidence of such rules respectively in all cases, and no certiorari shall be sought or allowed to remove any such rules into any

of her Majesty's Courts of Record: provided that nothing herein contained shall be construed to require any rule making any alteration in the days or hours of attendance at any such savings bank as aforesaid to be laid before such barrister.

5. Every savings bank established, or to be established under the provisions of the said hereby repealed Acts or this Act shall be certified under the provisions of this Act by the title of "Savings Bank certified under the Act of 1863;" and if any other bank, association, or company, or any other person shall use or adopt such title as their or his designation, or on carrying on business, the members of every such association or company, or any of them, or any such person respectively, shall be guilty of a misdemeanor, and on conviction thereof shall be punishable accordingly.

6. No savings bank, subject to the proviso hereinafter contained with respect to the branch offices or local receivers of any savings bank, shall have the benefit of this Act unless in the rules and regulations for the management thereof it shall be expressly provided,—

1. That no person or persons being treasurer, trustee or manager of such savings bank, or having any control in the management thereof shall derive any benefit from any deposit made in such savings bank, save only and except such salaries and allowances, or other necessary expenses as shall according to such rules and regulations be provided for the charges of managing such savings bank, and for remuneration to officers employed in the management thereof, exclusive of the treasurer or treasurers, trustee or trustees, manager or managers, or other persons having direction in the management of such savings bank, who shall not directly or indirectly have any salary, allowance, profit, or benefit whatsoever therefrom beyond their actual expenses for the purposes of such savings bank:
2. That not less than two persons, being either trustees, managers, or paid officers appointed for that specific purpose, and where two only, except in the case of savings banks which are open for more than six hours in every week, one such person to be a trustee or manager, be present on all occasions of public business, and be parties to every transaction of deposit and repayment, so as to form at least a double check on every such transaction with depositors:
3. That the depositor's pass book shall be compared with the ledger on every transaction of repayment, and on its first production at the bank after each twentieth day of *November*:
4. That every depositor in a savings bank established under this Act shall once at least in every year cause his deposit book to be produced at the office of the said savings bank for the purpose of being examined:
5. That no money be received from or paid to depositors except at the office or branch offices where the business of the savings bank is carried on under the authority of the board of managers;

and during the usual hours for public business:

6. That a public accountant or one or more auditors be appointed by the trustees and managers, but not out of their own body, to examine the books of the bank, and to report in writing to the board or committee of management the result of such audit, not less than once in every half year, also to examine an extracted list of the depositor's balances made up every year to the twentieth day of *November*, and to certify as to the correct amount of the liabilities and assets of the bank:
7. That a book containing such extracted list of every depositor's balance, omitting the name but giving the distinctive number and separate amount of each, and showing the aggregate number and amount of the whole, checked and certified by such public accountant or auditors, be open at any time during the hours of public business for the inspection of every depositor as respects his own account, to examine his own deposit book therewith, and the general results of the same:
8. That the trustees and managers or committee of management shall hold meetings once at least in every half year, and shall keep minutes of their proceedings in a separate book provided for that purpose:
9. Provided that where savings banks are established with agents or local receivers elsewhere than at the head office, the rules shall provide for the due receipt of and accounting for all monies by such agents or local receivers on account of such savings banks respectively, and also for the presence of a second party in every transaction when money is paid or received, and also for the periodical examination of the depositors' books with the ledger once at the least in every year.
7. The trustees and managers of every savings bank shall transmit weekly returns to the commissioners for the reduction of the National Debt, in such form and giving such particulars as the said commissioners may direct, showing the amounts of the week's transactions of such savings bank, and the amount of the cash balances remaining in the hands of the treasurer, or any other person on account of such savings bank.
8. Every treasurer, actuary, or cashier who shall be intrusted with the receipt or custody of any sum of money subscribed or deposited for the purpose of such savings bank, or any interest or dividend from time to time accruing therefrom, and every officer or other person receiving any salary or allowance for his services from the funds of any savings bank, (except in the cases of supernumerary assistants employed at the periods of balancing the accounts,) unless he shall already have given good and sufficient security, shall give good and sufficient security, to be approved of by not less than two trustees and three managers of such savings bank, for the just and faithful execution of such office or trust; and such security, when given by an actuary or cashier, or officer, or other person receiving any salary or allowance for

his services as aforesaid, shall be given by bond or bonds, with one or more sureties, to the Comptroller General of the National Debt Office for the time being without fee or reward, and in case of forfeiture it shall be lawful for the trustees or managers for the time being of such savings bank to sue upon such bond or bonds in the name of such Comptroller General for the time being, and to carry on such suit the costs and charges and for the use of the said savings bank, fully indemnifying and saving harmless such Comptroller General from all costs and charge in respect of such suit, and such bond shall, when executed, be deposited with the Commissioners for the Reduction of the National Debt, and the said commissioners may, upon application signed by not less than two trustees and three managers, in such form as the said commissioners shall direct, deliver up to the trustees of the savings bank any such bond or bond which may have been or shall hereafter be deposited with them for the purpose of being cancelled.

9. If an actuary, cashier, secretary, officer, or other person holding any situation or appointment in any savings bank, shall receive any sum or sums of money from or on account of any depositor or person desirous of becoming such, or on account of such savings bank and shall not forthwith, or in the case of local receiver acting on behalf of any savings bank within the time specified in the rules of the said savings bank, duly account for and pay over the same to the trustees or managers thereof, or to such person as may be directed by the rules of the said savings bank, such actuary, cashier, secretary, officer, or local receiver, or other person as aforesaid, on being convicted thereof shall be guilty of a misdemeanor.

10. All monies, goods, chattels, and effects whatever, and all securities for money, or other obligations, instruments and evidences or muniments and all other effects whatever, and all rights or claims belonging to or had by such savings bank, shall be vested in the trustee or trustees of such savings bank for the time being, for the use and benefit of such savings bank and the respective depositors therein, their respective executors or administrators, according to their respective claims and interests, and after the death or removal of any trustee or trustees, shall vest in the succeeding trustee or trustees for the same estate and interest as the former trustee or trustees had therein, and subject to the same trusts, without any assignment or conveyance whatever, and also shall, for all purposes of action, suit, as well criminal as civil, in law or in equity, in anywise touching or concerning the same, be deemed and taken to be, and shall in every such proceeding (where necessary) be stated to be, the property of the person or persons appointed to the office of trustee or trustees of such savings bank for the time being, his, her, or their proper name or names, without further description, and such person or persons shall and they are hereby respectively authorised to bring or defend, or cause to be brought or defended, an action, suit, or prosecution, criminal as well as civil in law or equity, touching or concerning the property, right, or claim aforesaid, of or belonging to or had by such savings banks; and such person or persons so appointed shall and may in all cases concerning the property, right, or claim aforesaid of such savings

bank sue and be sued, plead and be impleaded, in his or their proper name or names as trustee or trustees of such savings bank, without other description; and no such suit, action, or prosecution shall be discontinued or abate by the death of such person or persons, or his or their removal from the office of trustee or trustees as aforesaid, but the same shall and may be proceeded in by the succeeding trustee or trustees in the proper name or names of the person or persons commencing the same, any law, usage, or custom to the contrary notwithstanding, and such succeeding trustee or trustees shall pay and receive like costs as if the action or suit had been commenced in his or their name or names for the benefit of or to be reimbursed from the funds of such savings bank.

11. No trustee or manager of any savings bank (subject to the provision herein-after contained in respect to savings banks in *Ireland*) shall be personally liable, except—

1. For monies actually received by him on account of or for the use of such savings bank, and not paid over and disposed of in the manner directed by the rules of the savings bank:

2. For neglect or omission in complying with the rules and regulations required by this Act to be adopted as herein-before is provided in the maintenance of checks, the audit and examination of accounts, the holding of meetings and keeping minutes of proceedings thereat:

3. And also for neglect or omission in taking security from officers as is herein-before provided.

12. Any trustee or manager of a Savings Bank in *Ireland* who has declared or shall declare in writing under his hand deposited with the Commissioners for the Reduction of the National Debt, that he is willing to be answerable for a specific amount only, such amount being in no case less than one hundred pounds, shall not be liable to make good any deficiency which may thereafter arise in the funds of such savings bank beyond the amount specified in such writing; provided always, that the trustee and manager of every savings bank in *Ireland* shall be personally liable for all monies actually received by him on account of or to and for the use of such savings bank, and not paid over and disposed of in the manner directed by the rules of the said savings bank; and an extract of this provision shall be enrolled as one of the rules of every such savings bank in *Ireland*, and printed and affixed in every office or place where deposits are received, with the names and places of residence of the trustees and managers for the time being, and the amount (if any) to which they have collectively or individually limited their responsibility.

13. Every person who shall have or receive any part of the monies, effects, or funds of or belonging to any savings bank availing itself of the provisions of this Act, or who shall in any manner have been or shall be intrusted with the disposition, management, or custody thereof, or of any securities, books, or papers, or property relating to the same, his executors, administrators, and assigns, shall, upon demand made in pursuance of any order of not less than two trustees and three managers of such savings bank, or at any general meeting of the trustees or managers thereof, give in his or their account or accounts to the said

trustees or managers, or to such general meeting of such savings bank, or to such other person or persons as shall be nominated to receive the same, to be examined and allowed or disallowed by the said trustees or managers respectively, and shall on the like demand pay over all the monies remaining in his or their hands, and assign and transfer or deliver all securities and effects, books, papers, and property in his or their hands or custody to such person or persons as the said trustees or managers shall appoint, and in case of any neglect or refusal to deliver such account or to pay over such monies, or to assign, transfer, or deliver such securities, effects, funds, books, papers, or property in manner aforesaid, it shall be lawful to and for the trustee or trustees of such savings bank for the time being to exhibit a petition to the justices of the peace at their general or quarters sessions of the peace, or at any adjournment thereof, for the county, riding, division, or place wherein such savings bank shall be established, who shall and may proceed thereupon in a summary way, and make such order therein, upon hearing all parties concerned, as to such court in their discretion shall seem just, which order shall be final and conclusive, and all assignments, sales and transfers made in pursuance of such order shall be good and effectual in law to all intents and purposes whatsoever.

14. If any person already appointed or who may hereafter be appointed to any office in a savings bank, and being intrusted with the keeping of the accounts, or having in his hands or possession by virtue of his said office or employment any monies or effects belonging to such savings bank, or any deeds or securities relating to the same, shall die, or become a bankrupt or insolvent, or have any execution or attachment or other process issued against his lands, goods, chattels, or effects, or make any assignment thereof for the benefit of his creditors, his executors, administrators, or assignees, or other persons having legal right, or the sheriff or other officer executing such process, shall, within forty days after demand made by two of the trustees of the said savings bank as aforesaid, deliver and pay over all monies and other things belonging to such savings bank to such person as the said trustees shall appoint, and shall pay out of the estates, assets, or effects, of such person all sums of money remaining due, which such person received by virtue of his said office or employment, before any other of his debts are paid or satisfied, or before the money directed to be levied by such process as aforesaid is paid over to the party issuing such process, and all such assets, lands, goods, chattels, estates, and effects shall be bound to the payment and discharge thereof accordingly.

15. The several sums of money belonging to any savings bank which the trustees of such savings bank respectively are authorised to invest under this Act or under any rules or regulations of any such savings banks shall, except as herein-after is excepted, be paid into and invested in the bank of *England* or the bank of *Ireland*, as the case may require, in the names of the Commissioners for the Reduction of the National Debt, according to the provisions of this Act enabling such trustees to make investments in the names of the said commissioners, and no such sum or sums shall be

paid or laid out by the trustees of such savings bank in any other manner or upon any other security whatever, except as aforesaid, and except such sums of money as from time to time shall necessarily remain in the hands of the treasurer or treasurers of such savings bank to answer the exigencies thereof: provided always, that nothing herein contained shall restrain or prevent any depositor, or any trustee or trustees acting on behalf of any depositor or depositors of any friendly society, or any charitable or provident institution or society, or penny savings bank, from withdrawing from any such savings bank any sum or sums of money which shall have been deposited by such depositor, friendly society, charitable or provident institution or society, or penny savings bank, and investing the same in any other securities: Provided always, that the trustees of any savings bank already established, or which shall take the benefit of this Act in manner herein-before provided, shall be and they are hereby empowered to pay into the bank of *England* or *Ireland* (as the case may be) any sum or sums of money, not being less than fifty pounds, to the account of the Commissioners for the Reduction of the National Debt, upon the declaration of the trustees of such savings bank, or any two or more of them, that such monies belong exclusively to the savings bank for which such payment is intended to be made, whether such monies shall have been deposited therein before the passing of this Act, or thereafter shall be deposited therein, and the cashier or cashiers of the banks of *England* and *Ireland* respectively are hereby required to receive all such monies and to place the same into the account raised in the names of the said commissioners in the books of the banks of *England* and *Ireland* respectively, denominated "The Fund for the Banks for Savings:" provided nevertheless, that previous to any payment being made into the banks of *England* or *Ireland* as aforesaid, the person or persons applying for that purpose shall in all cases produce to the officer of the said commissioner, at their office in *London* or *Dublin* (as the case may be), an order under the hands of two of the trustees of such savings bank on the account of which such payment is to be made.

16. Nothing in this Act contained shall extend to prevent the trustees of any savings bank already established or to be established receiving any sum or sums of money from any depositor for any purpose except to be paid into the bank to the account of the Commissioners for Reduction of the National Debt, and it shall be lawful for such trustees to apply any such sum or sums of money in any other manner for the benefit of the several depositors according to the rules and regulations of such savings bank respectively, anything in the said hereby repealed Acts or in this Act contained to the contrary notwithstanding.

17. In cases where any savings banks have been or shall be established in any town or place, and other smaller banks have been or shall be established in the neighbourhood of such town or place, as branch banks thereof, and such branch banks by their treasurers have paid or shall pay any sums into the bank in any such town or place as a central bank, it shall and may be lawful for the said trustees of any such central bank or any two of them, to pay into the bank of *England* or

Ireland in manner prescribed by this Act, along with the monies belonging to such central bank, any sum or sums of money belonging to and on account of any such branch bank: Provided always, that the treasurer of such branch banks shall certify to the treasurer of such central bank that the amount contributed by any one depositor in any such branch bank in any one year does not exceed the limit of deposits authorised by this Act.

18. If any order or declaration produced to the said officer for the purpose of paying monies into the banks of *England* or *Ireland* to the account of the said commissioners as aforesaid shall contain any matter or thing which be false or untrue, then and in every such case the sum so paid shall be forfeited to the said commissioners.

19. The said commissioners shall cause all the monies paid into the banks of *England* and *Ireland* respectively, and placed to their account in pursuance of the provisions of this Act, to be invested from time to time in their names and to be carried to the account herein-before provided, under such regulations as the said commissioners shall direct, in the purchase of bank annuities or exchequer bills or parliamentary securities of whatsoever kind created or issued or which may hereafter be created or issued under the authority of any Act or Acts of Parliament for the interest on which provision is made by Parliament, or any stock or debenture or other securities expressly guaranteed by authority of Parliament, and the interest which shall from time to time arise and become due thereon shall in like manner be invested in the purchase of such government annuities or exchequer bills or securities aforesaid.

20. It shall be lawful for any three or more of the Commissioners for the Reduction of the National Debt for the time being to execute and do all matters and things which the said commissioners are required or empowered to do in the execution of this Act.

21. From and after the twentieth day of November one thousand eight hundred and sixty-three all receipts issued prior to that day to the trustees of savings banks established under the said hereby repealed Acts by the Commissioners for the Reduction of the National Debt shall carry interest at the rate of three pounds five shillings *per centum per annum*; and from and after the said twentieth day of November, one thousand eight hundred and sixty-three, upon the payment of any sum or sums of money into the banks of *England* or *Ireland* to the account of the said commissioners by the trustees of any savings bank established under the said hereby repealed Acts or this Act, it shall be lawful for the officer or officers of the said commissioners in that behalf, and he and they is and are hereby authorized and empowered to issue, upon every such payment made, a receipt, signed by one of the cashiers of the governor and company of the bank of *England* or *Ireland*, as the case may be, for the amount of such payment, carrying interest at the like rate of three pounds five shillings *per centum per annum* from the day of such payment inclusive, payable with the principal at the banks of *England* and *Ireland* respectively, whenever the same shall be required or drawn for in manner directed by this Act, and such receipt shall be dated on the day

on which the payment of any such sum or sums of money shall be made respectively, and every such receipt shall be in such form as shall be from time to time directed by the said commissioners, and the principal and interest of all sums mentioned in any receipt shall be charged and chargeable upon, and the same are hereby charged and made payable out of all or any monies standing in any account in the names of the said commissioners, or out of any monies produced by the sale of any stock, or annuities, funds, or Exchequer bills, or other securities standing in their names in the books of the banks of *England* and *Ireland* respectively, as the said commissioners shall from time to time direct: Provided always, that no fractional part less than one penny shall be allowed or paid as interest upon the principal sum contained in any receipt issued under the provisions of this Act.

22. All interest which shall become due and payable upon any sum of money mentioned in any such receipt upon the twentieth day of *November* and the twentieth day of *May* in every year next after the date of any such receipt shall be from time to time calculated and computed by the officer of the said commissioners, and shall in each and every year be placed to the credit of the savings bank on whose account any such sum of money was paid within six weeks from such twentieth day of *November* and twentieth day of *May* respectively, and shall be carried to and written on the account of such savings bank, and shall become principal, and shall from thenceforth carry interest as principal money paid into the said bank of *England* or *Ireland*, as the case may be, on the account of such savings bank; and a receipt according to such form as the said commissioners shall approve shall be signed by the officer of the said commissioners, and shall be issuable by the said officer half yearly within sixty days from and after such twentieth day of *November* and twentieth day of *May* respectively (and such receipts shall bear date the twenty-first day of *November* and twenty-first day of *May* respectively) for the amount of such interest so credited and made principal as aforesaid as if the amount thereof had been a payment made by the trustees of such savings bank to the account of the said commissioners: Provided always, that no interest shall be computed or calculated on any fractional part of a pound of the half-yearly balance standing in the books of the said commissioners on account of any savings bank on any twentieth day of *November* or twentieth day of *May* respectively.

23. It shall be lawful for the trustees and managers of any such savings bank, if they shall so think fit, to direct that all interest which shall be payable to the depositors in such savings bank shall yearly, or twice in each and every year, be calculated and computed by the trustees of such savings bank, or such person or persons as they shall appoint, and shall be carried to the credit of such depositors respectively, and shall become principal, and shall from thenceforth carry interest in all respects as other principal money deposited in the said banks, or as if the said sum of interest so credited to the said depositors respectively had actually been paid to the said depositors, and by them repaid to the said trustees and managers, any law, statute, or usage to the contrary notwithstanding: Pro-

vided always, that from and after the twentieth day of *November*, one thousand eight hundred and sixty-three, the interest payable to depositors by the trustees and managers of any savings banks shall not exceed the rate of three pounds and tenpence *per centum per annum*.

24. Before trustees of any savings bank shall make any order or draft for payment by the said commissioners of any sum or sums of money under this Act, the trustees of such savings bank shall make, give, sign, and execute an appointment under the hands and seals of not less than two of such trustees, and the execution of which shall be attested by two managers of the same savings bank, empowering and authorizing some person or persons named in such appointment to be agent or agents for receiving all and every such sum and sums of money as such trustees shall from time to time require to be paid by such commissioners, and every such appointment shall be produced by or on behalf of the person or persons named therein to the officer of the said commissioners fourteen days at least before the payment of any sum or sums of money on account of such savings bank; and such appointment shall remain deposited in the office of the said commissioners; and every such appointment shall be made in such form and under such regulations as shall from time to time be directed or required or approved of by the said commissioners or their officer: Provided always, that it shall be lawful for the trustees of any savings bank by whom any such appointment shall be made, given, signed, and executed, or for the survivors or survivor of such trustees, to revoke such appointment by any certificate or other instrument under the hands and seals or hand and seal of such trustees or trustee attested by two managers of such savings bank, and in such form and under such regulations as shall be directed or required or approved of by the said commissioners or their officer; and in case of the decease of every such trustee except one it shall be lawful for the surviving trustee, together with any other trustee or trustees, being not less than two, of the said savings bank, and in case of the decease of all such trustees, or in case all such trustees shall decline or refuse to act, it shall be lawful for not less than two other trustees of the said savings bank from time to time to make, give, and execute an appointment in manner aforesaid re-appointing the person or persons named in such appointment, or any other person or persons in his or their room or stead, to be the agent or agents of such trustees, and every such certificate or instrument of revocation and every such new appointment shall be produced to the officer of the said commissioners by the person or persons named in such new appointment fourteen days at least before the payment of any sum or sums of money to the person or persons named in such new appointment, and shall remain deposited in the office of such officer.

25. It shall be lawful for the trustees of any such savings bank from time to time (by any draft or order in writing under the hands of any two trustees of such savings bank, attested by two other trustees or managers, or by any two credible witnesses, according to such form as the said commissioners for the reduction of the national debt shall from time to time direct) to

require that the whole or any part of the principal sum or sums of money standing in the books of the said commissioners to the credit of the trustees of such savings bank shall be paid to such person or persons as such trustees shall from time to time require, being the agent or agents named in some appointment executed under this Act or the said hereby repealed Acts, and lodged with the officers of the said commissioners as hereinbefore mentioned, and then remaining in force, and every such draft or order shall be addressed to the said commissioners, and upon the same being produced to the officers of the said commissioners the said officer shall, within five days after the production thereof, upon the back of such draft or order endorse and sign an order in such form as shall from time to time be directed and required by the said commissioners for the payment of the sum mentioned in the draft or order of such trustees, together with the amount of all interest due on such sum up to the day immediately preceding the day of the date of the order of such officer, and which order of such officer previously to the issuing thereof shall be entered and countersigned by the clerk or other proper officer making such entry, and shall be addressed to the cashiers of the governor and company of the bank of *England* or *Ireland*, as the case may be, and such cashiers or one of them shall, upon the production of such order, pay the sum mentioned therein to the person or persons mentioned in the draft or order of the said trustees, and the signature of such person or persons, jointly or severally, shall be a sufficient discharge to the said commissioners and to the said governors and company respectively, and all payments made in pursuance of such draft or order respectively shall be deemed and taken to be payments made by the said commissioners to the trustees of such savings banks respectively according to the numerical order and priority of date in which the original receipts of money deposited on account of such savings banks respectively shall have been issued to the trustees thereof respectively in manner hereinbefore mentioned.

26. Whenever the sum to be drawn for by the trustees of any savings bank shall exceed five thousand pounds, the draft or order for that purpose shall be signed by not less than four such trustees, and the signature of each and every of the said four trustees shall be separately attested by at least one manager of such savings bank, or some one other credible person: and any manager or other person attesting the signature of any one of the said four trustees shall not be an attesting witness to the signature of any other of such four trustees: Provided also, that whenever the sum or sums drawn for by one or more drafts by the trustees of any savings bank, or by the trustees of any friendly society, shall exceed the sum of ten thousand pounds, the amount of such draft or drafts (if more than one) shall not be payable by the officer of the said commissioners until the expiration of fourteen days next after the day when the draft or drafts for such sum or sums shall be produced to the said officer.

27. Such officer shall be and he is hereby restrained from issuing any order or orders for payment as aforesaid, bearing the same date, upon any one day, on account of the same savings bank exceeding in amount

the principal sum of ten thousand pounds, anything hereinbefore contained to the contrary thereof in anywise notwithstanding.

28. In case any one or more trustee or trustees of any savings bank, who shall have made, given, signed, and executed any such appointment, shall at any time appear in person at the offices of the said commissioners in *England* or *Ireland* respectively, and require payment of any sum or sums of money which might be required by the person or persons authorized to receive the same by such appointments, or if any trustee or trustees of any savings bank shall appear in person where no appointment shall have been made, and if such trustee or trustees so appearing shall produce a draft or order signed by any two or more trustees of such savings bank for any sum under five thousand pounds, or by any four or more trustees for sums exceeding five thousand pounds, no such trustee or trustees being himself or themselves a party or parties who signed such draft or order, and if the identity of the person of the trustee or trustees so appearing shall be ascertained to the satisfaction of the said commissioners or their officer, it shall be lawful for the said officer to direct payment to be made to such trustee or trustees so appearing, of any sum or sums required to be paid by such order or draft, in like manner as if the person or persons authorized by such appointment to receive the same had required such payment, anything hereinbefore contained to the contrary in anywise notwithstanding: Provided nevertheless, that notwithstanding the payments made to such trustees or trustee appearing in person on the appointment of such person or persons as aforesaid, the appointment shall remain in full force and virtue until revoked by the trustees, as hereinbefore mentioned.

29. In all cases where the joint stock or property of any savings bank arising from deposits made under the said hereby repealed Acts or this Act shall, from and after the twentieth day of *November*, one thousand eight hundred and sixty-three, be increased by the interest received beyond the rate of interest payable to the depositors by the rules and regulations of such savings bank, or by any other means, the said trustees or managers of such savings bank, after deducting all such expenses as they may deem proper, shall, within six months after the twentieth day of *November* in each year, ascertain, certify, and pay over to the said commissioners the amount of such increased stock and property, reserving such portion as may appear necessary to meet current expenses, and the amount of such surplus which shall be ascertained, certified, and paid over (after such deduction as aforesaid) shall be discharged from the account of such savings bank standing in the books of the said commissioners; and the said commissioners shall keep a separate and distinct account of such surplus so discharged from the account of the said savings banks respectively as aforesaid, and apply the same in such manner and under such regulations from time to time as any other monies under the provisions of this Act: Provided nevertheless, that it shall be lawful for the trustees or managers of the said respective savings banks, for the purposes of such savings banks respectively, to claim and receive of and from the said com-

missioners (who are hereby required to pay the same upon such certificate as they may appoint) all or any part of the principal monies which may have been already or may be hereafter so discharged from the account of such savings banks respectively as aforesaid under the provisions of the said hereby repealed Acts or of this Act.

30. In case the trustees or managers of any savings bank shall receive or shall have received any deposit of money from or for the benefit of any person under the age of twenty-one years, it shall be lawful for the trustees or managers of such savings bank to pay such person his or her share and interest in the funds of such savings bank, and the receipt of such person shall be a sufficient discharge, notwithstanding his or her incapacity or disability in law to act for himself or herself.

31. It shall be lawful for the trustees and managers of any savings bank to pay any sum of money in respect of any deposit already made or to be made by married women, or by women who may marry after such deposit, to any such woman, unless the husband of such woman shall give to such trustees or managers notice in writing of his marriage with such woman, and shall require payment to be made to him.

32. It shall be lawful for the trustees or treasurers of any charitable or provident institution or society, or charitable donation or bequest for the maintenance, education, or benefit of the poor, or of any penny savings bank within the United Kingdom of *Great Britain and Ireland*, to invest, with the approval of the commissioners for the reduction of the national debt or the comptroller general acting under them, and under such regulations as shall be prescribed by them in that respect, the funds of such institution or society, without restriction as to amount, into the funds of any savings bank established under the provisions of the said hereby repealed Acts or of this Act, and also without such approval of the said commissioners to invest from time to time, if the trustees and managers of such savings bank shall be willing to receive the same, any part of the funds of such institution or society or penny savings bank to the amount of one hundred pounds *per annum*: Provided in such last cases the amount of the sum to be invested by any such institution or society or penny savings bank shall not at any time exceed the sum of three hundred pounds in the whole, exclusive of interest.

33. It shall be lawful for the trustees or treasurers of any friendly society legally enrolled or certified in the manner required by the Acts in force relating to friendly societies, to invest any sum of money the property of such society, without restriction as to amount, into the funds of any savings bank established under the provisions of the said hereby repealed Acts or of this Act, and which shall be willing to receive the same, under such terms and conditions as shall be specially provided for that purpose by the rules, orders, and regulations of such savings bank.

34. The receipt of the treasurer, trustee, or other officer for the time being of any such charitable or provident institution or society, penny savings bank, or friendly society, for any money paid according to the requisition of such treasurer, trustee, or other officer apparently authorized to require such payment,

shall be a sufficient discharge for the same, and the savings bank paying such money, and the trustees, managers, and officers thereof, shall not be responsible for any misapplication or for any want of authority of the person or persons requiring or receiving payment of such money.

35. No person who is or shall be a member of any friendly society established or to be established under and by virtue of any Act or Acts relating to friendly societies, or a member of any of the charitable institutions or penny savings banks hereinbefore mentioned, shall, by reason of such person being or becoming a depositor in any savings bank taking the benefit of this Act, be considered as subject or liable to any penalty, forfeiture, or disability declared, or expressed or intended so to be, by or in the rules, orders, or regulations of such friendly society, charitable institution, or penny savings bank respectively, any rules, orders, or regulations of such friendly society, charitable institution, or penny savings bank made or hereafter to be made to the contrary notwithstanding: Provided also, that no depositor shall be subject or liable to any penalty or forfeiture on account of his belonging to or being interested in the funds of any friendly society, or charitable institution or penny savings bank, deposited in the same or any other savings bank.

36. No sum shall be paid into any savings bank by any person or persons by ticket or number or otherwise, without disclosing to the trustees and managers of such savings bank his or her name, together with his or her profession, business, occupation, calling, and residence, and the trustees and managers of every savings bank are hereby required to cause the name of such depositor, together with his or her profession, business, occupation, calling, and residence to be entered in the books of the savings bank.

37. It shall be lawful for the trustees and managers of any savings bank to receive from any person or persons acting as trustee or trustees on behalf of any depositor or depositors, whether such person or persons is or are himself or themselves a depositor or depositors in the same or any other savings bank or not, any sum or sums not exceeding the annual amount hereinafter mentioned, provided that such trustee or trustees shall make such declaration on behalf of such depositor or depositors, and subject to the like conditions as by this Act is required in the case of any person or persons making any deposit on his or her own account, and all deposits made by any such trustee or trustees shall be inserted in the books of such savings bank in the joint names of such trustees or trustee and of the person or persons in whose account such sum shall be so deposited, and the receipt and receipts of such trustee or trustees, or the survivor of them, or the executors or administrators of any sole trustee or surviving trustee, with or without the receipt of the person or persons on whose account such sum may have been deposited, shall, provided such account shall have been opened before the ninth day of *August*, one thousand eight hundred and forty-four, be a good and valid discharge to the trustees and managers of the savings bank: Provided always, that in respect to all such deposits made after the said ninth day of *August*, one thousand eight hun-

dred and forty-four, repayment of the same or any part thereof shall not be made by the trustees and managers of any savings bank without the receipt and receipts of the said trustee and the person on whose account such deposit may have been made, or the survivor or survivors, or the executors or administrators of such survivor, whose receipt and receipts, either in person or by agent appointed by power of attorney, which power of attorney shall be valid if executed by an infant of or exceeding the age of fourteen years, shall alone be a good and valid discharge to the said trustees and managers, except in case of the insanity or imbecility of the party on whose behalf the deposit has been made, upon proof of which, to the satisfaction of the said trustees and managers, repayment may be made to the said trustee, and an abstract of the above provisions shall be enrolled as one of the rules of all savings banks.

38. It shall not be lawful for any person or persons who shall have made any deposit in or who shall be entitled to any benefit from the funds of any savings bank (unless such benefit shall be derived solely as executor, administrator, or other personal representative of any deceased depositor in the same or any other savings bank) to make any deposit in any other account at the same or any other savings bank; and that every person desirous of making any deposit in any savings bank shall at the time of the making the first deposit in any savings bank, and at such other time or times as such depositor shall be required so to do by the trustees and managers of any such savings bank, make a declaration signed either by themselves, or in case of infants under the age of seven years, by some person to be approved by the trustees and managers, or by such other person as they shall appoint, in such form as shall be directed or approved of by the commissioners or other proper officer, that the person or persons on whose behalf any such first deposit shall be required to be made is not or are not entitled to any deposit or any such subsequent deposit in, or any benefit from the funds of any savings bank other than that into which such deposit shall be made, or any other funds in the said savings bank; and in case any such declaration shall not be true, or if any person shall at any time have or hold or be possessed of any deposit or funds in more than one savings bank within the United Kingdom, except as aforesaid, every such person shall, if in the opinion of the barrister-at-law such deposit was made with a fraudulent intention, forfeit and lose all right and title to any deposit in or to any funds of any and every such savings bank, and the trustees and managers of such savings bank shall and they are hereby required in such case to close the account of such depositor, and to cause the sum or sums so forfeited to be forthwith paid into the bank of *England or Ireland*, as the case may be, to the account of the commissioners standing in the books of the governors and company of the said bank respectively under the title of "The account of the Commissioners for applying certain sums of money annually to the reduction of the National Debt," and the cashier or cashiers of the said governors and company respectively is and are hereby required to receive all such sums, and to place the same to the said account, to be applied in like manner as all other money

placed to the said account; and every such declaration so made shall be filed and kept and preserved by the trustees of every such savings bank, and a printed notice of such regulation and prohibition shall be affixed in the office or place appointed for the receiving of deposits of any savings bank in such form as the said commissioners or their proper officer shall from time to time direct or require or approve; and a copy of such declaration, with notice of the penalty attached thereto (if false), shall also be annexed to or printed at the beginning of the deposit book.

39. It shall not be lawful for the trustees of any savings bank to receive from any one present or future depositor, within any one year ending on the twentieth day of *November* (whether any sum or sums of money had been previously withdrawn or not), any sum or sums exceeding in the whole thirty pounds, exclusive of compound interest, nor to receive from any depositor any sum or sums of money whatever which shall make the sum to which such depositor shall be entitled exceed the sum of one hundred and fifty pounds in the whole, exclusive of interest as aforesaid: Provided always, that, except in the cases hereinafter provided, whenever the sum or sums standing in the name of any depositor shall amount in the whole to two hundred pounds, principal and interest included, thenceforth no interest shall be payable on any such deposit so long as it shall continue to amount to the said sum of two hundred pounds: Provided also, that nothing in this Act contained shall prevent or be construed to prevent the trustees of any savings bank from paying interest to any depositor whose deposit on the 28th day of *July*, one thousand eight hundred and twenty-eight, amounted to and has since continued to amount to or exceed the sum of two hundred pounds; nor to prevent any depositor, having closed his or her account in any savings bank, from making a deposit in the same or any other savings bank, not exceeding the limit allowed to be received in any one year from any new depositor.

40. If any depositor in any savings bank shall desire to transfer the amount of his deposit to any other savings bank, he shall, upon application at the savings bank in which his account shall be open, be furnished with a certificate stating the whole amount which may be due to him, with interest, and thereupon his account at such savings bank shall be closed, and upon delivery of such certificate to the trustees or managers of the savings bank to which it is proposed by the depositor to transfer such deposit they shall forthwith, upon such depositor's signing such declaration as is required in the case of a new depositor, open an account for the amount stated in such certificate for such depositor, and the amount stated in such certificate shall, upon such certificate being forwarded to the Commissioners for the Reduction of the National Debt, be transferred in the books of the said commissioners from their account with the trustees of the savings bank issuing such certificate to the credit of the said commissioners' account with the trustees of the savings bank receiving such certificate; and every such certificate for transfer for the purpose aforesaid shall be in such form as is set forth in the schedule hereunto annexed marked B.

41. In case any depositor in the funds of any sav-

ings bank taking the benefit of this Act shall die leaving any sum or sums of money in the said funds, or any dividends or interests due thereon, belonging to him or her at the time of his or her death exceeding in the whole the sum of fifty pounds, the same shall not be paid to any person or persons as representative or representatives of such depositor but upon the probate of the will of the deceased depositor, or letters of administration, of his or her estate and effects: Provided always, that where the whole estate or effects of any such deceased depositor, for or in respect of which any probate or letters of administration respectively shall be granted, shall not exceed the value of fifty pounds, no stamp duty shall be chargeable thereon, nor upon any legacy or residue or part thereof bequeathed, nor upon any share or part of the estate or effects to be paid or distributed by or under such probate or letters of administration: Provided also, that in every such case the person or persons claiming such probate or letters of administration free from stamp duty under this Act shall, in such case, exhibit to the Court or person having authority to grant the probate or letters of administration a certificate of the amount of the principal money and interest which the deceased depositor had in the funds of the said savings bank, which certificate shall be granted in such form and manner as shall have been settled by the rules or regulations of the savings banks respectively, and shall be signed or testified by such person or persons as shall be directed therein, and every such certificate shall be taken and received by the Court or person having authority to grant such probate or letters of administration as evidence of the amount of the deposit and interest of the deceased depositor in the funds of the said savings bank.

42. In all cases where the whole estate and effects of any deceased depositor for or in respect of which letters of administration shall be granted shall not exceed the value of fifty pounds sterling, no stamp duty shall be chargeable upon the bond required to be given by the administrator for the due administration of the effects of such deceased depositor, nor upon any affidavit or document leading to or connected with such administration, but every such bond and affidavit shall be exempted from stamp duty in like manner and under the like regulations as are provided in and by this Act, with respect to such letters of administration.

43. In case any depositor in any such savings bank shall die leaving any sum of money in the said savings bank belonging to him or her at the time of his or her death, not exceeding in the whole the sum of fifty pounds, exclusive of interest, and probate of the will of the deceased depositor, or letters of administration of his or her estate and effects, is not produced to the trustees and managers of the said savings bank, or if notice in writing of the existence of a will and intention to prove the same or to take out letters of administration is not given to the said trustees and managers within the period of one month from the death of the said depositor, and in the latter case unless such will is proved or letters of administration taken out within the period of two months from the death of the said depositor, it shall be lawful for the said trustees and managers of any savings bank to pay and

divide the same to or amongst any person or persons who shall appear to such trustees and managers to be the widow or entitled to the effects of such deceased depositor, according to the statute of distribution, or according to the rules of the said savings bank.

44. The payment of any such sum of money shall be valid and effectual with respect to any demand of any other person or persons as next of kin of such deceased depositor, or as the lawful representative or representatives of such depositor, against the funds of such savings bank, or against the trustees and managers thereof; but, nevertheless, such next of kin or representatives shall have remedy for recovery of such money so paid as aforesaid against the person or persons who shall have received the same.

45. Payment of any money by any such savings bank as aforesaid to any person or persons having had granted to him any letters of administration to the effects of a depositor, or probate of his will, or testamentary disposition granted by any ecclesiastical court, and appearing to be in force, shall be valid and effectual with respect to any demand of any other person or persons as the lawful representative or representatives of such depositor against the funds of such savings bank, or against the trustees and managers thereof: but, nevertheless, such lawful representative or representatives shall have remedy for such money so paid as aforesaid against the person or persons who shall have received the same.

46. If any depositor in any such savings bank, being illegitimate, shall die intestate, leaving any person or persons who but for the illegitimacy of such depositor would be entitled to the money due to such deceased depositor, it shall be lawful for the trustees and managers of such savings bank, with the authority in writing of the barrister appointed to certify the rules of savings banks, to pay the money due to such deceased depositor to any one or more of such persons as in their opinion would have been entitled to the same according to the statute of distributions if the said depositor had been legitimate; or if there be no such persons, then that it shall be lawful for the said trustees or managers, with the authority in writing of the said barrister, to pay the amount due to such deceased depositor to such person or persons as shall be approved by the Commissioners of her Majesty's Treasury, such approval to be signified to the trustees and managers of the savings bank by the Commissioners for the Reduction of the National Debt.

47. Where this Act provides for payments made or to be made to any of the relations of any deceased intestate depositor according to the statute of distribution, the provisions thereof shall be held in *Scotland* to apply to payments made or to be made to persons appearing to be next of kin according to the law of *Scotland*; and where this Act refers to probate of the will of the deceased or letters of administration of his or her estate and effects, the said provisions shall in *Scotland* be held to apply to confirmation by the law of *Scotland*.

48. If any dispute shall arise between the trustees and managers of any savings bank and any individual depositor therein, or any executor, administrator, next of kin, or creditor or assignee of any depositor who may become bankrupt or insolvent, or any person

claiming to be such executor, administrator, next of kin, creditor, or assignee, or to be entitled to any money deposited in such savings bank, then and in every such case the matter in dispute shall be referred in writing to the barrister-at-law appointed under the said hereby repealed Acts or this Act, who shall have power to proceed *ex parte* on notice in writing to the said trustees or managers left or sent through the post office by the said barrister to the office of the said savings bank, and whatever award, order, or determination shall be made by the said barrister shall be binding and conclusive on all parties, and shall be final to all intents and purposes, without any appeal.

49. On any such reference it shall be lawful for the said barrister and he is hereby authorized to inspect any book or books belonging to the said savings bank relating to the matter in dispute, and to administer an oath to any witness appearing before him, or to take the affirmation in cases where affirmation is allowed by law instead of oath; and if upon such oath or affirmation any person making the same shall wilfully and corruptly give any false evidence, every person so offending shall be deemed and taken to be guilty of perjury, and shall be prosecuted and punished accordingly.

50. No power, warrant, or letter of attorney granted to or to be granted by any person or persons, or trustee or trustees of any savings bank as aforesaid, nor any power, warrant, or letter of attorney given by any depositor or depositors in the funds of any such savings bank to any other person or persons authorizing him, her, or them to make any deposit or deposits of any sum or sums of money in the said funds on behalf of the said depositor or depositors, or to sign any document or instrument required by the rules or regulations of such savings bank to be signed on making such deposits, or to receive back any sum or sums of money deposited in the said funds, or the dividends or interest arising therefrom, nor any receipt nor any entry in any book of receipt for money deposited in the funds of any such savings bank, nor for any money received by any depositor, his or her executors or administrators, assigns, or attorneys, from the funds of such savings bank, nor any draft or order, nor any appointment of any agent or agents, nor any certificate or other instrument for the revocation of any such appointment, nor any surety-bond, nor any submission to, or award, order, or determination of the said barrister, nor any other instrument or document whatever required or authorized to be given, issued, signed, made, or produced in pursuance of this Act, shall be subject or liable to or charged with any stamp duty or duties whatsoever.

51. The trustees of each savings bank in *Ireland* shall, as soon as conveniently may be after the passing of this Act, and from time to time in case of a vacancy, appoint an auditor or auditors to audit the accounts of the said savings bank, as well as to examine and inspect the books of the several depositors, and the said trustees shall, immediately after such appointment, transmit the signature, name, and address of the said auditor or auditors to the Commissioners for the Redemption of the National Debt; and the trustees of every such savings bank in *Ireland* shall cause the annual and other statements required to be trans-

mitted under this Act to be certified and verified by the auditor or auditors appointed by the said trustees, in addition to the attestation by trustees and managers, as also required by this Act, and shall also cause a certificate from the said auditor or auditors, as to the result of his or their examination of such of the depositors' books as may have been produced to him or them for examination, to be transmitted with the said annual statement to the said commissioners: Provided always, that it shall be lawful for the trustees of any such savings bank in *Ireland* to agree with the trustees of any other such savings bank or banks in *Ireland* as to the appointment of a common auditor or auditors, and the auditor or auditors so appointed for all the said banks shall be deemed and taken, as soon as the signature, name, and address shall have been transmitted by each such bank to the said commissioners, to be the auditor or auditors of each such bank.

52. Every depositor in every savings bank in *Ireland* on his first deposit shall be furnished with a deposit book, in which shall be printed at length a copy of the certified rules of the savings bank in which he shall make such deposit; and a duplicate copy of the certified rules, and of every alteration and amendment thereof, and a duplicate copy of every annual statement or account required by and furnished to the said commissioners, signed by two trustees or managers of any such savings bank, shall be from time to time exhibited in the office of such savings bank, and shall be open to the inspection of every depositor or person intending to be such.

53. The rules of every savings bank in *Ireland* shall specify a number of days, not less than two in every year ending on the twentieth of *November*, in which the book of each depositor shall be produced at the office of the said savings bank for the purpose of being inspected, examined, and verified with the books of the savings bank by the auditor or auditors.

54. If it shall appear to the satisfaction of the said commissioners that the clauses of this Act, or the orders, directions, and regulations of the said commissioners signified by the comptroller general to the trustees of any savings bank in *Ireland*, have not been complied with by the trustees or managers of any savings bank in *Ireland*, it shall and may be lawful for the said commissioners, if they shall so think fit, to close the account of the said savings bank and to discontinue the keeping any further account with the trustees thereof, and to direct that no further sum shall be received at the Bank of *Ireland* from the trustees of such savings bank to the account of the commissioners until such time as such commissioners shall think proper; provided always, that the said commissioners may re-open and allow the growing interest of such accounts during the time of such discontinuance, and authorize the receipt of money at the Bank of *Ireland*, whenever the said commissioners shall think fit so to do, upon such trustees complying with the directions of such commissioners; and the said commissioners shall forthwith publish a notification of such account being closed, or of the same being re-opened, in the *Dublin Gazette*, and also in some newspaper published in the county in which the said savings bank shall be established.

55. For the more effectually ascertaining from time

to time the actual and progressive state of the several savings banks enrolled under the provisions of this Act, the trustees and managers of every such savings bank shall annually cause a general statement of the funds of such savings bank invested in the Bank of *England* or the Bank of *Ireland* in the names of the commissioners for the reduction of the national debt to be prepared up to the twentieth day of *November* in each year, showing the balance or principal sum due to all the depositors collectively in such savings bank, and a statement of the expenses incurred, and stating in whose hands such balance shall then be remaining; and every such annual statement shall be attested by two managers or two trustees, or by one manager and one trustee, of such savings bank, and every such annual statement shall be countersigned by the secretary or actuary of such savings bank, and all such annual statements shall be transmitted to the office of the said commissioners for the reduction of the national debt in *London* or *Dublin* (as the case may be) within nine weeks after the twentieth day of *November* in each year; and in case the trustees of any such savings bank shall neglect or refuse to make out and transmit such accounts as aforesaid, or in case any such trustees shall at any time neglect or refuse to obey any orders or directions given by the said commissioners or through their officer, pursuant to the directions of this Act, it shall be lawful for the said commissioners to close the account of the trustees of such savings bank, and to discontinue the keeping any further account with the trustees of such savings bank, and to direct that no further sum shall be received at the bank of *England* or at the bank of *Ireland* from the trustees of such savings bank to the account of the said commissioners until such time as such commissioners shall think fit: provided always that it may be lawful for the said commissioners to re-open such account, and to allow the growing interest of such account during the time of such discontinuance, and to authorize the receipt of money at the Bank of *England* or *Ireland*, whenever such commissioners shall think fit to do so, upon such trustees complying with the directions of such commissioners or their officer.

56. If the annual statements directed by this Act to be prepared and transmitted by the trustees of a savings bank shall not be prepared and transmitted to the commissioners for the reduction of the national debt within the time limited by this Act, it shall be lawful for the said commissioners, or for the comptroller general or assistant comptroller acting under the said commissioners, and they and he are and is hereby severally required, forthwith to publish in the *London Gazette*, and also in any newspapers published in the county in which the savings bank is established, the name of every such savings bank so neglecting or making default in transmitting such annual statement as aforesaid, in such form and words for the information of the depositors, and under such regulations as the said commissioners or the said comptroller general or assistant comptroller shall from time to time think fit.

57. It shall be lawful for the commissioners for the reduction of the national debt, or the comptroller general or assistant comptroller acting under the said

commissioners, if they or he shall think fit, to require from time to time of and from the trustees and managers of any savings bank a detailed statement of all the expenses whatever incurred by the said trustees and managers in the management or otherwise of the said savings bank.

58. Whenever it shall appear in any annual statement that any sum of money of or belonging to a savings bank is in the hands of any treasurer or other person, the said annual statement shall be accompanied with a certificate signed by such treasurer or other person, that the sum of money therein mentioned is in his possession.

59. The trustees and managers of every such savings bank shall cause a duplicate of every such annual statement, accompanied by a list of the trustees and managers of such institution for the time being, attested and countersigned as aforesaid, to be publicly affixed and exhibited in some conspicuous part of the office or place where the deposits of such savings banks are usually received, for the information of all parties making deposits therein; and every such duplicate shall from time to time remain so affixed and exhibited until the ensuing annual statement shall in like manner be affixed and exhibited as aforesaid; and every depositor shall be entitled to receive from the said savings bank a printed copy of such annual statement on payment of one penny.

60. From and after the passing of this Act the commissioners for the reduction of the national debt shall, at the close of every year ending on the twentieth day of *November*, make to the commissioners of her Majesty's treasury the following accounts; first, of the gross amount of all sums received and credited, including interest, and of all sums paid, including interest, from the sixth day of *August* in the year of our Lord one thousand eight hundred and seventeen up to each twentieth day of *November*, by the said commissioners on account of the trustees of the several savings banks in *Great Britain* and *Ireland*, and also on account of any friendly societies in *Great Britain* respectively, and of the gross amount of all sums, stock, funds, annuities, and exchequer bills and other securities standing in the names of such commissioners on the twentieth day of *November* on account of any such savings banks or friendly societies respectively, and the sums paid for the purchase of such stocks, funds, exchequer bills, or other securities, and the gross amount of the interest or dividends received thereon by the said commissioners, and the gross amount of the interest paid by such commissioners up to such twentieth day of *November* on all receipts issued to the trustees of such savings banks or friendly societies in *Great Britain* and *Ireland* respectively, and also on account of all expenses incurred by the said commissioners for salaries of clerks or other incidental charges during the preceding year; secondly, on account of the whole of the several transactions set forth in detail which shall have taken place during the course of the previous year in the investment of all monies coming into their hands for savings banks and friendly societies, and of the variations, if any, which have taken place during such year in the securities held by the said commissioners for those institutions; and thirdly, an account, shewing the aggregate amount

of the liabilities of the Government to the trustees of savings banks and friendly societies respectively, and the nature, amount, and value of the securities (taken at the price of the day) held by the said commissioners to meet the same, stating the amount of surplus or deficiency (as the case may be) thereon; distinguishing in each of such accounts hereby required to be rendered as aforesaid the funds of savings banks from the funds of friendly societies; and copies of all such accounts shall be laid before both houses of Parliament, not later than the fifteenth day of *February*, if Parliament shall be then sitting, and if not then sitting then within ten days after the next re-assembling of Parliament.

61. In every such account so to be made to the commissioners of her Majesty's treasury as herein-before is provided, a distinct account shall be shown of the aggregate amount of the separate surplus funds of all savings banks made up to such twentieth day of *November*, and of the gross amount of all sums transferred to or paid out of such surplus fund in the course of the previous year, and of the balance of such account then remaining in the hands of the said commissioners.

62. For the purpose of rendering the accounts of the several savings banks in *Great Britain* and *Ireland* uniform and correspondent with the accounts of the commissioners for the reduction of the national debt, the interest payable to the depositors in such savings banks in *Great Britain* and *Ireland* shall, from and after the twentieth day of *November* one thousand eight hundred and sixty-three, be computed half-yearly to the twentieth day of *May* and the twentieth day of *November*, or yearly to the twentieth day of *November* in each year, as the case may be, and to no other periods.

63. It shall be lawful for the said commissioners for the reduction of the national debt, if they shall so think fit, and they are hereby authorised and empowered, to pay into the Bank of *England* from time to time any sum or sums of money to be placed to their credit in account with the governor and company of the Bank of *Ireland* on account of the fund for the banks for savings, under such regulations as shall be agreed upon from time to time between the said commissioners and the said governor and company of the Bank of *Ireland*, and all sums of money so placed to the said commissioners' credit as aforesaid shall be carried to the account of the said commissioners by the cashiers of the said governor and company of the Bank of *Ireland*, standing in the books of the said bank under the title of "The Funds for the Banks for Savings," and shall be subject and shall be applied to the several purposes herein-before mentioned, as if every such sum and sums of money had been originally paid into the Bank of *Ireland* to the said account under the provisions of this Act.

64. All receipts, orders, certificates, endorsements, accounts, returns, or instruments, or other matters or things whatsoever which shall be required for carrying into execution this Act, shall be made in such form and manner, and containing such particulars, and under such regulations as shall from time to time be directed or required or approved of by the said commissioners or their officer or officers.

65. This Act shall be a full and sufficient indemnity and discharge to the commissioners for the reduction of the national debt, and to the governor and company of the Bank of *England* and Bank of *Ireland* respectively, and their officers, for all things to be done or required or permitted to be done pursuant to this Act.

66. It shall be lawful for the said commissioners for the reduction of the national debt and they are hereby authorised and empowered to appoint a barrister-at-law, and employ such and so many of the clerks and other officers as shall be necessary for carrying into execution the purposes of this Act, and it shall be lawful for the lord high treasurer or the commissioners of her Majesty's treasury of the United Kingdom of *Great Britain* and *Ireland* for the time being, and he or they is or are hereby authorised and empowered, to settle and appoint such allowances as shall be proper for the services, pains, and labour of such clerks or other persons to be appointed and employed by the said commissioners in manner and for the purposes aforesaid, and out of the fund upon which the establishment of the said commissioner is chargeable by any Act now in force to pay and discharge all such allowances and all other incidental charges which shall necessarily attend the execution of this Act, in such manner as to them shall seem just and reasonable.

67. This Act shall, except as herein-after is excepted, extend to all savings banks established or hereafter to be established in *England*, *Scotland*, or *Ireland*, and *Berwick-upon-Tweed*, and the islands of *Guernsey*, *Jersey*, and *Isle of Man*.

68. This Act shall not be held to repeal any of the now existing statutes relating to savings banks in so far as relates to post office savings banks established or to be established under the twenty-fourth *Victoria*, chapter fourteen, nor to repeal any of the powers and authorities now vested by those Acts in the commissioners for the reduction of the national debt in regard to the control, management, investment, conversion, and regulation of the funds remitted by the trustees of savings banks, or by the trustees of friendly societies to the said commissioners.

SCHEDULES.

SCHEDULE A.

ACT AND PARTS OF ACTS REPEALED.

The portions printed in Italics show the extent of repeal.

9 Geo. 4, c. 92.—An Act to consolidate and amend the laws relating to savings banks.—*The whole.*

3. Will. 4, c. 14.—An Act to enable depositors in savings banks and others to purchase government annuities through the medium of savings banks, and to amend an Act of the ninth year of his late Majesty to consolidate and amend the laws relating to savings banks.—*Sections 21, 22, 25, 28, 29, 30, 31, 32, 33, 34, and 35.*

5 & 6 Will. 4, c. 57.—An Act to extend to Scotland certain provisions of an Act of the ninth year of his late Majesty to consolidate and amend the laws relating to savings banks, and to consolidate and amend the laws relating to savings banks in Scotland.—*The whole.*

7 & 8 Vict., c. 83.—An Act to amend the laws relating to savings banks, and to the purchase of government annuities through the medium of savings banks.—*The whole.*

11 & 12 Vict., c. 133.—An Act to amend the laws relating to savings banks in Ireland.—*The whole.*

17 & 18 Vict., c. 50.—An Act to continue an Act of the twelfth year of her present Majesty for amending the laws relating to savings banks in Ireland, and to authorize friendly societies to invest the whole of their funds in savings banks.—*Section 2.*

22 & 23 Vict., c. 53.—An Act to enable charitable and provident societies and penny savings banks to invest all their proceeds in savings banks.—*The whole.*

23 & 24 Vict., c. 137.—An Act to make further provision with respect to monies received from savings banks and friendly societies.—*The whole.*

SCHEDULE B.

FORM OF CERTIFICATE FOR TRANSFER TO ANOTHER SAVINGS BANK.

To be issued to any depositor desiring to transfer his [or her] deposits from one savings bank to another.

Savings bank at _____, in the county of _____
 WHEREAS of _____ a depositor in the above-named savings bank, is desirous of closing his [or her] account with the said bank for the purpose of transferring his [or her] deposits to the savings bank at _____ in the county of _____, and to enable him [or her] so to do, the said depositor has applied for a certificate of the whole amount due to him [or her] pursuant to the Act [referring to this Act]; we hereby certify that the sum due to the said depositor for money deposited by him [or her] in this savings bank, inclusive of all interest due to him [or her] to this date, amounts to the sum of [state the amount in words], of which the sum of [state the amount, if any, in words] has been deposited since the twentieth of November last; and we further certify that his [or her] account with this savings bank has been closed by the issue of this certificate.

Witness our hands this _____ day of _____ 18 ____.

 _____ } Two of the trustees or managers [appointed, for this object, by the trustees] of the above-named savings bank.

Examined _____

Actuary or Secretary of the above-named savings bank.

CAP. LXXXVIII.

An Act to enable landed proprietors to construct works for the drainage and improvement of lands in Ireland. [28th July, 1863.]

Sec. 1. *Short title.*

2. *To apply to Ireland only.*

3. *Definition of terms.*

4. *Constitution of elective drainage districts.*

5. *Commissioners to be a body corporate.*

6. *Mode of constituting elective drainage district. Power of inspector.*

7. *Evidence of constitution of district.*

8. *Power to commissioners to extend time for completion of works.*

9. *Definition of "proprietor."*

10. *Provision as to proprietorship by corporations and companies.*

11. *Provision in case of no proprietor.*

12. *Constitution of drainage boards.*

13. *Regulations as to drainage boards.*

14. *Rules to be observed with respect to electors of drainage boards.*

15. *How value is to be ascertained.*

16. *Mode of election of drainage boards, and proceedings thereof.*

17. *Certain provisions of 10 & 11 Vict. c. 16, incorporated.*

18. *Power to execute the works.*

19. *Powers enabling drainage board to carry on works.*

20. *Power to purchase lands.*

21. *8 & 9 Vict. c. 18, incorporated.*

22. *Drainage board to have same powers as a railway company.*

23. *Commissioners of Public Works to appoint an arbitrator on application of drainage board.*

24. *Power to arbitrator to call for documents and administer oaths.*

25. *Arbitrator to make and subscribe declaration before acting.*

26. *Proceedings to ascertain purchase money and compensation for injuries.*

27. *Provisions of 14 & 15 Vict. c. 70, and 23 & 24 Vict. c. 97, as to ascertainment of claims incorporated.*

28. *Assessment of compensation to millowners.*

29. *Provision for payment of expenses of commissioners.*

30. *After award drainage board may commence the works.*

31. *Compensation to be ascertained as before provided.*

32. *Saving of existing liabilities to repair.*

33. *Power to drainage boards to borrow money for the purposes of this Act.*

34. *Power to drainage boards to grant debentures to lenders for principal and interest. Form of debenture. Debentures may be transferred.*

35. *Drainage boards to pay off debentures on notice after period limited for such purpose.*

36. *Power to commissioners of Public Works to make advances.*

37. *Application by memorial.*

38. *Commissioners to make an order for advance. Every loan to be issued by instalments.*

39. *On completion of works, commissioners to make award.*

40. *A draft of the award to be printed and published, and a copy deposited with the clerk of the peace. Notice thereof to be posted at the usual places, and inserted in newspapers requiring persons objecting thereto to send in their objections.*

41. *Drainage board to furnish documents.*

42. Commissioners or one of them to examine into objections.
43. Award to be enrolled.
44. Apportioned expenses to be charged on lands.
45. In case of nonpayment of money so charged, drainage boards may enter into receipt of the rents, and mortgage the land.
46. In case of loan by the Commissioners of Public works, they may make award.
47. A rentcharge of £6 10s. for every £100 charged.
48. Priority of rentcharge.
49. Charges to extend to the entire denomination of land drained.
50. Rentcharges to be paid.
51. Certain clauses in 10 & 11 Vict. c. 32, incorporated.
52. Powers of commissioners as to summoning witnesses, &c.
53. Costs of arbitration to be deemed part of expenses.
54. Tenants paying monies on account of landlord to deduct them from rent.
55. Proprietors of less than fee simple may charge the expenses on the lands.
56. Commissioners to determine amount of increased rent to be paid for land improved.
57. Drainage board to hold annual meetings, and fix the amount to be raised for maintenance and repairs for the ensuing year.
58. Power to drainage board to release.
59. Power to drainage board to sell lands not required.
60. Power to recover maintenance rates by civil bill.
61. Service of notices on occupiers and proprietors.
62. Notices to corporations to be left at their principal office.
63. On death of arbitrator, commissioners to appoint another.
64. Commissioners of public works may appoint an officer to inspect and report upon execution of works.
65. Costs of legal proceedings on part of drainage boards.
66. Any person swearing falsely, guilty of perjury.
67. Tender of amends.
68. Saving rights of canal owners, wharfingers, &c.
69. Drainage boards not to divert rivers so as to injure harbours.
70. Power to Canal Commissioners to alter sewers.
71. Penalty on persons creating obstructions or nuisances.
72. Power to drainage boards to remove or alter any insufficient bridges, &c.
73. In case new bridge, &c. should confer a public benefit a portion of the expense to be paid by the county.
74. Proviso in case of a new bridge being in two counties.
75. In case grand jury refuse to present, the Court to make an order.

76. Exchanges may be made of land.
77. Notice of such exchanges to be given.
78. Security to be given.
79. Provision in case of alteration of local boundary.
80. Power to drainage boards, in case mill power be improved, with owner's consent, to rate the millowner towards the expenses of the works.

"WHEREAS it is expedient that the proprietors of lands in Ireland should be enabled to construct and maintain works for drainage and other improvements of their lands: Be it therefore enacted by the Queen's most excellent Majesty, by and with the advice and consent of the lords spiritual and temporal, and commons in this present Parliament assembled, and by the authority of the same, as follows:

PRELIMINARY.

1. This Act may be cited for all purposes as "The Drainage and Improvement of Lands Act (Ireland), 1863."

2. This Act shall extend to Ireland only.

3. "Watercourse" shall include all rivers, streams, drains, sewers, and passages through which water flows:

"Person" shall include any body of persons, corporate or unincorporate, unless there is something in the context inconsistent therewith:

"Commissioners" shall mean her Majesty's Commissioners of Public Works in Ireland for the time being, or any one or more of them:

"Owner," as used throughout this Act, shall have the same meaning as it has in "The Lands Clauses Consolidation Act, 1845:"

In the construction of this Act the word "district" shall mean and include the lands mentioned and described or referred to in the maps or plans and schedules as approved of by the Commissioners of Public Works:

"Land" shall extend to all arable, pasture, or otherwise profitable, and to all waste uncultivated land, and shall also extend to messuages, tenements, mills, weirs, easements, fisheries, and other hereditaments, corporeal or incorporeal, and any estate or interest therein, and any undivided part thereof, or any of them:

"Petitioners" shall mean those who shall petition for the purpose of putting this Act into execution.

ELECTIVE DRAINAGE DISTRICTS.

4. Any person or persons interested in any land liable to be flooded, or injured by water, or the drainage whereof may be capable of being improved, may, with the consent of the Commissioners of Public Works, as hereinafter mentioned, constitute such land, or other area of land, a separate drainage district.

5. The "Commissioners" for the purposes of this Act shall be a body corporate and possess a common seal.

6. The following proceedings shall be taken for the purpose of obtaining the sanction and order of the Commissioners of Public Works:

(1.) A petition shall be presented to them, stating

the proposed boundaries of the district by reference to a map, or in such other manner as they shall think expedient, and also stating the exigencies which render the formation of such drainage district necessary: It shall be signed by the petitioners, and shall be accompanied by proper schedules, maps, plans, and sections showing the drainage works proposed to be executed within such district, including therein all works necessary for any outfall, and showing the land to be drained or improved by such drainage, and showing in one or more of such schedules the reputed proprietors and occupiers thereof, and the lands or other property required to be taken for or likely to be injured by the proposed works or the making of any outfall, and the reputed proprietors and occupiers thereof, and showing, so far as may be possible, the line, course, and situation of the streams, watercourses, drains, rivers, and lakes intended to be cleared, scoured, or embanked, and the requisite variations, diversions, abridgments, or enlargements of the same, and the direction and extent of any new drains, watercourses, or works necessary to be made, and the land in and through which the same are to be made; and such petition shall also be accompanied by an estimate of the expense of the proposed works, including in such estimate the probable amount of money payable as compensation in respect of any injury likely to be occasioned by such works, or for the purchase of any land, houses, fisheries, weirs, mills, or other property required to be taken or purchased for the purpose of such works, and other miscellaneous expenses likely to be incurred; and such schedules shall also set forth the then actual value of the land to be drained or improved by drainage by the proposed works, so far as the petitioners shall be able to ascertain the same, and the probable increase in such value by the proposed works and such actual value and estimated increase shall be stated in the said schedules, and also the proportions in which such lands should contribute towards the payment of the costs of the proposed works, specifying such proportions in the ratio of the estimated increase in the value of such lands; and the petitioners shall cause to be made copies of the said schedules, maps, plans, sections, and estimate, and shall cause such copies to be deposited in such convenient place or places as the said petitioners shall think proper, within or in the immediate vicinity of the district in which such land or the river or part of a river shall be situated, there to remain open for public inspection at all reasonable times for three successive weeks; and all persons shall be at liberty to inspect or make copies of or extracts from the said schedules, maps,

plans, sections, and estimate, and copies thereof or extracts therefrom shall be made for any person who shall require the same, on payment of the costs of making such copies or extracts:

And the said petitioners shall cause a notice, stating the place or places in which copies of the said schedules, maps, plans, sections, and estimate have been deposited as aforesaid, to be lodged with the clerks of the unions respectively, and to be published in some newspaper usually circulated in the district in which the land or river, or part of a river, proposed to be drained or improved, shall be situated, or in the immediate vicinity thereof, and also to be served on the proprietor by delivery of the same personally, or, if such proprietor is absent from *Ireland*, to his agent, or by leaving the same at the usual or last known place of abode of such proprietor as aforesaid, or by forwarding the same by post in a prepaid letter addressed to the usual or last known place of abode of such proprietor; and in all cases where it shall be proposed to take or remove any mill or factory, or to lower, raise, or modify any weir, dam, or other work or obstruction connected with any mill or factory, a copy of such notice shall be served on the owner, lessee, or occupier, or person in charge of such mill or factory, and be posted on the door or wall thereof; and by such notice all parties interested shall be required, on or before a day to be therein named, not sooner than two months from such publication and posting or service as aforesaid of such notice, to transmit to the said petitioners their objections, if any, to the said schedules, maps, plans, sections, and estimates, and all other objections which such parties shall think fit to make with respect to anything proposed to be done under the provisions of this Act; and the petitioners shall by the same notice specify their intention of having an inspector sent to the district, before whom all persons interested in the proposed works, or having any objection thereto, shall be required to appear, at a time and place to be fixed by such notice:

- (2.) After the expiration of the period mentioned in such notice for sending in objections, the said commissioners shall send an inspector to the district for the purpose of making inquiries as to the propriety of constituting the proposed district, and as to the amount of the proprietors thereto; and they shall deliver to such inspector the schedules, maps, plans, sections, and estimate which shall have been deposited with them under the provisions hereinbefore contained: The person so sent as inspector by the commissioners shall in no case be the same person who may have previously reported for the petitioners, nor shall the person so sent by

the commissioners be afterwards in any way employed in the execution of any of the works in the district:

- (3.) The inspector shall proceed to the district, and make all necessary inquiries with respect to the propriety of constituting such district, and also with respect to the area of land to be comprised therein: And such inspector shall, at the time and place named in such notice as aforesaid, or at such other time and place as the petitioners may by any further notice appoint, attend, and shall have power to adjourn from time to time, or hold such new meeting as he may find necessary, and shall inquire into the correctness of the schedules containing the names of such proprietors and occupiers as aforesaid, and shall hear all such objections as shall have been or shall then be made by any person or persons interested in the said lands or river, or any person on his or their behalf, as to any omission or misdescription in such schedules, or any name improperly inserted therein, and shall hear all such other objections as shall have been or shall be then and there made by such person or persons to the schedules, maps, plans, sections, and estimate which shall have been made under the provisions hereinbefore contained; and the said inspector shall also hear and inquire, on oath (which he is hereby authorized to administer) or otherwise, into all such objections by any of the persons aforesaid to the said proposed works as shall have been or shall then and there be made, and also all objections to the stated value of the land, or to the stated probable increase in such value, as the same shall have been respectively set forth in the said schedules, and also into all such objections as shall have been made, or shall then and there be made, by or on behalf of the owner, lessee, or occupier, or other person interested in any mill or factory likely to be affected by anything proposed to be done in such district under any of the provisions of this Act, and after having considered all such objections as aforesaid he shall cause such alterations (if any) as he may deem expedient to be made in the said schedules, maps, plans, sections, and estimate, and shall sign the same; and such schedules, maps, plans, sections, and estimate so signed by the said inspector shall be preserved by the said commissioners in their office in *Dublin*, and a copy thereof shall be deposited by the petitioners with the clerk of the peace of each county wherein such works are proposed to be executed, and shall be open to public inspection at all reasonable times on payment of a fee of one shilling:
- (4.) Any inspector sent by the commissioners in pursuance of this Act may, by himself and his servants, enter upon any lands in order to obtain information upon any of the mat-

ters aforesaid, and may do all such things as to him shall seem expedient and necessary for the purposes of his inspection and report, making reasonable compensation for any injury which may be done by him or his servants, and he may also, by summons under his hand, require to appear before him, at some convenient place within or near the proposed district, any persons whomsoever, and examine them upon oath or otherwise touching any matter relating to the purposes of the enquiry, and he may by any such summons require any officer of or acting under any corporation or guardians of the poor, and any commissioner, trustee, officer, or person acting under any local Act of Parliament in force within the district to which any such inquiry may relate, to produce before him any surveys, plans, sections, rate books, or other like documents which may by reason of their office be in their custody or control touching any matter relating to the purposes of such inquiry; and such inspector may examine, inspect, or take copies of any such books, surveys, plans, sections, and documents, or any of them, or part thereof; and whosoever refuses to permit any such inspector or his servants to do any of the matters aforesaid, or wilfully disturbs or interferes with him or them in the course of their inspection, or wilfully disobeys any such summons, or prevents any such inspector from examining, inspecting, or taking copies as aforesaid, or refuses to answer any question put to him by such inspector for the purposes of the said inquiry, shall be liable to a penalty not exceeding five pounds for every such offence, to be recovered in a summary manner before two justices of the peace sitting at petty sessions in any district within the jurisdiction of which any of the lands in the proposed drainage district are situate; but no person shall be required to attend before the inspector in obedience to any summons unless the reasonable charges of his attendance have been paid or tendered to him:

- (5.) The inspector shall report the result of his inquiries to the commissioners, who shall transmit a certified copy thereof to the petitioners; and the petitioners shall lodge copies of such report with the clerk or clerks of the unions respectively, and shall forthwith cause a notice, stating that said report has been so lodged, to be published in some newspaper usually circulated in the proposed district; and objections in writing to said report, or any part thereof, may, within one month from the lodging of said report, be served on or transmitted by post to the said commissioners at their office in *Dublin* by or on the part of any proprietor in the proposed district; and the said commissioners, after having considered such ob-

jections (if any), may, if satisfied with the propriety of constituting the district, and that the proprietors of two third parts in value of such land in the proposed district are in favour thereof, and have subsequently to the report of such inspector assented thereto in writing, make a provisional order under their seal declaring the area in such provisional order mentioned or referred to, to be a drainage district; provided that no such provisional order shall be made authorising a drainage board to remove or injuriously interfere with any millrace, mildam, weir, or other like obstruction, whereby the level of water is raised for milling or other purposes of profit, unless upon the report of their inspector they shall be satisfied that any injury that may be caused thereby is of a nature to admit of being fully compensated for by money:

- (6.) Notice of the provisional order shall be published by the petitioners in the *Dublin Gazette*, and in some newspaper circulating in the district to which it relates, and copies thereof shall be served in such manner and upon such persons as the commissioners may require:
- (7.) Upon the receipt of the report of the inspector the commissioners may, by provisional order under their seal, constitute the area mentioned in the petition or report, with such alterations of boundaries, if any, as they think fit, a separate drainage district; and it shall be the duty of the commissioners, as soon as conveniently may be, to take all proper steps for the confirmation of such provisional order by Act of Parliament, and when so confirmed it shall be deemed to be a public general Act of Parliament, and take effect accordingly, but previous to such confirmation it shall not be of any validity whatever:
- (8.) No petition for constituting a district under this Act shall be entertained until the petitioners have given such security for costs by deposit of such sum of money as the said commissioners shall require; and in the event of a drainage district not being constituted in pursuance of such petition, the petitioners shall pay all costs, charges, and expenses, including the expense incurred by reason of the presenting of the petition and of the appointment of such inspector; but in the event of the drainage district being constituted, such costs, charges, and expenses shall be deemed to be expenses incidental to the execution of the works, and shall be defrayed accordingly out of the monies to be raised by virtue of this Act; and such order shall, by reference to maps or otherwise, as the commissioners may think proper, state the lands proposed to be purchased for the proposed works, subject to such alterations and deviations therefrom as the commissioners may there-

after sanction; and such order shall also limit the time within which the works in any such district shall be completed, and state the several matters and things hereinafter mentioned, and the commissioners may also state in such order such other matters and things as they may think proper, according to the circumstances of each particular case.

7. The making of such order shall be conclusive evidence that all the requirements of this Act in respect of proceedings required to be taken previously to the making of such order have been complied with.

8. It may be lawful for the said commissioners, upon sufficient ground being laid before them, to extend the time by any such order limited for the completion of any such proposed works to such further period, not exceeding three years, as may by the said commissioners be deemed right, also to sanction within such extended time the purchase of such additional land as may from time to time appear necessary for the execution of the proposed works.

9. The definition of the term "proprietor" contained in the Act of Parliament of the fifth and sixth years of her Majesty, chapter eighty-nine, shall apply to this Act, and the twenty-third, twenty-fifth, twenty-sixth, and twenty-eighth sections of the said last-mentioned Act shall be deemed to be incorporated in this Act.

10. Where a corporation aggregate, a joint stock or other company, or any body of proprietors or undertakers, is proprietor of any land, such corporation, company, body of proprietors or undertakers respectively shall be deemed to be one proprietor for the purpose of giving an assent or dissent under this Act, and may express their assent or dissent in writing under their common seal in the case of a corporation, and in any other case under the hands of three directors or other persons in the direction or management of the company or concern; but no member of such corporation, nor proprietor or person interested in such company or concern, shall be entitled to dissent individually as a proprietor in respect of such land.

11. When any portion of land comprised within the boundaries referred to in any such petition as is hereinbefore mentioned appears to have no proprietor within the meaning of this Act, or the proprietor cannot be found, the land so circumstanced shall be altogether excluded in any computation that may be made of the proportion borne by the dissenting proprietors of any area of land, as hereinbefore provided, to the aggregate value of such land.

12. After the constitution of a district the execution of the works necessary in the said district shall be vested in a board, hereinafter called a drainage board, and such board shall be a body corporate, with perpetual succession and a common seal, having capacity to hold lands for all the purposes of their constitution.

13. Subject to any provisions to the contrary that may be made by the order constituting the district, the following regulations shall be made with respect to drainage boards:

- (1.) The members of the first drainage board shall be named by the commissioners in the order

constituting the drainage district, and such order shall fix the number of which the board is to consist, the mode of summoning the first meeting of the board, the qualification of subsequent members of the board, and the time at which the first and subsequently appointed members of the board are to vacate their offices, such time not being later than the end of the month of *September* in the year following that in which such order is made:

- (2.) The members of every board succeeding the first board shall vacate their offices on the first *Thursday* in *September* in each succeeding year, or on such other day as may be prescribed by the board:
- (3.) The offices of vacating members shall be filled up by an equal number of qualified persons, to be elected as hereinafter mentioned:
- (4.) Every member of a drainage board going out of office shall be re-eligible; and if at any time when an election of members ought to take place, the places of any retiring members are not filled up, the retiring members whose places are not filled up shall continue in office until the succeeding year:
- (5.) Any casual vacancy occurring in the board may be filled up by the board; but any person so chosen shall retain his office so long only as the vacating member would have retained the same if no vacancy had occurred:
- (6.) During any vacancy in the board the continuing members shall act as if such vacancy had not occurred:
- (7.) Any person who acts as member of a drainage board without being qualified as required by the order of the commissioners shall incur a penalty not exceeding fifty pounds; and in any proceeding for the recovery of such penalty the burden of proving qualification shall be upon the person against whom such proceeding is taken:
- (8.) All acts done by any meeting of a drainage board, or of any committee of a drainage board, or by any person acting as a member of a drainage board, shall, notwithstanding it may be afterwards discovered that there was some defect in the appointment of any such board or person acting as aforesaid, or that they or any of them were or was disqualified, be as valid as if every such person had been duly appointed and was qualified to be a member.

14. Subject to any provisions to the contrary that may be made by the order constituting the district, the following rules shall be observed with respect to the electors of drainage boards:

- (1.) The electors for members of a drainage board for any district shall be the proprietors of lands within such district:
- (2.) Each elector shall vote according to the following scale; that is to say,
If his property within such district shall

be of an annual value of less than fifty pounds, he shall have one vote:

If such annual value amount to fifty pounds and be less than one hundred pounds, he shall have two votes:

If it amount to one hundred pounds and be less than one hundred and fifty pounds, he shall have three votes:

If it amount to one hundred and fifty pounds and be less than two hundred pounds, he shall have four votes:

If it amount to two hundred pounds and be less than two hundred and fifty pounds, he shall have five votes:

If it amount to two hundred and fifty pounds and be less than five hundred pounds, he shall have six votes:

If it amount to five hundred pounds and be less than one thousand pounds, he shall have eight votes:

If it amount to or exceed one thousand pounds, he shall have ten votes:

15. For the purpose of ascertaining the annual value in the last preceding section mentioned, and also for the purposes of ascertaining the proportions of assenting or dissenting proprietors under any of the provisions of this Act, and also for the purposes of the final award to be made as hereinafter mentioned, the schedules of value of the lands deposited with the commissioners before the constitution of the district, and signed by the inspector, under the provisions hereinbefore contained, shall be binding upon all persons concerned.

16. Subject to any provisions to the contrary that may be made by the order constituting the district, the mode of electing members of drainage boards, and the proceedings of drainage boards, shall be conducted in manner directed by the schedule annexed hereto.

17. The provisions of the Commissioners Clauses Act, 1847, with respect to,—

- (1.) The contracts to be entered into and deeds to be executed by the commissioners;
- (2.) The liabilities of the commissioners, and to legal proceedings by or against the commissioners;
- (3.) The appointment and accountability of officers of the commissioners;
- (4.) The accounts to be kept by the commissioners;
- (5.) The giving notices and orders;

shall apply to the drainage boards, and shall be incorporated with this Act; and in the construction of this Act and the said incorporated provisions this Act and the order constituting the drainage district shall together constitute the "Special Act."

GENERAL POWERS OF DRAINAGE BOARDS.

18. It shall be lawful for the said drainage board to contract with or employ such contractors, surveyors, agents, and workmen as they shall think fit, and to make and execute all such works as shall be described in the maps, plans, and sections hereinbefore mentioned, or such deviations therefrom, or such other works as the commissioners shall from time to time deem necessary for effecting all or any of the purposes of this Act, and for such purposes to enter into and

upon any land whatsoever, and to widen, straighten, deepen, divert, scour, or cleanse any river, stream, drain, brook, pool, or watercourse running through such land, and to make, open, and cut in or upon the same any new watercourse, side cut, ditch, or drain, and to alter or remove any bank, sluice, flood gate, drain, or tunnel, and to make or erect any bank, sluice, flood gate, drain, tunnel, or other works necessary for drainage, and to dam, bar, and stop up with any weir or dam any river, brook, pool, stream, or watercourse, and also to make upon such land any embankment against the sea or any lake, river, stream, or watercourse, and to put and place on such land any piles, stones, earth, soil, or other materials for the purposes of the works, or for the more effectual protection or defence of such land, or for the better conveying the waters from the said land into the sea or into any river, lake, stream, or watercourse, and also to form any dam, and to erect any sluice, hatch, or lock in any river, lake, stream, or watercourse, for the purpose of supplying water to any mill or factory, or of keeping back a sufficiency of water for the use of cattle, or for the irrigation or warping of lands where such irrigation or warping shall be wanted, and shall be a beneficial manurance to such lands, and also to stop up or divert any road or remove any bridge, and to make any new road or bridge, and also from time to time to repair, alter, or remove any sluice, flood gate, hatch, tunnel, road, or other works now made or to be made as aforesaid, and to divert, deepen, widen, cleanse, and scour any ditch, drain, watercourse, or side cut now existing or to be made as aforesaid, and also to do all such things and execute all such works as may be necessary or convenient for the purposes of this Act, and be sanctioned by the commissioners, making compensation, to be ascertained in the manner hereinafter mentioned to all persons for any damage occasioned to them by the exercise of any such powers.

19. In order to enable the said drainage board to construct and maintain the said works there shall be incorporated with this Act the several sections of the several Acts of Parliament next hereinafter mentioned, *viz.*, the thirtieth, forty-sixth, fiftieth, fifty-fifth, fifty-sixth, fifty-ninth, sixty-first, sixty-second, sixty-third, and sixty-fourth sections of the Act Fifth and Sixth *Victoria*, chapter eighty-nine, and the twenty-eighth, twenty-ninth, and thirty-first sections of the Act Sixteenth and Seventeenth *Victoria*, chapter one hundred and thirty; and every power, authority, and privilege by the said several sections of the said Acts respectively conferred upon the Commissioners of Public Works in *Ireland* shall be deemed and taken to be conferred on such drainage board as aforesaid, to all intents and purposes whatsoever, and the said drainage board and every other person or persons shall be entitled to all rights and benefits conferred and subject to all liabilities imposed by the said several sections of the said last-mentioned Acts of Parliament, in like manner in all respects as if the said sections had been re-enacted by this Act, as far as the difference of circumstances will admit.

20. It shall be lawful for the drainage board to contract for and purchase any lands, mills and water-power which may, with the sanction of the commis-

sioners, be thought necessary or proper to purchase for accomplishing any of the purposes of this Act, making such reasonable satisfaction and recompense to the persons entitled to or interested in such lands as shall be agreed upon or otherwise settled and ascertained in manner hereinafter provided.

21. All the clauses and provisions contained in the Lands Clauses Consolidation Act, 1845, relating to the taking of lands belonging to persons under disability, or to the application of monies payable in respect of the purchase of such lands, or as compensation for injuries to the same, shall be deemed to be incorporated in this Act.

22. The said drainage board, with respect to the acquisition and transfer of all such lands as under this Act they may be enabled to take, and with respect to the purchase monies or compensation payable for the same, shall possess all such powers and privileges, and be subject to all such liabilities, costs, charges, and expenses, as any railway company in *Ireland* would possess or be subject to under the provisions of the said last mentioned Act, or of any Act amending or varying the provisions of the same.

23. After the constitution of a district under the provisions of this Act, it shall be lawful for the commissioners, upon the application of the drainage board, from time to time, as occasion may require, to appoint an arbitrator between the drainage board and the persons whose lands are proposed to be taken for or which may be injuriously affected by the proposed works to which the plans and estimates deposited as hereinbefore provided relate.

24. The arbitrator may call for the production of any documents in the possession or power of the drainage board, or of any party making any claim under the provisions of this Act, which such arbitrator may think necessary for determining any question or matter to be determined by him, and may examine any such party and his witnesses, and the witnesses for the drainage board, on oath, and administer the oaths necessary for that purpose.

25. Before any arbitrator shall enter upon any inquiry he shall, in the presence of a justice of the peace, make and subscribe the following declaration; that is to say,

‘I, *A.B.*, do solemnly and sincerely declare, that I will faithfully and honestly, and to the best of my skill and ability, hear and determine the matters referred to me under the provisions of the Act [*naming this Act*].

‘*A.B.*

‘Made and subscribed in the presence of
And such declaration shall be annexed to the award when made; and if any arbitrator, having made such declaration, wilfully act contrary thereto, he shall be guilty of a misdemeanor.

26. Upon the first appointment of such arbitrator, the schedules, maps, plans, and sections which have been deposited with the commissioners as aforesaid, or copies thereof, shall be delivered to him by the commissioners; and thereupon the drainage board shall take the same steps with respect to publishing of notices in all respects as are required by the Railway Act (*Ireland*), 1851, and the Railways Act (*Ireland*), 1860, to be taken by a railway company upon the

appointment of an arbitrator under those Acts, and the same proceedings shall be thereupon taken by such arbitrator and drainage board respectively as are by the said Acts required to be taken in the case of lands to be taken or works to be done by a railway company under the said Acts; and the arbitrator shall decide upon the purchase money to be paid by the drainage board for any lands to be taken, and also upon the compensation to be paid for injuriously affecting any estate or interest of any person or persons in any lands by reason of the execution of the proposed works, and also upon the accommodation works, if any, to be executed by the drainage board; and such compensation shall be ascertained, and the amount thereof, when ascertained, shall be paid and recoverable, in the same manner, and subject to the same restrictions and conditions in all respects, and to the same right of traverse, as is by the said Acts provided in the case of the purchase money and compensation for lands taken or injuriously affected by the works proposed to be made by any railway company; and every award to be made under the provisions of this Act shall be subject to the same provisions as are in the said recited Acts contained with reference to awards under the said Acts.

27. For the purposes mentioned in the last section the Railway Act (*Ireland*), 1851, and Railways Act (*Ireland*), 1860, shall be incorporated with this Act; and in the interpretation of those Acts and of the said Lands Clauses Consolidation Act, 1845,—

The expression "The Special Act" used in the said Acts shall be taken to mean or apply to the order sanctioning the purchase of lands and the execution of works by the drainage board:

The expression "the railway" used in the said Acts shall be taken to mean or apply to the works proposed to be executed by the drainage board:

The expression "the company" used in the said Acts shall be taken to mean the drainage board who shall have obtained an order sanctioning the purchase of lands and the execution of works in manner aforesaid.

28. The arbitrator under this Act, and also the jury which shall try any traverse under this Act, shall have regard, in case of mills or factories, to any benefit resulting or which may result from any improvement which shall be acted by the execution of the works, in the water power or constancy of supply of water to such mill or factory, or by relief from back water, afforded to it; and every arbitrator and jury to whom any question shall be referred under this Act shall set off such benefit or estimated benefit against the sum or sums which shall be assessed by him or them for purchase money or compensation by reason of the execution of the works.

29. The salary or remuneration, travelling and other expenses, of any arbitrator appointed for any of the purposes of this Act, and all costs, charges, and expenses (if any) which shall be incurred by the said commissioners in the exercise of the powers vested in them under this Act, shall be paid by the drainage board; and it shall be lawful for the commissioners from time to time to require the drainage board to advance to the commissioners any sum or sums of

money which may be required, or give other security for the payment of any such costs, charges, and expenses; and the amount of all such costs, charges, and expenses shall be included in and form part of the expenses incidental to the execution of the works in the district in relation to which such expenses shall be incurred, and shall be discharged accordingly.

30. At any time after the making of an award by the said arbitrator, and the payment of the purchase money and compensation thereunder, as hereinbefore provided, the drainage board may commence and proceed with the works proposed to be executed for the drainage or improvement of the land to which the plans, sections, and estimates deposited with the Commissioners of Public Works may relate.

31. No person shall be entitled to take any proceedings at law or in equity for the recovery of any compensation or damages in respect of any property in any drainage district by reason of any works which the drainage board thereof shall execute, but his right to any compensation or damages in respect of such property, and the amount thereof, shall be ascertained and be recoverable in the manner hereinbefore provided, and not otherwise.

EXISTING LIABILITIES.

32. The liability of any person whomsoever to defray or contribute towards the expense of making, completing, altering, amending, or maintaining any sewer or drain, or any walls or works for protecting the land against the force or encroachments of the sea or of any river, or doing any other work within the jurisdiction of a drainage board, shall continue, and the same may be enforced as if this Act had not passed.

33. It shall and may be lawful for every and any drainage board under this Act, from time to time as occasion shall require, to contribute amongst themselves, or to borrow and take up at interest of and from any person who shall be willing to advance and lend the same, any sum or sums of money required for defraying the costs, charges, and expenses incurred or to be incurred by them in the execution of any works for the drainage or improvement of any land, or otherwise, under or by virtue of this Act, and to include in such loan interest upon the principal sum which may be agreed to be paid during the interval between such loan and the making of the final award relative to the works for which such loan may have been contracted; and the repayment of such sum or sums of money, with interest at a rate not exceeding five pounds *per centum per annum*, shall be secured to the party lending the same upon the monies accruing to the drainage board under or by virtue of the award to be made as herein-after mentioned.

34. In all cases of monies to be contributed or borrowed and taken up at interest by drainage boards under the provisions of this Act, it shall and may be lawful for the drainage boards from time to time to grant a security in the form of debenture for such monies, under their common seals, to every person who shall advance any sum of money for the purposes of this Act, every such debenture being numbered in the order of its execution by the drainage boards, and setting forth the amount of the sum for which each such debenture is issued, and the rate of

interest payable for the same, and the period to expire before the same shall upon notice become payable, with a reference to the land for the drainage or improvement of which or other work for the construction of which such sum shall have been so borrowed or taken up, and the district within which the same or any of them may be situate; and that every such debenture shall be made in the following words, or as near thereto as the circumstances of the case will admit:

'No.

'Debenture to lender of money.

'Amount £

'26th Victoria, c.

'Drainage District, Ireland, in the Co. of No.

'By virtue of an Act passed in the twenty-sixth year of the reign of her Majesty Queen Victoria, intituled "The Drainage and Improvement of Lands Act (Ireland), 1863," the drainage board of the district, in consideration of the sum of sterling to them lent and paid by , doth hereby certify, and it is hereby witnessed, that the monies to become payable to the said drainage board under their final award, for and in respect of the drainage, improvement, and other works in the district of in the county of particularly mentioned, described, and referred to in the maps, plans, schedules, and estimates deposited with the commissioners of public works in Ireland, pursuant to the said Act, are hereby charged with the repayment of the said sum of , such repayment to be made to the said , or other the person entitled thereto in one payment, at such time after the expiration of years from the date hereof as may be appointed by the said drainage board, pursuant to notice to be given for that purpose, with interest at and after the rate of per centum per annum, such interest to commence and to be computed from the day of the date hereof, and be payable half-yearly, on each first day of January and first day of July, until the principal sum shall be repaid or be repayable, pursuant to notice as aforesaid, which sum so lent and advanced by the said was taken up and borrowed by the said drainage board for the purposes of said Act.

'In witness whereof the said drainage board have hereunto affixed their common seal, this day of .

'Entered common seal.'

And the monies mentioned in each such debenture, with the interest thereon, shall be charged upon and repayable and paid by the said drainage board out of the monies which shall come to their hands under the final award to be made in respect of the lands or district for or in respect of which such monies shall have been borrowed; and any such debenture may be transferred by any instrument of transfer or assignment endorsed thereon; and all persons to whom such securities shall be so given, or other person entitled thereto by endorsement thereon as aforesaid, shall be entitled to the monies accruing and payable under such final award, according to and in the order of the number of each such debenture as aforesaid: provided also, that nothing herein contained shall be deemed, construed, or taken to extend to make the members of drainage boards or any of them personally, or their

respective lands or tenements, goods and chattels, liable to the repayment of any of the monies to be borrowed or secured in pursuance of this Act, save in so far as they are or may be liable under and by virtue of the award to be made as herein-after provided. Every such debenture as aforesaid, and every assignment or transfer thereof, shall be chargeable with the same stamp duty as a bond for the like amount and the assignment or transfer thereof are by the laws in force subject or liable to respectively.

35. In all cases of debentures issued as herein-before provided, it shall be lawful for the drainage boards, at any time after the expiration of the period when, under the provisions aforesaid, any such debenture may upon notice as aforesaid become payable, to publish a notice in the *Dublin Gazette*, and in such newspapers as they shall deem fit, fixing a time, not sooner than two calendar months from the date of such last-mentioned notice, when the principal money secured by any such debenture shall be paid or payable, having regard to the numerical order in which the several debentures for the district shall have been executed by the drainage boards; and in such notice the debenture to become payable shall be described by the name of such district in respect of the works within which such debenture shall have been so issued, and by the number on such debenture; and it shall be lawful for the drainage board, at the expiration of the time in such notice stated, to pay off the monies due on account of any such debenture mentioned in such notice; and from and after the expiration of the time appointed by the said notice the interest upon the principal monies secured by any such debenture shall cease and determine.

LOANS OF PUBLIC MONIES TO DRAINAGE BOARDS.

36. It shall be lawful for the commissioners of public works, upon application of any drainage board, out of any monies in their hands available for loans, by and with the sanction of the commissioners of her Majesty's treasury, and subject to such rules and regulations and conditions as the said commissioners of the treasury may think proper from time to time to make, to issue and advance to any drainage board such sum and sums of money as they may think proper, to be applied for the purposes of aiding in the completion of the works in any such district.

37. Every such application shall be made by memorial stating the particular circumstances rendering such loan necessary or expedient, the estimated expense of the intended works, the period at which the same are proposed to be completed, and the sum of money in the hands of the drainage board applicable to the said works, together with such other particulars as the commissioners may require.

38. The commissioners shall thereupon cause an inquiry to be made into all the circumstances of the case, and may, if after such inquiry they shall so think fit, make an order for the advance to the drainage board of the money required for the completion of the works: provided always, that no issue or instalment of any such loan or advance shall be made unless the said commissioners shall be satisfied that the drainage board have previously *bona fide* expended a sum of money equal to the amount of such issue or instal-

ment in the drainage and improvement of such district, nor in any case shall any such loan or advance be made exceeding one moiety of the monies proposed to be expended on the drainage and improvement of such district; and every loan to be made by the said commissioners of public works under this Act shall be issued by instalments not exceeding at any time one-fifth of such moiety; and no second or any subsequent instalment of any such loan shall be made until it shall have been proved to the satisfaction of the said commissioners, in such manner as they shall require, that the preceding instalment has been properly expended on the works for which such loan shall have been sanctioned and approved of by the said commissioners.

39. As soon as conveniently may be after any works for the drainage or improvement of any land under this Act, or any other work by this Act authorized to be executed, shall have been completed, or, if the commissioners shall think fit, on the expiration of the period by the order of the commissioners limited for the completion of such works, though the same may not have been fully completed, the said commissioners shall make an award or awards as herein-after mentioned: They shall draw up, or cause to be drawn up, a draft award or instrument in writing, which shall describe in general terms, and by reference to maps and schedules or otherwise, as the commissioners shall think proper, the land or river drained or improved as aforesaid, and the works which shall have been so completed; and such award shall also specify the several quantities belonging to the reputed proprietors respectively of such land so drained or improved as aforesaid, and the original value and the increase of the value of the land so drained or improved; and such award shall also specify the amount of the sums which shall have been expended upon and about the works which shall have been so executed for drainage or improvements by drainage, and all expenses incident thereto; and such award shall also specify the amount of any monies borrowed or contributed under the provisions of this Act (otherwise than and except any sum advanced or agreed to be advanced by the commissioners of public works), and the interest on the same from the date of such advance; and such award shall specify the proportions of such sums payable in respect of the several parcels or portions of the lands drained or improved by drainage towards payment of the total amount of the costs, charges, and expenses of such drainage or incidental thereto, and whether the same shall be repaid in one sum or by instalments, and if by instalments the said award shall also specify the said instalments; and in every such award regard shall be had to the degree of benefit conferred as aforesaid, and the circumstances of each particular case; and by such draft award the said commissioners may also appropriate to each proprietor so advancing monies as aforesaid (if in their opinion it shall be practicable to do so) a portion of the entire charge which shall be proportionate to the sum so advanced by such proprietor, and to declare such proprietor to be entitled, in respect of such portion, to a specified charge affecting only certain specified parcels or denominations of the said lands, or to declare any two or more proprietors so advancing

monies as aforesaid to be jointly entitled to any distinct proportionate part of the sum or sums so to be charged on any distinct parcel or parcels, denomination or denominations of the said lands, and in such shares and proportions between such last-mentioned proprietors respectively as by such draft award shall be specified; and the said commissioners may insert in every such award all such other determinations, matters, and things as they shall think necessary and proper; and the commissioners shall also specify in every such award the proportions in which the land drained and improved as aforesaid, and the proprietors of such lands in respect thereof respectively for the time being, shall in future be annually charged towards the costs and expenses which may from time to time be incurred in or about the maintaining, cleansing, and keeping in repair the several watercourses, sluices, drains, ditches, cuts, rivers, lakes, streams, tunnels, culverts, banks, bridges, outlets, weirs, embankments, fences, and other works executed under this Act, and shall also specify, according to such proportions as aforesaid, the rate which shall be payable towards such costs and expenses as last aforesaid for the year next ensuing the date of such award.

40. The commissioners shall within one calendar month next after the making of said award cause a draft thereof to be printed and sold at a price not exceeding two shillings and sixpence for each printed copy thereof, and shall within such calendar month cause such draft, or a copy thereof, to be deposited in their office, and another copy with the clerk of the peace for every county wherein the land or river, or any part thereof, which shall have been drained or improved, may be situate; and such clerk of the peace is hereby authorized, and required to receive the same; and all persons shall have liberty to inspect the same on the payment of sixpence; and when such draft award has been so deposited, the commissioners shall cause notice thereof to be inserted once in each week for three successive weeks in some one or more newspapers usually circulated in such district or the vicinity thereof; and the commissioners shall by such notice require all persons who may desire to lodge objections to the said award to lodge the same at such place and before such time as shall be specified in the said notice; and the commissioners shall also in the said notice state that they will proceed to hear any objections which may be lodged, and to settle the award, at such time and place in or near such district as shall be specified in the said notice, such time not to be sooner than one calendar month from the first publication of such notice.

41. For the purpose of enabling the commissioners to make such award, the said drainage board shall furnish and submit to the commissioners all accounts, plans, maps, specifications, and other documents and information in their power or procurement relating to the district respecting which such award is intended to be made.

42. The commissioners or one of them shall attend at such time and place as he shall so appoint, and examine into the matter of any objection which shall be so lodged to the award, and shall hear all such proper evidence as may be offered to them or him in respect thereof, and shall make such alterations (if

any) in the said award as they or he shall think fit, and may adjourn such attendance from time to time, and shall settle and seal such award.

43. Every award, when finally settled by the said commissioners, with proper schedules, map, or plan referred to, describing the district and the lands therein to which such award shall relate, shall be enrolled in the rolls office of her Majesty's Court of Chancery in *Ireland*; and such award, when so finally settled and enrolled, shall be binding and conclusive on all parties, and a copy thereof, certified by the proper officer of her Majesty's rolls office, shall be evidence that it was duly made, and that all the requisitions of this Act in relation thereto were complied with; and the said drainage board shall, within one month after the said award shall be finally settled, cause such award to be printed and kept for sale at a price not exceeding two shillings and sixpence for each printed copy thereof; and such award shall be entitled, "The — District Apportionment of Expenses Award."

44. The respective sums of money which by the award of the commissioners shall be specified as the proportions or contributions payable in respect of the several parcels or portions of the land drained or improved by drainage, or by any works under this Act, towards the total amount of the sums (other than any rentcharge payable in respect of any advance of public money as aforesaid) expended in and about such drainage or improvements as aforesaid, with interest for such respective sums of money at the rate not exceeding five pounds *per centum per annum* from the date of such award, shall be charged on such several parcels or portions of the land so drained or improved as aforesaid, and that in preference to and with priority over all incumbrances on such land, save those created under the authority or provisions of any Act of Parliament heretofore passed, and save the rentcharge payable in respect of any advance of public money under this Act as aforesaid, and any quit or crown rent or rentcharge in lieu of tithe issuing thereout.

45. If any sum of money so charged as aforesaid, or any instalment thereof, or any interest in respect thereof, shall remain unpaid for the space of three calendar months next after the time appointed for the payment of the same by the said award, then it shall be lawful for the drainage board, or any person authorized by them, to enter upon the land charged with or liable to the payment of the sum of money or interest so in arrear, or any part thereof, (but subject nevertheless to such quit or chief rent, or other incumbrance, if any, as aforesaid,) and the rents and profits of such land to receive and take, until thereby or otherwise the sum and interest so due (together with all costs and expenses attending or occasioned by such entry and receipt of the rents, profits, and issues of such land) shall be fully paid and satisfied; and it shall be lawful for the Court of Chancery in *Ireland*, upon the application by petition of the drainage board, to appoint a receiver of the rents, profits, and issues of such land, which receiver shall have full power to receive the same rents, profits, and issues, and apply the same, after deduction of the necessary expenses of the application to the said court, order, and proceedings thereon, and of such quit or chief rent

issuing out of such lands and premises (if any), and without prejudice to such prior incumbrances, or any remedy for the recovery of the same, respectively in payment of the sum and interest so due, until the same shall be fully paid; and it shall also be lawful for the drainage board, if they shall so think fit, to raise such sum and interest, and all costs and expenses attendant thereon, by mortgage of such land or a competent part thereof; and every such mortgage, and every receipt given for the consideration money, shall be valid and effectual to all intents and purposes whatsoever; and no mortgagees shall be bound to see to the application of his mortgage money, or to inquire whether the mortgage made by the drainage board is hereby authorized.

46. In case any such loan shall have been made to any drainage board by the commissioners of public works as aforesaid, then and in such case it shall be lawful for the commissioners, on the completion of the works in the district within the period mentioned in the order of the commissioners, or within such further period as the commissioners may have appointed for the completion of the said works, or in case the works in any district shall not be completed within either of the periods aforesaid, then at such time as the commissioners shall think proper, they shall make an award for the purpose of ascertaining the proportions in which the several lands within such district shall be chargeable with the repayment of such loan by the commissioners, together with interest on the same from the date of such advance until the date of such award; and such award shall be called "The — District Repayment of Public Advances Award," and shall describe, by reference to maps, plans, or otherwise, the land or river in respect of which such award shall have been made, and shall specify the several lands, and quantities belonging to the reputed proprietors respectively of such land, and of the amount of such loan and interest as aforesaid, and all other expenses incurred by the said commissioners in respect thereof, in pursuance of the provisions of this Act; and such award shall specify the principal monies advanced by the commissioners, and interest thereon at the rate of four pounds *per centum per annum* from the respective dates of such advances; and such consolidated sum of principal and interest shall by such award be apportioned amongst the respective proprietors in such district, and on their land respectively; and such awards shall specify the respective amounts of the gross sums of money and the rentcharges payable in respect of such loan, interest, and expenses as aforesaid, which shall be charged upon the said several parcels or portions of land as aforesaid, regard being had to the circumstances of the case, and the degree of benefit conferred or expected to be conferred upon the said several lands by the said several works within the said district; and the like proceedings in all respects shall be had with regard to the said last-mentioned award as are herein before directed of and concerning the aforesaid award to be made after the completion of the works within any district, called district apportionment of expenses award.

47. The several lands mentioned in any such award as last aforesaid shall, from the date of such award,

become charged with the payment to her Majesty of an annual rentcharge of six pounds ten shillings for every one hundred pounds charged on the said lands respectively, and so in proportion for any lesser amount, to be payable for the term of twenty two years, to be computed from the fifth day of *April* or tenth day of *October* which shall next happen after the making of such award, such rentcharge to be paid by equal half-yearly payments on the fifth day of *April* and tenth day of *October* in every year, the first of such payments to be made on the second of such days, which shall happen after the date of such award: provided always, that where the gross sum chargeable on any particular parcel or denomination of lands in respect of any such advance of public monies shall not exceed the sum of one hundred pounds, it shall be lawful for the commissioners, by their said award, to fix and determine the instalments by which such sum, together with interest at the rate of four pounds *per centum per annum* from the date of such award, shall be repaid, and such instalments shall be charged and recovered in like manner as the rentcharge aforesaid.

48. Every such rentcharge or instalment to be secured by any such award shall take priority of all charges and incumbrances whatsoever and whensoever made, save and except quitrents and rentcharges in lieu of tithes, and also save all charges prior in date (if any) created under the authority or provisions of any Act of Parliament heretofore passed.

49. All monies, including the rentcharges aforesaid, charged by virtue of this Act upon any lands, shall be held to be chargeable upon the whole of any denomination or townland any part of which shall be drained or improved under the provisions of this Act, or upon any portions thereof belonging to the same proprietor which may by the award of the commissioners be made chargeable therewith.

50. The rentcharges which shall become payable under this Act shall be paid to the commissioners of public works in *Ireland*, or to such person and in such manner as the commissioners of her Majesty's treasury may from time to time signify and appoint, by notice to be published in the *Dublin Gazette* for that purpose, and the receipt of the said commissioners or their accountant, or such other person to whom they shall be so directed to be paid, shall be a sufficient discharge for the same.

51. The thirty-ninth, fortieth, forty-second, forty-third, forty-fourth, forty-fifth, forty-seventh, forty-ninth, fiftieth, fifty-first, fifty-second, fifty-third, and sixty-fifth sections of the Act tenth *Victoria*, chapter thirty-two, together with the schedules referred to by the said sections or any of them, shall be deemed to be incorporated in this Act, save that every Act therein directed to be done by or to the paymaster of civil services shall be done by or to the commissioners of public works, and shall be as effectual to all intents and purposes as any such act would have been if done by or to the said paymaster under the provisions of the said last-mentioned Act.

52. The commissioners shall have the same powers of summoning witnesses, and calling for the inspection of documents, and generally for the ascertaining of all matters to enable them to make their award, as are by the *Railways Act, Ireland (1851)*, and Rail-

ways Act, *Ireland (1860)*, given to an arbitrator acting under the said Acts; and they shall also have power, by themselves and their servants, to enter upon any lands within the drainage district, in case they shall deem it necessary or expedient so to do, for the purposes of their award.

53. All costs, charges, and expenses of any arbitration under this Act, and of making any award by the commissioners, shall be included by the commissioners making any award under this Act in the monies chargeable and apportioned by virtue of such award.

54. Every occupier of any land who, not being a proprietor thereof within the meaning of this Act, shall pay for the land in his occupation, on account of his landlord, any sum charged thereupon under and by virtue of the provisions of this Act, shall and he is hereby authorized to deduct and retain out of his rent the amount of the sum of money which he shall so pay as aforesaid, and the next immediate landlord of such occupier, if not himself a proprietor of such land within the meaning of this Act, shall and he is hereby authorized to make the like deduction from the rent payable by him, and so on, each sub-lessee and sub-lessor of such land, not being a proprietor thereof within the meaning of this Act, being entitled to deduct the same so charged upon such land under or by virtue of this Act from the rent payable to his next immediate landlord, until such deduction shall be made from the rent payable to a person being a proprietor within the meaning of this Act, who shall not be entitled to make any such deduction from the rent, if any, payable by him; and every such occupier, sub-lessee, or sub-lessor paying any such sum of money shall be acquitted and discharged of the sum so paid by him as fully and effectually as if the same had been actually paid to his landlord (except where there may be a covenant to the contrary in any lease or agreement for a lease); but nothing herein contained shall extend or be construed to enable any occupier or lessee to deduct from his rent any costs or expenses incurred by nonpayment of the monies hereby imposed or authorized to be levied.

55. Any person entitled to less than an immediate estate of fee simple may charge (according to the priority aforesaid) the land to which he shall be entitled, and which shall have been drained or improved by drainage under the provisions of this Act, with the proportion of any expenses to be defrayed by him under the award as aforesaid, or any part thereof, with lawful interest thereon, but so nevertheless that the charge upon such lands or premises shall be lessened in every successive year (to be computed from the date of such award) by the amount of at least one twentieth part of the whole sum of the instalments charged thereon by the award, and the interest in respect thereof.

56. After the completion of any drainage works under this Act, in case any land which shall be drained or improved by such drainage works shall be in the occupation of a person who shall not be a proprietor thereof within the meaning of the provisions in that behalf herein-before contained, or in case any land so drained or improved shall be held under any person who shall, within the meaning of the aforesaid provi-

sions, be a proprietor thereof, by any other person or persons, under any lease, agreement, or contract for a lease, or shall be held under any lease, agreement, or contract for a lease granted or made by any person or persons having any immediate or derivative title from or under such proprietor, then and in such case the commissioners, if called upon so to do, shall determine the amount of increased rent or rents which such occupant and other person or persons having such immediate or derivative title from or under such proprietor as aforesaid shall pay in consequence of any improvement of such land, regard being had to the duration, extent, and value of the interest of such occupant or person or persons in such land, and the necessary expenses to be incurred in the cultivation thereof, and the peculiar circumstances of each case, and specially to the amount of benefit derived by the tenant by means of the works, or, at his option, of the annual rentcharge which under this Act would cover the expenses of such works: and the landlord or respective landlords of such occupant or other person or persons, and every intermediate landlord, shall have the same remedies for the recovery of such increased rent or rents as he or they was or were entitled to for the rent or rents originally reserved; and the decision of the commissioners shall be signified by endorsement sealed by them on the lease or instrument, or leases or instruments of demise, or by a separate instrument, to be executed in like manner: provided always, that notice shall be given by the commissioners to the occupier or other person whose rent is proposed to be increased of the intention to make such increase, and by such notice a time and place shall be specified at which it shall be lawful for such occupier or other person to appear before the commissioners, and make any fair and reasonable objection which he may have to the rent being increased by the commissioners in the manner aforesaid.

57. For the purpose of effectually maintaining and upholding, in all cases in which works shall be executed under this Act, all and singular the drains, watercourses, banks, sluices, flood gates, tunnels, water gates, buildings, bridges, and other works, and of supplying in such cases all things that may be required to work the same, and for the payment of all necessary expenses of maintenance of works of drainage, water power, and all other expenses incident thereto, and all costs, charges, and liabilities from time to time properly incurred by them in the execution of the provisions of this Act, it shall be lawful for the drainage board, and they are hereby respectively authorized and required, once in every year to meet in some convenient place, and then to determine and fix the sum of money that shall be contributed and raised during the then ensuing year for the purposes of effecting, sustaining, supporting, and upholding all and singular the aforesaid works, and for other the purposes of this Act, and (having regard to and in the proportions fixed for such purpose by the said award) to assess, rate, and tax the proprietors of the said land for and towards the payment and satisfaction of all such sums of money, costs, charges and expenses as may be required for the purposes last aforesaid, and for the payment and satisfaction of any sum of money raised for such pur-

poses, and the interest thereof; and the said several sums so rated and assessed shall be charged on the lands so drained or improved, in preference to and with priority over all incumbrances thereon: provided nevertheless, that any quit or crown rent, or rentcharge in lieu of tithe, issuing thereout, and any rentcharge under this Act, shall have priority to such sums of money so rated or assessed; and the drainage board shall have the same powers, rights, and privileges, by entry or mortgage, to enforce the payment of all such last-mentioned sums of money, costs charges, and assessments as are herein-before given to them for the enforcing payment of the sums charged under the award as aforesaid.

58. It shall be lawful for the drainage board from time to time and at any time, for such considerations as they may think proper, and with the consent of the said commissioners signified under their seal, to release any portion of the lands of any proprietor from the whole or any part of any charge payable to such board under the provisions of this Act; and no such release shall affect the rights or remedies of such board as against the residue of the lands, part of which may be so released, or in respect of the residue of any such charge.

59. It shall be lawful for any such drainage board from time to time, with the like consent of the said commissioners signified as aforesaid, for such considerations as they may think proper, to sell and convey any of the lands which they may have acquired under the provisions of this Act, and which may be no longer required by such board; provided that the said drainage board, before they shall sell or dispose of any such land as aforesaid, shall first offer the same to the person to whose estate the same originally belonged, and then to the person whose estate shall adjoin thereto, and such land shall not be sold to any other person at such price as the persons entitled to a preference shall be willing to give for them, or at any lower price.

60. The said rates or charges for maintenance of the said works in any district shall also be recoverable by civil bill, brought by the drainage board to which the same shall be payable, against the person or persons for the time being in possession or in receipt of the rents or profits of the lands in respect of which such rates or charges shall be payable.

61. Except where a special mode of service is provided by this Act, all notices required to be served by virtue of this Act upon the occupier or proprietor of any land shall either be served personally on him, or be left at his last usual place of abode in *Ireland*, if any such can after diligent inquiry be found, and in case he is absent from the United Kingdom, and his last usual place of abode cannot be found after diligent inquiry, it shall be affixed on some conspicuous part of such premises.

62. If any occupier or proprietor on whom notice is to be served is a corporation aggregate, or joint stock or other company, or body of proprietors or undertakers, such notice shall be left at the principal office of such corporation, company, or body, or if no such office can after diligent inquiry be found, shall be served on some agent, if any, of such corporation, company, or body, but if no such officer or agent can

be found it shall be left with the occupier of the lands, or if there be no such occupier, shall be affixed on some conspicuous part of such lands.

63. If any arbitrator appointed for any of the purposes of this Act shall die, or refuse, decline, or become incapable to act, the commissioners may from time to time, and as often as same may become necessary, appoint an arbitrator in his place, who shall have the same powers and authorities as the arbitrator first appointed.

64. After the constitution of a drainage district under the provisions of this Act, and during the execution of any works by the drainage board of such district, it may be lawful for the commissioners of public works, upon the application of any person or persons who shall have advanced any monies for the purpose of the works to be executed within such drainage district, and in case it shall seem expedient to the said commissioners to appoint a duly qualified officer to proceed to the district to inspect the execution of the said works, and to report to the said commissioners upon the sufficiency or insufficiency thereof, and thereupon the said commissioners shall make such order relative to the execution, alteration, or modification of such works as to them will seem requisite, and transmit such order to the drainage board of such district; and the drainage board shall thereupon proceed with the execution, alteration, or modification of such works, in accordance with the said order of the commissioners; and in the event of any drainage board wilfully neglecting or refusing to comply with such orders, it shall be lawful for the persons who shall have advanced any monies for the purpose of the works, to apply by summary petition to the Court of Chancery in *Ireland*, and thereupon such Court shall make such order thereon as shall seem just, and shall issue any writ or writs of injunction to enforce any such order, and shall have power to adjudge by whom the costs of any such proceeding shall be borne.

65. All costs, charges, and expenses incurred by drainage boards in instituting or defending any legal proceedings instituted or defended by them in their character of drainage boards may be defrayed out of the rates leviable by them, and no member of a drainage board shall be personally liable in respect of any such costs, charges, or expenses.

66. That every person upon examination on oath or affirmation before the commissioners, or any officer appointed by them, and also every person making any affidavit, declaration, deposition or affirmation, who shall wilfully and corruptly give false evidence, or shall in such affirmation, affidavit, declaration, or deposition, wilfully or corruptly swear, affirm, or allege any matter or thing which shall be false or untrue, shall be subject to the pains and penalties of persons convicted of wilful and corrupt perjury by any law in force for the time being.

TENDER OF AMENDS.

67. If any party has committed any irregularity, trespass, or other wrongful proceeding in the execution of this Act, or by virtue of any power or authority hereby given, and if before action brought in respect thereof such party makes tender of sufficient amends to the party injured, such last-mentioned party shall not recover in any such action; and if no

such tender has been made it shall be lawful for the defendant, by leave of the Court where such action is pending, at any time before issue joined, to pay into Court such sum of money as he thinks fit, and thereupon such proceedings shall be had as in other cases where defendants are allowed to pay money into Court.

SAVING CLAUSES AND MISCELLANEOUS.

68. Nothing in this Act shall authorize any drainage board or proprietor—

- (1.) To interfere with any sewers or other works already or hereafter made and used for the purpose of draining, preserving, irrigating, or improving land under any public, local, or private Act of Parliament, so as to injuriously affect the same;
- (2.) To interfere with any lake, river, canal, dock, harbour, lock, reservoir, or basin, or the supply of water to any lake, river, canal, dock, harbour, lock, reservoir, or basin, so as to injuriously affect the navigation on such lake, river, canal, dock, harbour, lock, reservoir, or basin, or the use or maintenance thereof, or to interfere with any towing-path so as to interrupt the traffic thereof, in cases where any corporation, company, undertakers, commissioners, conservators, trustees, or individuals are by virtue of any Act of Parliament or otherwise entitled to navigate on or use such lake, river, canal, dock, harbour, lock, reservoir, or basin, or in respect of the navigation on or use of which lake, river, canal, dock, harbour, lock, reservoir, or basin any corporation, company, undertakers, commissioners, conservators, and trustees, or individuals are entitled by virtue of any Act of Parliament to the receipt of any tolls or other dues;
- (3.) To interfere with the works or supply of water of any body or persons, corporate or unincorporate, supplying water to any town or place, so as to injuriously affect the same;
- (4.) To execute any works in, through, or under any wharfs, quays, docks, harbours, or basins belonging to the proprietor or proprietors of any inland navigation constituted by Act of Parliament or otherwise, or for the use of which they are entitled by virtue of any Act of Parliament or otherwise to demand any tolls or dues;

without the consent of such corporation, company, undertakers, commissioners, conservators, trustees, or individuals as are herein-before in that behalf respectively mentioned, such consent to be expressed in writing, in the case of individuals under their hands, in the case of a corporation under their common seal, and in the case of a company, undertakers, commissioners, conservators, or trustees under the hand of their clerk, or other duly authorized officer or agent.

69. Nothing in this Act shall authorize any drainage board to divert any river in such manner as to injure or to diminish the supply of water to any harbour, without the consent of the conservators or any authority having the management of such harbour.

70. Any corporation, company, undertakers, commissioners, conservators, trustees, or individuals authorized by virtue of any Act of Parliament to navigate on or use any river, canal, dock, harbour, or basin, or to demand any tolls or dues in respect of the navigation on such river or canal, or the use of such dock, harbour, or basin, may, at their own expense, and on substituting other sewers, drains, culverts, and pipes equally effectual, and certified as such by the surveyor of the drainage board, take up, divert, or alter the level of sewers, drains, culverts, or pipes constructed by the drainage board, and passing under or interfering with or with the improvement or alteration of such river, canal, dock, harbour, or basin, or the towing-path of such river, canal, dock, harbour, or basin, and do all such matters and things as may be necessary for carrying into effect such taking-up, diversion, or alteration.

* 71. No person shall cause or permit any obstruction in or otherwise injuriously affect any watercourse in respect of which any works shall have been commenced or executed by any drainage board, or shall, without the consent of the drainage board, cause any filthy or unwholesome water, or washings of manufactories or mines, or other foul or poisonous liquid, to flow into any such watercourse; and any person offending against this enactment shall incur a penalty not exceeding five pounds, and a further penalty of forty shillings for every day during which the offence is continued, to be recovered in a summary way before two or more justices at petty sessions; but this section shall not apply to any person having a legal right to create such obstruction or other injury, or to cause such water, washing, or liquid as aforesaid to flow into any existing watercourse.

72. If the commissioners shall be of opinion that for the purpose of carrying out the drainage works in any district it is necessary to rebuild or alter any existing bridge, culvert, or archway for the discharge of water under any public road, it shall be lawful for any drainage board (having first obtained the certificate of the commissioners to that effect) to take down and remove or to alter such bridge, culvert, or archway, the drainage board (when in the opinion of the commissioners necessary) constructing a temporary bridge, culvert, or archway in the place of that so to be taken down, removed, or altered, and supporting and maintaining the same until the completion of the works necessary for the restoration to public use of such bridge, culvert, or archway; and in every case where an existing bridge, culvert, or archway shall be taken down and removed the drainage board shall construct a new bridge, culvert, or archway, with the necessary roads of approach thereto respectively, according to such plans, specification, and estimate as shall have been submitted to and approved by the said commissioners; and the expense of such temporary and permanent bridge, culvert, or archway and roads shall (save as herein-after mentioned) form part of the costs of the works in the district in which the same may be situated.

73. Provided always, that in case the commissioners shall be of opinion that the original bridge had been so constructed as to be an impediment to the natural discharge of the water, having reference to the

state of the river, stream, or drain in its unimproved condition, or in case the said commissioners shall be of opinion that such new bridge, culvert, or archway, when so constructed, will confer greater advantages on the public than the former bridge, culvert, or archway, by affording an improved means of communication or otherwise, it shall be lawful for the said commissioners to issue a certificate under their seal declaring the amount which the county within which such works shall be situate ought to contribute towards the expenses so incurred by the said drainage board; and such certificate shall be laid before the grand jury of the said county at the assizes next after the issuing of the same; and the grand jury of the said county is hereby authorized and required, without any application to presentment sessions, to present the amount mentioned in such certificate to be levied off the county at large by such sums and at such times as shall be mentioned in such certificate, and to be paid to the said drainage board.

74. Provided also, that where any such new bridge, culvert, or archway shall be over any stream or river forming a boundary between two counties, the commissioners shall in their said certificate state that the said amount shall be chargeable on and paid by the said counties in equal moieties, and such proceedings shall be had with reference to the several moieties of such amount, and the presentment, levying, and payment of the same respectively, as are herein-before directed with respect to the entire amount, when chargeable on one county in manner aforesaid.

75. And in case any such grand jury shall refuse to present the sum mentioned in any such certificate, the Court shall make an order directing the treasurer to insert such sum in his warrant, and the same shall be levied off such county in the same manner as if the same had been duly presented by such grand jury, and thenceforth such bridges, culverts, archways, and roads shall be the property of such county or counties.

76. 'And whereas it may happen that by reason of the works to be executed in pursuance of the provisions of this Act it may be convenient to alter the boundaries of the lands of different owners, and therefore that such powers of exchange should be given to the commissioners as after-mentioned:' be it therefore enacted, that it shall be lawful for the commissioners, upon the application in writing of the persons interested as owners, as herein-before defined, except persons holding under a lease reserving rent for a life or lives, or for a term of years, in any lands which shall be drained or improved under the provisions of this Act, or in any lands adjacent to any such lands, and who shall desire to effect an exchange of lands in which they respectively shall be so interested, to direct inquiries whether such proposed exchange would be beneficial to the owners of such respective lands, and has been rendered necessary or expedient by reason of any such drainage or improvement as aforesaid; and in case the commissioners shall be of opinion that such an exchange would be beneficial, and that the terms of the proposed exchange are just and reasonable, they shall cause to be framed and confirmed, under the seal of the commissioners, an order of exchange, with a map or plan thereunto annexed, in which order shall be specified and shown the lands

given and taken in exchange by each person so interested respectively, and a copy of such order shall be delivered to each of the parties on whose application the exchange shall have been made, and such order of exchange shall be good, valid, and effectual in the law to all intents and purposes whatsoever, and shall be in nowise liable to be impeached by reason of any infirmity of estate or defect of title of the persons on whose application the same shall have been made; and the land taken upon every such exchange shall be and enure to, for, and upon the same uses, trusts, intents, and purposes, and subject to the same conditions, charges, and incumbrances, as the lands given on such exchange would have stood limited or been subject to in case such order had not been made; and all expenses with reference to such order and exchange, or the inquiries in relation thereto, or to any proposed exchange, shall be borne by the persons on whose application such order shall have been made or such inquiries undertaken: Provided always, that no exchange shall be made of any land held in right of any church or chapel or other ecclesiastical benefice, without the consent, testified in writing, of the bishop of the diocese and the patron of such benefice: provided also, that no one lot or parcel of land given or taken in exchange shall ever exceed ten acres; and it shall be lawful for the said commissioners to authorize the payment of any sum of money by way of equality of exchange, or in respect of any such exchange, and the monies so given shall be paid and divided by the said commissioners in such manner as they shall think fit, and for the compensating the parties interested in the land given in exchange, and according to their respective estates and interests, and the decision of the commissioners in the premises shall be binding and conclusive upon all persons interested in such lands.

77. Provided always, that no such order of exchange as aforesaid shall be confirmed by the commissioners until notice shall have been given by advertisement, in three successive weeks, of such proposed exchange, and three calendar months shall have elapsed from the publication of the last of such advertisements; and in case, before the expiration of such three calendar months, any person entitled to any estate in or to any charge upon any land included in such proposed exchange shall give notice in writing to the commissioners of his dissent from such proposed exchange, the commissioners shall not confirm an order for such exchange unless such dissent shall be withdrawn, or it shall be shown to the commissioners that the estate or charge of the party so dissenting shall have ceased.

78. Provided also, that before taking any proceedings in reference to any such exchange the commissioners may require security or deposit of a sum of money to be given by the person making the application for the expenses to be incurred attending such proceedings.

79. Where, in exercise of any powers given by this Act, any watercourse forming a boundary line between two or more counties, baronies, unions, parishes, or other areas defined by law is straightened, widened, or otherwise altered so as to affect its character as a boundary line, the drainage board, under

whose authority such alteration is made, shall forthwith report the same to the lord lieutenant in council, who, if satisfied that a new boundary line may be adopted with convenience, shall, by notice to be published in the *Dublin Gazette* and in such other manner as he may direct, declare that the watercourse as altered shall either wholly or partially be substituted for the former boundary line, and the limits of the areas of which the watercourse when unaltered was the boundary shall be deemed to be varied accordingly; but if the lord lieutenant in council is of opinion that a new boundary cannot wholly or partially be adopted with convenience, he shall require the drainage board under whose authority the alteration in the watercourse was made to set out a boundary upon the line of the watercourse as it existed before its alteration, or in a new course in lieu thereof, in such manner as he may direct and approve; and a copy of the *Dublin Gazette* containing the advertisement in respect of any alteration of boundary made in pursuance of this section shall be admitted as evidence in all courts of justice of the fact of such alteration having been made.

80. In case the proprietor of any mill or factory shall consent that any dam, weir, or watercourse, or other work or obstruction connected with such mill or factory, shall, for the purpose of drainage to be effected under this Act, be altered and rebuilt, or that such mill or factory shall, by any works of the drainage board, obtain any increased water power, it shall be lawful for the commissioners to fix and determine the amount of rate or contribution which shall be paid by the proprietor of such mill or factory for the improvement which shall be so effected, towards the repayment of the costs and expenses of the works to be executed within the district within which such mill or factory is situate, and the rate which shall be paid in future for such increased water power; and the drainage board shall have such and the like powers and authorities to recover the amount of rate which shall be so fixed and determined as are given to them by this Act for the recovery of any other rates or charges to be imposed by them under the authority of this Act.

SCHEDULE referred to in the foregoing Act.

RULES AS TO ELECTION OF MEMBERS OF DRAINAGE BOARDS.

The chairman of the board of the previous year, or some person appointed by him, shall be the returning officer.

If at any time, from any default of such chairman as aforesaid, or from any reason, there is no returning officer, or such returning officer is unwilling or unable to act, the members of the board of the preceding year may appoint a returning officer in his stead.

The election of new members shall take place on the first Thursday, or on such other day as may be appointed by the board, in September in every year, excepting the year in which the order of the commissioners is made.

On every occasion of the election of new members of the board the returning officer shall convene a meeting of the electors for the purpose of such elec-

tion, and shall give notice of such meeting, and of the time and place at which it is to be held—

By advertisement in some one or more of the newspapers circulating in the district:

By causing a copy of such notice to be affixed to the outer door of the principal office of the board:

Such advertisement to be published, and copy to be fixed, fourteen days before the day appointed for such election.

The returning officer shall preside and regulate the proceedings at such meeting.

At any such meeting as aforesaid any qualified person or persons may, if he or they consent thereto, be nominated by any elector, and seconded by any other elector, as a member or members of the board in the place of any retiring member or members.

If more candidates are proposed than the number to be elected, the returning officer shall forthwith, in such manner as shall appear to him most convenient, ascertain the number of votes for the candidates who shall have been so proposed, and the election and return of such candidates shall be determined by the majority of such votes; but if no more candidates are proposed than the number to be elected, then a declaration by the returning officer that the candidates are elected members of the board shall be evidence of the fact.

For the purpose of ascertaining the votes of the electors the returning officer may, if he thinks fit, or if it shall be necessary or expedient, hold an adjourned meeting of the electors, at such time and place as he may fix at such first meeting, and the time and place of such adjourned meeting shall be publicly announced by him at the first meeting, to be held as before provided.

Votes may be given either personally or by proxy. A proxy shall be appointed under the hand of the appointer; but no person shall be appointed a proxy unless he is a qualified elector.

The returning officer shall cause to be entered in the polling books to be kept for that purpose the name and address of every voter, and the manner in which he votes.

After the election the returning officer shall, as soon as possible, publish the names of the candidates elected as herein mentioned:—

(1.) By advertisement in some one or more newspaper or newspapers circulating in the district:

(2.) By affixing a list of such candidates to the outer door of the principal office of the board.

RULES AS TO PROCEEDINGS OF DRAINAGE BOARDS.

1. The drainage board shall meet together for the despatch of business, and shall from time to time make such regulations with respect to the summoning, notice, place, management, and adjournment of such meetings, and generally with respect to the transaction and management of business, as they think fit, subject to the following conditions:—

That—

(a) No business shall be transacted at any meeting unless at least three members are present

at the commencement and close of such business:

(b) All questions shall be decided by a majority of votes of the members present;

(c) The names of the members present, as well as of those voting upon each question, shall be recorded.

2. The board shall, at their first meeting, and afterwards from time to time at their first meeting after each annual election, appoint one of their number to be chairman for the year following such choice.

3. If any casual vacancy occurs in the office of chairman, the board shall, as soon as they conveniently can after the occurrence of such vacancy, choose some member of their number to fill such vacancy; and every such chairman so elected as last aforesaid shall continue in office so long only as the person in whose place he may be so elected would have been entitled to continue if such vacancy had not happened.

4. If at any meeting the chairman is not present at the time appointed for holding the same, the members present shall choose some one of their number to be chairman of such meeting.

5. In case of an equality of votes at any meeting, the chairman for the time being of such meeting shall have a second or casting vote.

6. The board may delegate any of their powers to committees, consisting of such member or members of their body as they think fit. Any committee so formed shall, in the exercise of the powers delegated, conform to any regulations that may be imposed on them by the board.

7. A committee may elect a chairman of their meetings. If no such chairman is elected, or if he is not present at the time appointed for holding the same, the members present shall choose one of their number to be chairman of such meeting.

8. A committee may meet and adjourn as they think proper. Questions at any meeting shall be determined by a majority of votes of the members present, and in case of an equal division of votes the chairman shall have a second or casting vote.

9. The board shall cause minutes to be made in books provided for that purpose,—

(1.) Of all the appointments of officers made by the board;

(2.) Of the names of the members present at each meeting of the board and committees of the board;

(3.) Of all orders made by the board and committees of the board; and

(4.) Of all resolutions and proceedings of meetings of the board and of committees of the board.

And any such minutes as aforesaid, if signed by any person purporting to be the chairman of any meeting of the board or committee of the board, shall be receivable in evidence without any further proof.

CAP. LXXXIX.

An Act for the further amendment of the law relating to the removal of poor persons, natives of *Ireland*, from *England*. [28th July, 1863.]

Sec. 1. *So much of 24 & 25 Vict. c. 76, as autho-*

rizes conveyances other than in warrant, repealed.

2. *Sec. 3 of 8 & 9. Vict. c. 117, extended to Ireland.*

3. *Sec. 4 repealed.*

4. *Penalty imposed upon wilful desertion of pauper on their journey.*

5. *Penalty for violating section 6 of 24 & 25 Vict. c. 76.*

6. *New forms of warrants supplied.*

7. *Institution of preliminary inquiry and repeal.*

‘WHEREAS it is expedient that the law for the removal of poor persons, natives of *Ireland* from *England*, should be amended:’ Be it therefore enacted by the Queen’s most excellent Majesty, by and with the advice and consent of the lords spiritual and temporal, and commons, in this present Parliament assembled, and by the authority of the same, as follows:

1. That so much of the fourth clause of the Act of the twenty-fourth and twenty-fifth years of the reign of her Majesty, chapter seventy-six, as authorizes the conveyance of any poor person to any other place than that mentioned in the warrant of removal, shall, at the expiration of one month from the date hereof, be repealed.

2. Section three of the Act of the eighth and ninth years of her Majesty, chapter one hundred and seventeen, shall be deemed to have applied and to apply to *Ireland* as well as to *England*.

3. Section four of the same Act is hereby repealed.

4. Any person being employed in the execution of a warrant, duly issued under the authority of the said Acts or either of them, who shall wilfully desert any person mentioned therein before he or she shall have been conveyed to the place of destination, shall be guilty of a misdemeanor, and upon conviction thereof shall be liable to a fine not exceeding ten pounds, and, in default of payment, to imprisonment for a term not exceeding three months.

5. Any person guilty of violating the provision contained in the sixth section of the Act of twenty-fourth and twenty-fifth *Victoria*, chapter seventy-six, shall be liable to a penalty not exceeding five pounds, to be recovered on a summary conviction before two justices or a police or stipendiary magistrate, and the offence shall be deemed to have been committed at the port where the poor person shall be landed.

6. Instead of the forms set forth in the schedule (C.) annexed to the said Act of the eighth and ninth *Victoria*, chapter one hundred and seventeen, the forms contained in the schedule hereunto annexed, or to the like effect, shall be sufficient in regard to poor persons removed to *Ireland*, with such changes in the names and descriptions of persons and places as the circumstances of the case may render necessary; and except where this Act makes any alteration, it shall be deemed to be incorporated with Acts herein referred to.

7. If the board of guardians of any union in *Ireland* think themselves aggrieved by the removal of any poor person, and if they forward to the Poor Law Commissioners for *Ireland* a statement of the grounds for concluding that such poor person is legally settled in any parish or township in *England*, or was not in law liable to be removed to *Ireland*, and if such board

of guardians, or any person on their behalf, shall agree to pay all costs which may be incurred in any necessary preliminary inquiry, and in the appeal against the warrant for the removal of such poor person, such commissioners, if satisfied that it will be expedient to do so, may appoint some person to make a preliminary inquiry into the circumstances attending such removal, and after such inquiry may, if they think fit, appeal on behalf of the guardians so aggrieved to the court of quarter sessions held for the county or borough within which the parish or township from which such removal was made is situate, at any time within six months after such removal was completed; and such commissioners shall, at least twenty-one days before the holding of such sessions, send by post to the guardians or overseers on whose application such warrant was obtained notice in writing purporting to be signed by their secretary or chief clerk, of their intention to appeal against such warrant, containing a statement in writing of the grounds of such appeal, and such court of quarter sessions shall hear and determine such appeal; and if the warrant of removal be reversed or declared illegal by such court, the guardians or overseers on whose application the same was obtained shall pay the costs and expenses incurred by or on account of such board of guardians, both for the preliminary inquiry and the appeal, and for the maintenance of such poor person, and for conveying such person back to the parish or township in *England* from which the removal was made; and if such guardians or overseers neglect or refuse to pay such costs and expenses within seven days after demand thereof, the guardians on whose behalf such appeal was made, or any person authorized by them, may recover the same as a debt in a court of law in *England*: Provided always, that the said guardians or overseers may, at any time after such notice of appeal, send by post notice in writing under the hands of any two or more of them to the said commissioners that they abandon such warrant, and thereupon such warrant shall be of no effect; and such guardians or overseers shall pay to the guardians on whose behalf such notice of appeal was given, or to some person authorized by them, the expenses incurred by them or on their account by reason of such warrant, and of the preliminary inquiry, and of any proceedings consequent thereon, and the actual expenses and charges of maintaining such poor person, and of conveying such poor person back to such parish or township, and if they do not pay the same within seven days after demand the same may be recovered as a debt in a court of law in *England*: Provided also, that if on the hearing of the appeal judgment shall be given against the appellants, the respondents shall be entitled to recover the costs which they have incurred in and about the appeal from such appellants.

SCHEDULES.

I.

FORM OF WARRANT where the removal is to be made to the place of birth or residence.

To the guardians of the poor of the [insert name of the union or parish in England] union, [or parish], in the count of

To the guardians of the poor of the [insert name of the union in Ireland] union, in the count of in Ireland.

County { At a petty session of her Majesty's justices of the peace for the county [riding or division, or city or borough] of holden in and for the division of in the said county [riding or division, or city or borough] at on the day of in the year of our Lord one thousand eight hundred and sixty before us, the undersigned, her Majesty's justices of the peace for the said county [riding or division, or city or borough].
(to wit)

WHEREAS complaint is now made by the guardians of the poor of the union [or parish] in the count of that [name of pauper] hath become and is now chargeable to the parish [or township] [of in the said union;] [erase this passage when it is inapplicable].

And whereas the said [name of pauper] having been brought before us, and application having been made to us, in petty sessions assembled, by [insert name of applicant] the [relieving] officer of the said guardians, on their behalf, we have made due examination, on oath, and find that the said [name of pauper] is of the reputed age of years, and was born in Ireland, [and last resided for the space of three years [erase this passage when it is inapplicable] in the parish of in the county of now contained in the said union of [insert name of the union in Ireland] and hath not a settlement in England, and is not otherwise exempt from removal from the said [insert name of the union or parish in England] union [or parish] [erase this passage when it is inapplicable] [And that he hath a wife, named of the reputed age of years, and [if more than one insert the number] child named of the reputed age of which child [insert is or are] not exempt from removal from the said union [or parish].

And we have seen the said [name of pauper] [where the head of the family is a woman, or a man without family, this passage must be modified accordingly] [and his said wife and child], and are satisfied that the said [name of pauper] [and his wife and child], [insert is or are] in such a state of health as not to be liable to suffer bodily or mental injury by the removal:

THERE are, therefore, to require you, the guardians of the poor of the union [or parish], to cause the said [name of pauper] [with his family], to be safely conveyed to the said union of [insert name of the union in Ireland] and to be delivered at the workhouse of such union.

Given under our hands and seals, at the sessions aforesaid

_____(L. S.)

_____(L. S.)

_____(L. S.)

MEMORANDUM.

Where the warrant is issued by a police magistrate, this form must be modified accordingly.

II.

FORM of WARRANT when the removal is to be made to some place other than that of the birth or residence.

To the guardians of the poor of the [insert name of the union in England] [or parish], in the count of

To the guardians of the poor of the [insert name of the union in Ireland] union, in the count of in Ireland.

County { At a petty session of her Majesty's justices of the peace for the county [riding, or division, or city, or borough] of holden in and for the division of in the said county [riding, or division, or city or borough] at on the day of in the year of our Lord one thousand eight hundred and sixty before us, the undersigned, her Majesty's justices of the peace for the said county [riding or division, or city, or borough].
(to wit)

NOTE.—A copy of this warrant is to be given to the person, if only one, or to the head of the family, if there be several persons about to be removed by virtue of it; and a copy is to be sent by post forthwith to the clerk of the board of guardians of the union in Ireland to which the poor person is ordered to be removed.

WHEREAS complaint is now made by the guardians of the poor of the union [or parish] in the count of that [name of pauper] hath become and is now chargeable to the parish [or township] [of in the said union;]

And whereas the said [name of pauper] having been brought before us, and application having been made to us, in petty sessions assembled, by [insert name of applicant] the [relieving] [if the applicant be not a relieving officer, erase relieving] officer of the said guardians, on their behalf, we have made due examination, on oath, and find that the said [name of pauper] is of the reputed age of years, and was born in Ireland,* but we are not able, upon the evidence before us, to ascertain the place in that country of his birth, or that he hath resided for the space of three years in any place therein,* [or erase the passage between asterisks, and add, and has not been absent therefrom more than twelve months] and we find that he hath not a settlement in England, and is not otherwise exempt from removal from the said [or township] union [or parish]. [Where the head of the family is a woman, or a man without a family, this passage must be modified accordingly] [And that he hath a wife named of the reputed age of years, and [if more than one insert the number] child named of the reputed age of which child [insert is or are] not exempt from removal from the said union [or parish].

And we have seen the said [name of pauper] [Where the head of a family is a woman, or a man without a family, this passage must be modified accordingly] [and his said wife and child], and are

satisfied that the said [name of pauper] [where the head of a family is a woman, or a man without a family, this passage must be modified accordingly] [and his wife and child] [insert is or are] in such a state of health as not to be liable to suffer bodily or mental injury by the removal.

THESE are, therefore, to require you, the guardians of the poor of the [or township] union [or parish], to cause the said [name of pauper] [with his family] to be safely conveyed to the port of _____ in the said union of [or township] and to be delivered at the workhouse of the said union, [where the pauper hath not resided twelve months in Ireland, erase the following words, and add, to which port, we, with the consent of the guardians of the said union of [or township] think it fit that the said [name of pauper] should be sent] which port is in our judgment, under the circumstances of the case, most convenient.

Given under our hands
and seals at the ses-
sions aforesaid,

(L. S.)

(L. S.)

(L. S.)

MEMORANDUM.

Where the warrant is issued by a police magistrate this form must be modified accordingly.

CAP. XC.

An Act to provide for the registration of marriages in Ireland. [28th July, 1863.]

- Sec. 1. *Short title.*
2. *Commencement of Act.*
3. *Interpretation of terms.*
4. *Act to extend to Ireland only.*
5. *Registrar-general to furnish to boards of guardians notices setting forth acts required to be done under this Act.*
6. *Register books to be provided.*
7. *Registrars, under Registration, &c. Act, to be registrars for purposes of this Act.*
8. *Lord Lieutenant, or registrar-general with his approbation, may alter boundaries of districts.*
9. *Registrar of marriages may, subject to approval of registrar general, appoint a deputy.*
10. *Registrars under said Act to act for purposes of this Act.*
11. *Provision for marriages not within provisions of 7 & 8 Vict. c. 81.*
12. *Persons unable to write may sign by making a cross.*
13. *Particulars of certificates to be entered in register books. Correction of erroneous entries.*
14. *Certified copies of entries of marriages to be sent quarterly, and the register books, when filled to the superintendent registrar.*
15. *Superintendent registrars to send certified co-*

pies of registers of marriages to registrar-general.

16. *Abstract of registers to be laid annually before Parliament.*
17. *Indexes to be kept at general register office. Searches allowed and certified copies given.*
18. *Indexes to be made at every superintendent-registrar's office, and persons allowed to search them.*
19. *Persons entitled to search register books.*
20. *Superintendent registrars to be paid for the certified copies sent to general register office.*
21. *Registrars to make out an account of number of marriages four times yearly.*
22. *Persons making false statements for entry on register to be subject to penalties for perjury.*
23. *Secs. 36 and 37 of 24 & 25 Vict. c. 98, incorporated with Act.*
24. *Penalty for neglect of registrar to register marriage, &c.*
25. *Penalty for omission to deliver registers to superintendent registrar or registrar-general.*
26. *Penalties how recoverable. 14 & 15 Vict. c. 93.*
27. *Not to affect law of marriage in Ireland.*

“WHEREAS it is expedient that a system of registration of such marriages as are not within the provisions of an Act of the session holden in the seventh and eighth years of her present Majesty, chapter eighty-one, should be established and maintained in Ireland: Be it enacted by the Queen's most excellent Majesty, by and with the advice and consent of the lords spiritual and temporal, and commons, in this present Parliament assembled, and by the authority of the same, as follows:

1. This Act may be cited for all purposes as “The Registration of Marriages (Ireland) Act, 1863.”
2. This Act shall commence and take effect from and after the first day of January, one thousand eight hundred and sixty-four.
3. The following words and expressions in this Act shall have the meanings hereby assigned to them; that is to say,
“Lord Lieutenant” shall mean the Lord Lieutenant or other chief governor or governors of Ireland:
“General search” shall mean a search during any number of successive days, not exceeding six, without stating the object of search:
“Particular search” shall mean a search over any period not exceeding five years for any given register of marriage.
4. This Act shall extend to Ireland only.
5. The registrar-general of marriages appointed under the provisions of the said first recited Act shall, in sufficient time before the thirty-first day of December, one thousand eight hundred and sixty-three, furnish to the guardians of every union printed notices, which the said guardians shall on or before the said thirty-first day of December cause to be fixed or placed on the outside of the several church and chapel doors, or other public and conspicuous buildings or places within their respective unions, and which said notices shall specify the several acts required to be

done for the purpose of registering any marriage under the provisions of this Act.

6. The registrar-general shall cause to be provided such number of register books and forms as shall be necessary to the execution of this Act; and the said register books shall be of durable materials, and in them shall be printed on each side of every leaf, the heads of information herein required to be known and registered in respect of marriages, and every page of each of such books shall be numbered progressively from the beginning to the end of the book, beginning with number one, and every place of entry shall be also numbered progressively from the beginning to the end of the book, beginning with number one, and every entry shall be divided from the following entry by a printed line; and the registrar-general shall furnish for the use of the registrars a sufficient number of register books of marriages and such other forms as may from time to time be required for the purposes of this Act.

7. The several superintendent registrars and registrars districts which shall from time to time be made under the provisions of the Registration of Births and Deaths (*Ireland*) Acts shall be the superintendent registrars and registrars districts for the purposes of this Act.

8. The Lord Lieutenant, or the registrar-general with his approbation, shall have power, from time to time as may be deemed expedient, to alter the boundaries of the districts formed under the provisions of the said recited Act passed in the seventh and eighth years of her Majesty, chapter eighty-one, and to form new districts, and in the event of any new district being so formed to appoint fit persons to be registrars for such districts; and every such registrar shall hold his office during the pleasure of the registrar-general.

9. Every registrar of marriages, appointed under the said recited Act or this Act, shall have the power, subject to the approval of the registrar-general, to appoint, by writing under his hand, a fit person to act as his deputy in case of the illness or absence of such registrar, and every such deputy-registrar while so acting shall have all the powers and duties and be subject to all the provisions and penalties declared by the said recited Act and this Act concerning registrars of marriages, and in case of the death of the registrar shall act as registrar until another be appointed, and every registrar shall be civilly responsible for the acts and omissions of his deputy.

10. The several superintendent registrars and registrars of the several districts, and their respective deputies, appointed from time to time and acting under the provisions of the said last recited Act, shall from time to time be the superintendent registrars and registrars of their respective districts for the purposes of this Act, if they think fit to accept such office; and in the event of their refusal to act, the guardians of the union shall appoint a person, with such qualifications as the registrar-general may declare to be necessary, to be the superintendent registrar or registrar under this Act; and every such superintendent registrar and registrar shall hold his office during the pleasure of the registrar-general.

11. In all cases of marriages which may be legally solemnized in *Ireland*, and which do not come within

the provisions of the said Act of the seventh and eighth years of her Majesty, chapter eighty-one, or any Act amending the same, the parties about to contract any such marriage shall produce to the clergyman celebrating the marriage a certificate according to the form A. in the schedule hereunto annexed, which certificate shall be procured by the parties contracting the marriage, previous to its solemnization, from the registrar of the district appointed under this Act within which such marriage is intended to be solemnized, who shall be bound, as far as possible, without fee or reward, to fill up the said schedule, and it shall be signed by the parties contracting the marriage and by the witnesses present thereat, not being less than two, and also by the said clergyman; and the parties contracting the marriage shall within three days thereafter either deliver or send by post such certificate to the registrar of marriages appointed under this Act for the district wherein the marriage was solemnized; and the husband shall in case of failure so to deliver or send such certificate be liable in a penalty not exceeding ten pounds, to be recovered as hereinafter provided.

12. In case of the inability to write of any person whose signature is required or necessary under this Act, it shall be lawful for such person to make such signature by making a cross or other mark, which shall be made in the presence of the clergyman or two witnesses, who shall attest the same, and such mark shall be in all respects as binding and effectual as the signature of such person, if capable of writing, would have been.

13. Every registrar, on receipt of any such certificate, shall forthwith enter the particulars thereof in the register book: provided always, that if any error shall be discovered to have been committed in the entry of marriage in any register, the person discovering the same shall forthwith give information thereof to the justice or justices at the petty sessions of the district within which such marriage shall have been solemnized, or, if within the *Dublin* metropolitan police district, to a divisional justice or justices, within the said district, and it shall be lawful for the said justice or justices, and they are hereby authorized and required, thereupon, or upon otherwise coming to the knowledge of such erroneous entry, to summon before them the person who made and any person concerned in making such erroneous entry or having any knowledge regarding the same, and also any person interested in the effect of such erroneous entry, and to examine all such persons on oath; and if the said justice or justices shall be satisfied that any error has been committed in any such entry, such justice or justices shall, by authority in writing under his or their hands, direct the registrar to correct the erroneous entry; and it shall be lawful for the registrar, and he is hereby required, thereupon to correct the erroneous entry according to the truth of the case, by entry in the margin, without any alteration of the original entry; and such marginal entry shall contain a reference to the deposition upon which the said justice or justices directed the correction to be made, and shall be dated on the day on which it is made, and signed by the parties applying for the correction and by the registrar; and in every case the registrar shall make the

like alteration in the certified copy of the register book to be made by him as herein-after provided; provided that in case such certified copy shall have been already made he shall make and deliver in like manner a separate certified copy of the original erroneous entry and of the marginal correction therein made.

Returns.

14. In the months of *April, July, October, and January*, on such days as shall from time to time be appointed by the registrar general, every registrar shall make and deliver to the superintendent registrar of his district on durable materials, a true copy, certified by him under his hand, according to the Form B. in the schedule to this Act annexed, of all the entries of marriages made during the quarter of a year last preceding the first day of each of the several months herein-before mentioned respectively, in the register books kept by him, the first of such certified copies to be given in the month of *April* in the year one thousand eight hundred and sixty-four, and the superintendent registrar shall examine the same, and if found to be correct shall certify the same under his hand to be a true copy: if there shall have been no marriages registered since the delivery of the last certificate the registrar shall certify the fact, and such certificate shall be delivered to the superintendent registrar as aforesaid, and be countersigned by him: the registrar shall keep safely the register book furnished to him as herein-before mentioned until it shall be filled, and shall then deliver it to the superintendent registrar, to be kept by him with the records of his office.

15. Every superintendent registrar shall four times in every year, on such days as shall be named for the purpose by the registrar general, send to the registrar general all the certified copies of the registers of marriages which he shall have received from the registrars of marriages as aforesaid for the quarter of a year last preceding the first day of each of the several months herein-before mentioned respectively, in the Form B. in the schedule to this Act annexed; and the registrar general, if it shall appear, by interruption of the regular progression of numbers or otherwise, that the copy of any part of any book has not been duly delivered to him, shall procure, as far as possible, consistently with the provisions of this Act, that the same may be remedied and supplied. The certified copies so sent to the general register office shall be thereafter kept in the said office in such order and manner as the registrar general, under the direction of the lord lieutenant, shall think fit, so that the same may be most readily seen and examined.

16. The registrar general shall once in every year transmit to the lord lieutenant a general abstract of the numbers of marriages registered during the foregoing year, in such form and at such date as the lord lieutenant shall from time to time prescribe; and every such annual general abstract shall be laid before Parliament within one month after receipt thereof, or, if Parliament shall not be then sitting, within one month after the commencement of the next session.

17. The registrar general shall cause indexes of all the registers herein mentioned to be made and kept in the general register office; and every person shall

be entitled to search the said indexes between the hours of ten in the morning and four in the afternoon of every day, except *Sundays, Christmas Day, and Good Friday*, and to have a certified copy of any entry in the said registers; and for every general search of the said indexes the sum of twenty shillings and for every particular search the sum of one shilling, and for every such certified copy the sum of two shillings and sixpence, shall be paid to the registrar general or such other officer as shall be appointed to receive such fees on his account, in addition to the stamp duty of one penny imposed by an Act passed in the twenty-third year of her Majesty, chapter fifteen.

18. Every superintendent registrar shall cause indexes of the register books in his office to be made and kept with the other records of his office. Every person shall be entitled, on such days and at such reasonable hours as shall be directed by the registrar general, to search the said indexes, and to have a certified copy of any entry or entries in the said register books, under the hand and seal of the superintendent registrar, on payment of the fees hereinafter mentioned; that is to say, for every general search the sum of five shillings, and for every particular search the sum of one shilling, and for every certified copy the sum of two shillings and sixpence, in addition to the stamp duty of one penny imposed by an Act passed in the twenty-third year of her Majesty, chapter fifteen.

19. Every person shall be entitled, on such days and at such reasonable hours as shall be directed by the registrar general, to search such entries in the register books in the custody of the registrars as shall not have been included in the last preceding return made by such registrar to his superintendent registrar, and to have a certified copy of any such entry or entries, under the hand and seal of the registrar, on payment of the fees herein-after mentioned; that is to say, for every such search the sum of sixpence, and for every certified copy the sum of two shillings and sixpence, in addition to the stamp duty of one penny imposed by an Act passed in the twenty-third year of her Majesty, chapter fifteen.

Fees.

20. Every superintendent registrar shall make out an account four times in every year, on such days and for such periods as shall from time to time be appointed by the registrar general, of the number of entries in such certified copies so sent by him to the registrar general, as provided by this Act, and shall send the said account to the registrar general. If on examination and comparison with the certified copies of the registers or certificates received by the registrar general, such account shall be found correct, the superintendent registrar shall be entitled to receive twopence from the registrar general for every entry in such certified copies of registers of marriages, which shall be charged by the registrar general to the general expenses of his office.

21. Every registrar shall make out an account four times in each year, on such days and for such periods as shall from time to time be appointed by the registrar general, of the number of marriages which he

shall have registered in pursuance of the provisions of this Act, and the superintendent registrar shall verify and sign the same. The guardians of the union in which he shall be registrar, on production of the said account, so verified and signed, shall pay to the said registrar, out of the monies in their hands or power as such guardians, at the rate of sixpence for every entry of marriage included in such account, and the same shall be charged to the union at large, and such guardians shall be and they are hereby empowered to levy off the union at large such sums so paid by them, and such sums shall be included in the rates which such guardians are by law empowered to levy and raise.

22. Every person who shall wilfully make or cause to be made, for the purpose of being inserted in any register of marriages, any false statement touching any of the particulars herein required to be known and registered, shall be subject to the same pains and penalties as if he were guilty of perjury.

23. The 36th and 37th sections of an Act passed in the 24th and 25th years of her Majesty, intituled *An Act to consolidate and amend the statute law of England and Ireland relating to indictable offences by forgery*, shall be incorporated with and form part of this Act.

24. Every registrar who shall refuse or without reasonable cause omit to fill up the certificate of mar-

riage or register any marriage of which he shall have received a certificate, and every person having the custody of any register book or any part thereof who shall carelessly lose or injure the same, or carelessly allow the same to be injured whilst in his keeping, shall forfeit a sum not exceeding ten pounds for every such offence.

25. Every person who under the provisions of this Act is required to deliver the registers of marriages or copies of such registers to any superintendent registrar or to the registrar general, and who, after being duly required to deliver such register or copies as aforesaid, shall refuse or during one calendar month neglect so to do, shall be liable for every such offence to forfeit a sum not exceeding ten pounds.

26. Any penalty recoverable under the provisions of this Act shall be recoverable in a summary way, with respect to the police district of *Dublin* metropolis, subject and according to the provisions of any Act regulating the powers and duties of justices of the peace for such district, or of the police of such district, and, with respect to other parts of *Ireland*, before a justice or justices of the peace sitting in petty sessions, subject and according to the provisions of "The Petty Sessions (*Ireland*) Act, 1851," and any Act amending the same.

27. Nothing in this Act contained shall affect the law of marriage in *Ireland*.

SCHEDULE.

FORM A.

18. —MARRIAGES solemnized at the Roman Catholic Chapel of (),
in the Registrar's District of (), in the Union of (),
in the County of ().

No.	When Married.	Name and Surname.	Age.	Condition.	Rank or Profession.	Residence at the time of Marriage.	Father's Name and Surname.	Rank or Profession of Father.
1	27 March 18 .	Patrick Donovan	Of full age.	Bachelor	Carpenter	3, South Street	Peter Donovan	Upholsterer
		Mary O'Brien	Minor.	Spinster	—	17, High Street	Laurence O'Brien	Butcher

Married in the Roman Catholic Chapel of () according to the Rites and Ceremonies of the Roman Catholic Church,

This Marriage was solemnised { Patrick Donovan, } By me, [William Jackson],
between us, { Mary O'Brien, } in the presence of us, { Denis Donovan, Laurence O'Brien.

FORM B.

I (), registrar of births, deaths, and marriages in the district of () in the union of () in the county of (), do hereby certify, that this is a true copy of the registrar's book of marriages within the said district from the entry of a marriage of (), No. (), to the entry of a marriage of (), No. (). of the
Witness my hand this day of () registr 18 .

[The particulars in this schedule to be entered according to the fact.]

CAP. XCI.

a Act to extend for a further period the provisions of the Union Relief Aid Acts. [28th July, 1863.]
25 & 26 Vict. c. 110. 26 & 27 Vict. c. 4.

c. 1. Provisions of recited Acts further extended.

2. Issuing orders of Poor Law Board limited.
3. Power to Public Works Loan Commissioners to make advances not exceeding £200,000 to guardians under this Act.
4. Short titles.

'WHEREAS it is expedient that the provisions of the Act of the last session of Parliament, intituled *An Act to enable boards of guardians of certain unions to obtain temporary aid to meet the extraordinary demands for relief therein*, and of the Act of the present session whereby such provisions were extended for a further period, should be again extended for a limited period: ' Be it therefore enacted by the Queen's most excellent Majesty, by and with the advice and consent of the lords spiritual and temporal, and commons, in this present Parliament assembled, and by the authority of the same, as follows:

1. That the provisions of the said Acts shall be fur-

ther extended and apply to the expenditure for the quarters of the year which shall end respectively at *Michaelmas Day* and *Christmas Day* in this year, except that instead of "five shillings" in the fourth section of the said Act of the last session, the words "six shillings and sixpence" shall be substituted with reference to such expenditure.

2. The power of the Poor Law Board to issue any order under this Act shall determine on the first day of *April* next.

3. The guardians of any union or parish within the operation of this Act may, with the consent of the Poor Law Board, apply to the Public Works Loan Commissioners for an advance of any sum which such guardians shall be entitled to borrow under the authority of this Act; and the said commissioners may, out of the money for the time being at their disposal, make such advance upon the security of the rates for the relief of the poor in such union or parish, and without requiring any further or other security than a charge on such rates; provided that the aggregate advances to be made by such commissioners under this section shall not exceed two hundred thousand pounds.

4. The Acts referred to and this Act may be cited and described for all purposes as *The Union relief Aid Acts, 1862, 1863.*

CAP. XCII.

An Act for consolidating in one Act certain provisions frequently inserted in Acts relating to railways.

[28th July, 1863.]

Sec. 1. *Short title.*

2. *Division of Act into parts.*

3. *Application of part I., and interpretation of terms.*

4. *Power to alter engineering works.*

5. *Trains not to be shunted over level crossings.*

6. *Company to erect lodge at point of crossing.*

7. *Board of Trade may require bridge instead of level crossing.*

8. *Power to company to take additional land for such work.*

9. *Communications with other railways to be made under the direction of the engineer of those railways.*

10. *Company to acquire only easements in land of other railway company.*

11. *Not to take lands or interfere with works of other company further than necessary.*

12. *As to expense of signals, watchmen, &c.*

13. *Lights on works.*

14. *Construction of bridges.*

15. *User of bridges.*

16. *Access to the shore under or across the railway.*

17. *Prohibition of deviation of certain works without consent of Board of Trade.*

18. *Abatement of work abandoned or decayed.*

19. *Survey of works by Board of Trade.*

20. *Parties aggrieved by extension of time may have compensation for additional damage.*

21. *Existing contracts and notices to take lands not to be affected.*

22. *Restrictions on agreements between companies.*

23. *Sanction of shareholders to agreements.*

24. *Public notice of intention to enter into an agreement.*

25. *Approval of Board of Trade.*

26. *Joint committee for purposes of agreements.*

27. *Agreements between companies may be modified by Board of Trade.*

28. *Working agreements between a company and an individual.*

29. *Alteration of agreement.*

30. *Provision for securing equality of treatment.*

31. *Application of Railway and Canal Traffic Act.*

32. *Company empowered to make bye-laws regulating steam vessels.*

33. *Recovery of money by distress.*

34. *Several names in one warrant.*

35. *Provision for ceasing of powers as to steam vessels, on report from Board of Trade.*

36. *Application of part V.*

37. *Definition of cases of amalgamation.*

38. *Undertakings of dissolved companies vested amalgamated company.*

39. *Acts relating to dissolved companies to apply to amalgamated company.*

40. *Saving debts and claims of dissolved companies.*

41. *Saving conveyances, contracts, &c.*

42. *Causes and rights of action reserved.*

43. *Actions not to abate.*

44. *Saving submissions and awards relating dissolved companies.*

45. *Unexecuted works of dissolved companies not to be completed.*

46. *Contracts for land entered into by dissolved companies to be executed.*

47. *Application of money paid into bank or to trustees.*

48. *Officers of dissolved companies to be accountable for books, &c.*

49. *Officers of dissolved companies to be officers of amalgamated company.*

50. *Books, &c. to be evidence.*

51. *Resolutions of dissolved companies to remain in force.*

52. *Payment of calls.*

53. *Registers, books, and certificates relating dissolved companies to subsist until replaced.*

54. *Bye-laws to remain in force.*

55. *General saving of rights and claims.*

‘WHEREAS the Railway Clauses Consolidation Act 1845, and the Railways Clauses Consolidation (Scotland) Act, 1845, respectively, were passed in order to comprise in one General Act such provisions relating to railways in *England or Ireland*, or in *Scotland*, respectively, as were at the times of the passing of those Acts usually introduced into Acts of Parliament authorizing the construction of railways: And whereas sundry provisions of the like nature, but not comprised in the said General Acts respectively, have now frequently introduced into Acts of Parliament relating to railways, and it is expedient to comprise the last-mentioned provisions also in one General Act, such Act to be applicable to *England or Ireland*, or *Scotland*, as the case may require, and that as well

the purpose of avoiding the necessity of repeating such provisions in special Acts relating to railways, as for ensuring greater uniformity in the provisions themselves:

Be it therefore enacted by the Queen's most excellent Majesty, by and with the advice and consent of the lords spiritual and temporal, and commons, in this present Parliament assembled, and by the authority of the same, as follows:

1. This Act may be cited as The Railway Clauses Act, 1863.

2. This Act shall be deemed to be divided into five parts, as follows:

- Part I. relating to construction of a railway;
- Part II. relating to extension of time;
- Part III. relating to working agreements;
- Part IV. relating to steam vessels;
- Part V. relating to amalgamation.

PART I.

CONSTRUCTION OF A RAILWAY.

3. This part of this Act shall apply to the railway authorized to be constructed by any special Act hereafter passed and incorporating this part of this Act—

In this part of this Act—

All terms used have the same meanings as the same terms have when used in The Railways Clauses Consolidation Act, 1845, and The Railways Clauses Consolidation (*Scotland*) Act, 1845, respectively:

The term "tidal river" means any part of a river within the flow and ebb of the tide at ordinary spring tides:

The term "tidal water" means any part of the sea or any part of a river within the flow and ebb of the tide at ordinary spring tides:

The term "tidal lands" means such parts of the bed, shore or banks of a tidal water as are covered and uncovered by the flow and ebb of the tide at ordinary spring tides;

The provisions respecting the recovery of penalties contained in the said Railways Clauses Consolidation Acts respectively, as the case may require, shall be incorporated with this part of this Act.

Alteration of engineering works.

Notwithstanding anything in the said Railways Clauses Consolidation Acts respectively contained,—the company, in the construction of the railway, may deviate from the line or level of any arch, tunnel, or viaduct, described on the deposited plans or sections, so as the deviation be made within the limits of deviation shown on those plans, and subject to the limitations contained in sections eleven, twelve, and fifteen of those Acts respectively, and so as the nature of the work described be not altered,—and may also substitute any engineering work not shown on the deposited plans or sections, for an arch, tunnel, or viaduct, as shown thereon; provided that every such substitution be authorized by a certificate of the Board of Trade; and the Board of Trade may grant such certificate in case it appears to them, on due inquiry, that the company has acted in the matter with good faith, and that the owners, leasees, and occupiers of the lands in which the substitution is intended to be made consent thereto,

and also that the safety and convenience of the public will not be diminished thereby.

Provided, that nothing in the present section shall affect any power given to the company or to the Board of Trade by section eleven, twelve, fourteen, or fifteen of the last-mentioned Acts respectively.

Level Crossings.

5. Where the company is authorized by the special to carry the railway across a turnpike road or public carriage road on a level, it shall not be lawful for the company in shunting trains to pass any train over the level crossing, or at any time to allow any train, engine, carriage, or truck to stand across the same.

6. For the greater convenience and security of the public, the company shall erect and permanently maintain a lodge at the point where the railway crosses on the level the turnpike road or public carriage road; and the company shall be subject to and shall abide by all such regulations with regard to the crossing thereof on the level, or with regard to the speed at which trains may pass the level crossing, as may from time to time be made by the Board of Trade.

If the company fails to erect, or to maintain such lodge, or to appoint or keep a proper person to watch or superintend the level crossing, or to observe or abide by any such regulation as aforesaid, they shall for every such offence be liable to a penalty not exceeding twenty pounds, and also to a penalty of ten pounds for every day during which the offence continues after the penalty of twenty pounds is incurred.

7. The Board of Trade may, if it appears to them necessary for the public safety, at any time after the passing of the Special Act, require the company, within such time as the Board of Trade directs, and at the expense of the company, to carry the turnpike road or public carriage road either under or over the railway by means of a bridge or arch, instead of crossing the same on the level, or to execute such other works as, under the circumstances of the case, may appear to the Board of Trade best adapted for removing or diminishing the danger arising from the level crossing.

Where the road is so carried either under or over the railway, it shall not be necessary for the company to erect or maintain a lodge at the point where the road is crossed, or to appoint a person to watch or superintend the crossing thereat, nor shall they be liable to any penalty for failure so to do.

8. If the board of trade certifies that the public safety requires that additional lands be taken by the company for the purpose of the work directed by the board of trade to be executed, the company may, subject to the provisions of the Lands Clauses Consolidation Act, 1845, or The Lands Clauses Consolidation (*Scotland*) Act, 1845, as the case may require, enter upon, take, and use all or any part of the lands specified in the certificate of the board of trade as being necessary for the purpose of the work; and the board of trade before issuing the certificate shall cause at least three months notice to be given to any person who may be entitled to claim under the last-mentioned Acts or otherwise, compensation in respect of the taking of such lands or in respect of such work.

Junctions.

9. Where the company is authorized by the special Act to make a junction between the railway and any other railway, then and in every such case all interferences with the works of the other railway, necessary or convenient for effecting the junction, shall be made under the superintendence and to the reasonable satisfaction of the engineer for the time being of the company or person to whom the other railway belongs; and in case of any difference arising as to the mode of effecting the junction, the same shall be determined by a referee to be appointed by the board of trade, on the application of either party, at the cost of the company making the junction.

10. With respect to any lands belonging to the company or person to whom the other railway belongs, which the company are by the special Act authorized to use, enter upon, or interfere with, for the purposes of the junction, the company shall not, except by agreement, or unless otherwise provided in the special Act, purchase and take the same, but the company may purchase and take, and such other railway company or person may and shall sell and grant accordingly, an easement or right of using the same for the purposes of the junction.

11. Nothing relative to the junction in this Act contained shall be deemed to authorize the company for the purposes of the junction to take or enter upon any lands belonging to the company or person to whom the other railway belongs, or to alter or interfere with any railway, or any of the works thereof, further or otherwise than is necessary for making the junction and inter-communication between the railways, as shown on the deposited plans and sections of the railway to which the special Act relates, without the previous consent in writing in every instance of such other railway company or such person.

12. The company or person with whose railway the junction is made may from time to time erect such signals and conveniences incident to the junction, either on their or his own lands or on the lands of the company making the junction, and may from time to time appoint and remove such watchmen, switchmen, or other persons as may be necessary for the prevention of danger to, or interference with, the traffic at and near the junction. The working and management of such signals and conveniences, wherever situate, shall be under the exclusive regulation of the company or person with whose railway the junction is made; and all the expenses of erecting and maintaining those signals and conveniences, and of employing those watchmen, switchmen, and other persons, and all incidental current expenses, shall, at the end of every half year, be repaid by the company making the junction, and in default thereof may be recovered from them in any court of competent jurisdiction.

Protection of Navigation.

13. Where the company is authorized by the special Act to construct, alter, or extend any work on, in, over, through, or across tidal lands or a tidal water, the company shall, on or near the work, during the whole time of the constructing, altering, or extending thereof, exhibit and keep burning at their own expense, every night from sunset to sunrise, such

lights (if any) as the board of trade from time to time requires or approves; and (notwithstanding the enactments for the time being in force respecting lighthouses) shall also on or near the work, when completed, always maintain, exhibit, and keep burning, at their own expense, every night from sunset to sunrise, such lights (if any) for the guidance of ships as the board of trade from time to time requires or approves.

If the company fails to comply in any respect with the provisions of the present section, they shall for each night in which they so fail be liable to a penalty not exceeding twenty pounds.

14. Where the company is authorized or required by the special Act to construct a bridge over a navigable tidal water, and the special Act does not make express provision respecting the span or spans thereof, then the company shall construct the same with a span or spans of such headway and waterway, and with such opening span or spans (if any), and according to such plan, as the board of trade directs or approves.

15. Where the company constructs a bridge with an opening span, it shall not be lawful for the company to detain any vessel, barge, or boat at the bridge for a longer time than may be necessary for admitting a carriage or engine traversing the railway and approaching the bridge to cross the bridge, and for opening the bridge to admit the vessel, barge, or boat to pass, and the company shall be subject to and shall abide by such regulations with regard to the user of the bridge as may from time to time be made by the board of trade.

If the company detains a vessel, barge, or boat longer than the time aforesaid, or fails in any respect to abide by any such regulation as aforesaid, they shall for every such offence be liable to a penalty not exceeding twenty pounds, without prejudice to any remedy against them for any loss or damage sustained by any person.

16. Where the railway cuts off access between the land and a tidal water or tidal lands, then and in every such case the company shall, during the construction of the railway, and from time to time thereafter, make, and shall permanently maintain, and allow to be used by all persons, at all times, free of toll or other charge, all such footways and carriageways over, under, or across the railway, or on a level therewith, as the board of trade from time to time directs or approves: Provided always, as follows:

- (1.) The company shall not be obliged to make a footway or carriageway over lands for the use of an owner or occupier who has agreed to receive and has been paid compensation for the severance thereof from the tidal water or tidal lands:
- (2.) The company shall not be obliged to make or to allow to be made a footway or carriageway in such manner as would interfere with the working or using of the railway:
- (3.) The expense of the making and maintenance of a footway or carriageway required to be made after the construction of the railway shall be defrayed by the persons or body interested in the tidal water or tidal lands

for whose benefit or convenience the same is required.

Where the footway or carriageway is made across the railway on the level, then the manner of the making and watching of the level crossing shall be subject to the approval of the board of trade; and where the level crossing is made after the construction of the railway, then all expenses attending the watching thereof shall be defrayed by the persons or body interested in the tidal water or tidal lands for whose benefit or convenience the same is required.

17. Where the company is authorized by the special Act to construct a railway skirting a public navigable tidal river or channel, the company shall not make any deviation of the railway from the continuous centre line thereof marked on the plan deposited by them at the board of trade, even within the limits of deviation shown on that plan, in such manner as to diminish the navigable space, without the previous consent of the board of trade, or otherwise than in such manner as is expressly authorized by the board of trade.

If any deviation is made in contravention of the present section, the board of trade may abate and remove the work in the construction whereof the deviation is made, or any part thereof, and restore the site thereof to its former condition, at the expense of the company; and the amount of such expense shall be a debt due from the company to the Crown, and be recoverable accordingly with costs, or the same may be recovered, with costs, as a penalty is recoverable from the company.

18. If a work constructed by the company on, in, over, through, or across tidal lands or a tidal water is abandoned, or suffered to fall into decay, the board of trade may abate and remove the work, or any part of it, and restore the site thereof to its former condition, at the expense of the company; and the amount of such expense shall be a debt due from the company to the Crown, and be recoverable accordingly, with costs, or the same may be recovered, with costs, as a penalty is recoverable from the company.

19. If at any time the board of trade deems it expedient, for the purposes of the special Act or of this part of this Act, to order a survey and examination of a work constructed by the company on, in, over, through, or across tidal lands or tidal water, or of the intended site of any such work, the company shall defray the expense of the survey and examination; and the amount thereof shall be a debt due from the company to the Crown, and be recoverable accordingly, with costs, or the same may be recovered, with costs, as a penalty is recoverable from the company.

PART II.

EXTENSION OF TIME.

20. Where a railway is authorized to be constructed by a special Act passed either before or after the passing of this Act, and the time limited by the special Act for the exercise of powers of compulsory purchase of lands, or of powers for construction of the railway and works, is extended by a special Act hereafter passed and incorporating this part of this Act,—then and in every such case the justices, arbitrators, umpires, or juries, as the case may be, who

award or assess the compensation to be made by the company to the owners or occupiers of, or other persons interested in, lands taken or used for the purposes of the railway and works, or injuriously affected by the construction thereof, shall, in estimating the amount of such compensation, have regard to, and assess compensation for, the additional damage (if any) sustained by those owners, occupiers, or other persons, by reason of the extension of time.

21. The extension of time shall not affect any contract entered into or notice given by the company before the passing of the special Act granting the extension, for purchasing, taking, or using any lands which the company was entitled to purchase, take, or use; but every such contract and notice shall be construed and take effect, and the same proceedings may be had thereunder, and all parties thereto shall be entitled to the same rights and remedies in respect thereof, at law and in equity, as if the extension had not been granted.

PART III.

WORKING AGREEMENTS.

22. Where two or more companies are authorized by a special Act hereafter passed, and incorporating this part of this Act, to agree among themselves with respect to all or any of the following purposes; namely,—

The maintenance and management of the railways of the companies respectively, or any one or more of them, or any part thereof respectively, and of the works connected therewith respectively, or any of them;

The use and working of the railways or railway, or of any part thereof, and the conveyance of traffic thereon;

The fixing, collecting, and apportionment of the tolls, rates, charges, receipts, and revenues levied, taken, or arising in respect of traffic;—

then and in every such case the authority so to agree, or the agreement when entered into, shall not in any manner affect any of the tolls, rates, or charges which the companies parties thereto are from time to time respectively authorized to demand and receive from any person or from any other company; but all such persons and companies shall, notwithstanding the agreement, be entitled to the use and benefit of the railways of the several companies, parties to the agreement, on the same terms and conditions, and on payment of the same tolls, rates, and charges, as they would be if such authority had not been given or the agreement had not been entered into.

23. The agreement shall not, save so far as its terms and conditions are authorized by the Railways Clauses Consolidation Act, 1845, or by the Railways Clauses Consolidation (*Scotland*) Act, 1845, as the case may require, or by any other general statute or law from time to time in force with respect to the companies parties to the agreement, have any operation unless and until it is sanctioned by such proportion of the votes of the shareholders and stockholders entitled to vote in that behalf at meetings of the several companies parties thereto, (present personally or by proxy) at a general meeting of each company specially convened for the purpose (in manner herein-

after mentioned), as is prescribed in the special Act, and if no proportion is prescribed, then by three fifths of such votes.

Every such meeting shall be convened by circular addressed to each such shareholder and stockholder, and served in the manner prescribed by The Companies Clauses Consolidation Act, 1845, or The Companies Clauses Consolidation (*Scotland*) Act, 1845, as the case may require with respect to notices requiring to be served by the company upon the shareholders, and also by advertisement inserted once at least in each of two consecutive weeks in some newspaper published or circulating in the county prescribed in the special Act, and if no county is prescribed, then in the county in which the head office of the company is situate, the last of such advertisements to be published not less than seven days before the meeting.

24. Before the companies enter into the agreement, notice of their intention to do so shall be given by them or one of them, in a form to be approved by the board of trade, inserted once at least in each of three successive weeks in some newspaper published or circulating in the county prescribed in the special Act, and if no county is prescribed, then in the county or one of the counties in which each railway to the maintenance, management, use, or working whereof the proposed agreement relates, or some portion of that railway, is situate; and the notice shall set forth within what time and in what manner any company or person aggrieved by the proposed agreement, and desiring to object thereto, may bring the objection before the board of trade.

25. The agreement shall not have any operation until it is approved by the board of trade; and the board of trade shall not approve the agreement without being satisfied of its having received such sanction of meetings of the respective companies as aforesaid.

26. The companies parties to the agreement may, in accordance therewith and for the purposes thereof, appoint a joint committee, composed of such number of the directors of each company as the companies think proper, and from time to time may vary and renew the joint committee as occasion requires, and may regulate the proceedings of the joint committee, and may delegate to the joint committee all such of the powers of the companies as the companies think necessary for carrying into effect the purposes of the agreement; and the joint committee shall have and may exercise the powers so from time to time delegated to them in like manner as the same powers might be had and exercised by the companies respectively or their respective directors.

27. At the expiration of the first or any subsequent period of ten years after the making of the agreement, the board of trade may, if they are of opinion that the interests of the public are prejudicially affected thereby, cause the same to be revised; and the board of trade may require the companies parties thereto to publish such notices of any intended revision of the agreement as the board of trade may direct; and the board of trade may modify the agreement in such manner as may seem expedient for the protection of the interests of the public, and may declare the modification to be part of the agreement,

and the same shall be read and take effect accordingly.

28. Where a company is authorized by a special Act hereafter passed, and incorporating this part of this Act, to agree with a person being the proprietor of a railway with respect to all or any of the purposes specified in this part of this Act, then and in every such case the provisions of this part of this Act shall apply, *mutatis mutandis*, to the company in relation to such authority and to the agreement entered into by virtue thereof.

29. For the purposes of this part of this Act, any alteration of an agreement by the parties thereto shall be deemed an agreement.

PART IV.

STEAM VESSELS.

30. Where a railway company incorporated either before or after the passing of this Act is authorized by a special Act hereafter passed, and incorporating this part of this Act to build, or buy, or hire, and to use, maintain, and work, or to enter into arrangements for using, maintaining, or working steam vessels for the purpose of carrying on a communication between any towns or ports, and to take tolls in respect of such steam vessels,—then and in every such case tolls shall be at all times charged to all persons equally, and after the same rate in respect of passengers conveyed in a like vessel passing between the same places under like circumstances; and no reduction or advance in the tolls shall be made in favour of or against any person using the steam vessels in consequence of his having travelled or being about to travel on the whole or any part of the company's railway, or not having travelled or not being about to travel on any part thereof; or in favour of or against any person using the railway in consequence of his having used or being about to use, or his not having used or not being about to use, the steam vessels; and where an aggregate sum is charged by the company for conveyance of a passenger by a steam vessel and on the railway, the ticket shall have the amount of toll charged for conveyance by the steam vessel distinguished from the amount charged for conveyance on the railway.

31. The provisions of The Railway and Canal Traffic Act, 1854, so far as the same are applicable, shall extend to the steam vessels, and to the traffic carried on thereby.

32. The company may from time to time make byelaws in relation to passengers, animals, and goods conveyed in or upon the steam vessels, and as to the embarkation and disembarkation thereof respectively, and may enforce the observance of the same by penalties, in the same manner as they may with respect to passengers, animals, and goods conveyed upon their railway; such byelaws to be sanctioned and authenticated in the same manner as is required by any special or other Act with respect to byelaws relating to the company's railway, and being published by being painted on boards, or printed on paper and pasted on boards, and hung up or affixed and continued on some conspicuous part of every steam vessel and landing-place of the company; and such byelaws, and all penalties in respect of the

breach thereof, shall be enforced and recovered in the same manner as is provided with respect to byelaws relating to the company's railway, and to penalties in respect of the breach thereof.

33. All tolls and charges for the steam vessels due and payable to the company on any account whatsoever, and all costs, damages, and expenses by the special Act directed to be paid in respect of the steam vessels, may be levied by distress; and in *England or Ireland* any justice, and in *Scotland* the sheriff, may, on application by or on behalf of the company, issue his warrant accordingly.

The justice or sheriff who issues the warrant of distress may order that the costs of the proceedings for the recovery of the toll or sum shall be paid by the person liable to pay the toll or sum, and the costs shall be ascertained by the justice or sheriff, and shall be included in the warrant of distress for the recovery of the toll or sum.

34. Any number of names and sums may be included in any warrant of distress or notice obtained or given by the company for any of the purposes of this part of this Act, or of the provisions of the special Act with respect to the steam vessels, and may be stated either in the body of the warrant or notice, or in a schedule thereto.

35. In every seventh year after the passing of the special Act, reckoned from the first day of *January* next after its passing, the board of trade, if they are of opinion that the interests of the public are prejudicially affected by the exercise of the powers of the company relative to steam vessels, may give to the company notice in writing thereof, and of the reasons on which that opinion is founded, and if the company does not before the beginning of the then next session of Parliament make provision to the satisfaction of the board of trade for protection of the interests of the public, or if the injury done to the interests of the public is in the opinion of the board of trade incapable of being remedied by the company, then the board of trade, at the beginning of the session of Parliament then next following, shall report to both houses of Parliament such their opinion, and the reasons on which that opinion is founded, and at the expiration of twelve calendar months after the presentation to the houses of Parliament of that report, the powers of the company relative to steam vessels, or such of them as are specified in the report, shall, unless Parliament in the meantime otherwise provides, cease to be exercised.

PART V.

AMALGAMATION.

36. This part of this Act shall apply where two or more railway companies, respectively incorporated either before or after the passing of this Act, are amalgamated by a special Act hereafter passed and incorporating this part of this Act.

37. For the purposes of this part of this Act, companies shall be deemed amalgamated by a special Act, in either of the following cases:

(1.) Where by the special Act two or more companies are dissolved, and the members thereof respectively are united into and incorporated as a new company:

(2.) Where by the special Act a company or companies is or are dissolved, and the undertaking or undertakings of the dissolved company or companies is or are transferred to another existing company, with or without a change in the name of that company:

And in this part of this Act, such special Act is referred to as the Amalgamating Act; the company incorporated or continued by or under the Amalgamating Act is referred to as the amalgamated company; and the time prescribed in the Amalgamating Act for the amalgamation taking effect, and if no time is prescribed, then the time of the passing of the Amalgamating Act is referred to as the time of amalgamation.

38. In every case of amalgamation, the undertaking, railways, harbours, navigations, ferries, wharfs, canals, works, real and personal property, powers, authorities, privileges, exemptions, rights of action and suit, and all other the rights and interests of the dissolved company, shall, subject to the contracts, obligations, debts, and liabilities of that company, become at the time of amalgamation, and by virtue of the Amalgamating Act, vested in the amalgamated company, and may and shall be held, used, exercised, and enjoyed by the amalgamated company in the same manner and to the same extent as the same respectively at the time of amalgamation are, or if the Amalgamating Act were not passed, might be held, used, exercised, and enjoyed by the dissolved company.

39. The special Acts relating to or affecting the dissolved company or their undertaking in force at the passing of the Amalgamating Act shall, except so far as they are thereby expressed to be varied or repealed, remain in full force; and all rights and powers thereby conferred on and vested in the dissolved company in relation to their undertaking may be enjoyed and exercised by the amalgamated company in relation to the dissolved undertaking; and all matters to be done, continued, or completed, or which but for the amalgamation would, might, or could be done, continued, or completed, by the dissolved company, or their directors, officers, or servants, under or by virtue of those Acts, shall or may be done, continued, or completed by the amalgamated company, and their directors, officers, and servants, as the case may be; and every special Act, so far as it relates to or affects the dissolved company or their undertaking, shall be read and construed as if the name of the amalgamated company had been used therein in relation to that undertaking instead of the name of the dissolved company.

- 40. Except as may be otherwise provided in the special Act, all debts and money due from or to the dissolved company, or any persons on their behalf, shall be payable and paid by or to the amalgamated company; and all tolls, rates, duties, and money due or payable by virtue of any Act relating to the dissolved company from or to that company shall be due and payable from or to the amalgamated company, and shall be recoverable from or by the amalgamated company by the same ways and means, and subject to the same conditions, as the same would or might have been recoverable from or by the dissolved company if the Amalgamating Act had not been passed.

41. All deeds, conveyances, grants, assignments leases, purchases, sales, mortgages, bonds, covenants, agreements, contracts, and securities which before the amalgamation have been executed, made, or entered into by, with, to, or in relation to the dissolved company, or the directors thereof, and which are in force at the time of amalgamation, and all obligations and liabilities which before the amalgamation have been incurred by or to, or which but for the amalgamation might or would have arisen in relation to, the dissolved company or the directors thereof, shall be as valid and of as full force and effect in favour of, against, or in relation to the amalgamated company as if the same had been executed, made, or entered into by, with, or to, or in relation to, or had been incurred by or to or had arisen in relation to, the amalgamated company by name.

42. All causes and rights of action or suit accrued before the time of amalgamation, and then in any manner enforceable by, for, or against the dissolved company, shall be and remain as good, valid, and effectual for or against the amalgamated company as they would or might have been for or against the dissolved company affected thereby, if the Amalgamating Act had not been passed.

43. Nothing in the Amalgamating Act or in this part of this Act shall cause the abatement, discontinuance, or determination of or in anywise prejudicially affect any action, suit, or other proceeding at law or in equity commenced by or against the dissolved company, either solely or jointly with any other company or with any person, before the time of amalgamation, and then pending; but the same may be continued, prosecuted, or enforced by or against the amalgamated company, either solely or, as the case may require, jointly with such other company or with such person; and all persons committing offences against any of the provisions of any special Act relating to the dissolved company before the amalgamation may be prosecuted, and all penalties incurred by reason of such offences may be sued for and recovered, in like manner in all respects as if the Amalgamating Act had not been passed,—the amalgamated company being in respect of all such matters considered as identical with the dissolved company.

44. No submission to arbitration of any matter in dispute between the dissolved company and any other company or any person, under which any reference is pending and incomplete at the time of amalgamation, and no award theretofore made and then remaining in force shall be revoked or prejudicially affected by anything in the Amalgamating Act or in this part of this Act continued; but every such submission and award shall be as valid and effectual for or against the amalgamated company as it would have been for or against the dissolved company.

45. All works which the dissolved company is at the time of amalgamation authorized or bound to execute and complete, and which are not then executed or completed, may or shall (as the case may require) be executed or completed by the amalgamated company, and for that purpose the amalgamated company shall have and be subject to all the powers, rights, and conditions which were conferred or imposed upon the dissolved company, and which but for

the passing of the Amalgamating Act might have been exercised by or enforced against the dissolved company.

46. Where the dissolved company has under any special Act entered into any contract for the purchase of or taken or used any lands, which at the time of amalgamation have not been effectually conveyed to the dissolved company, or to the purchase money in respect of which has not been duly paid by the dissolved company,—then and in every such case the contract, if in force at the time of amalgamation, shall thereafter be completed by, and such lands shall be conveyed to the amalgamated company, or as the amalgamated company directs, and the purchase money shall be paid and applied pursuant to the special Acts relating to the dissolved company; and those Acts shall, in relation to the completion of the contract and the purchase and conveyance of the lands, and the payment and application of the purchase money in respect thereof, be read and construed as if the amalgamated company were the company named in the Acts and contract.

47. Where any money has, before the time of amalgamation, been paid by the dissolved company, or is thereafter paid by the amalgamated company under any special Act relating to the dissolved company, into the Bank of *England* or into one of the incorporated or chartered banks in *Scotland*, or into the Bank of *Ireland*, or to any trustee or trustees, on account of the purchase of any lands, or any interest therein, or for any compensation or satisfaction, or on any other account, such money, or the stocks, funds, or securities in or upon which the same then is or thereafter may be invested by order of any court, or otherwise, and the interests, dividends, and annual produce thereof shall be applied and disposed of pursuant to such special Act; and that and every other Act shall, in relation to such money, stocks, funds, or securities, or the interests, dividends, or annual produce thereof, be read and construed as if the amalgamated company were the company therein named with reference to the same money, stocks, funds, securities, interests, dividends, or annual produce.

48. All officers and persons who, at the time of amalgamation, have in their possession or under their control any books, documents, papers, or effects belonging to the dissolved company, or to which the dissolved company would but for such dissolution have been entitled, shall be liable to account for and deliver up the same to the amalgamated company, or to such persons as the amalgamated company may appoint to receive the same, in the same manner, and subject to the same consequences on refusal or neglect, as if such officers and persons had been appointed by and become possessed of such books, documents, papers, or effects for the amalgamated company.

49. All clerks, officers, and servants who at the time of amalgamation are in the employment of the dissolved company shall thereupon become clerks, officers, or servants, as the case may be, of the amalgamated company, with the same rights, and subject to the same obligations and incidents in respect of such employment as they would have had or been subject to as the clerks, officers, or servants of the dissolved company, and shall so continue unless and

until they respectively are duly removed from such employment by the amalgamated company, or until the terms of their employment are duly altered by the amalgamated company.

50. All books and documents which would have been evidence in respect of any matter for or against the dissolved company shall be admitted as evidence in respect of the same or the like matter for or against the amalgamated company.

51. All resolutions of any general meeting or board of directors of the dissolved company, or of any duly constituted and authorized committee thereof, so far as the same are applicable and remain in force, shall, notwithstanding the dissolution, continue to be operative, and shall apply to the amalgamated company, and to the directors, officers, and servants of the amalgamated company, until duly revoked or altered by the amalgamated company or under their authority.

52. All calls made by the dissolved company, and not paid at the time of amalgamation, shall be payable to and may be enforced by the amalgamated company, as if such calls had been made by the amalgamated company.

53. All registers of shares, stock, mortgages, and bonds of the dissolved company, and all registers of transfers thereof respectively, and all shareholders and stockholders address books, and all certificates of shares or stock of and in the dissolved company, which are valid and subsisting at the time of amalgamation, shall continue to be valid and subsisting, and shall have the same operation and effect as before the dissolution, unless and until new or altered registers, books, and certificates respectively are substituted in their stead; and all transfers, sales, or dispositions of stock or shares made before the dissolution and not then completed shall have the same operation and effect as if made after the dissolution.

54. All the bye-laws, rules, and regulations of the dissolved company relating to the management, use, or control of their undertaking shall, notwithstanding the dissolution, continue to be in force and applicable to and in respect of the undertaking, and shall and may be enforced by and available to the amalgamated company in their own name, as well for the recovery of penalties as for all other purposes, as if the same respectively had been originally made by the amalgamated company, until the expiration of twelve months after the time of amalgamation, or until other bye-laws, rules, and regulations are duly made by the amalgamated company in their stead, whichever first happens.

55. Notwithstanding the dissolution of the dissolved company, and the amalgamation, everything before the time of amalgamation done, suffered, and confirmed respectively, under or by virtue of any special Act relating to the dissolved company, shall be as valid as if the Amalgamating Act had not been passed; and the dissolution and amalgamation, and the Amalgamating Act, and this part of this Act respectively, shall accordingly be subject and without prejudice to everything so done, suffered, and confirmed respectively, and to all rights, liabilities, claims, and demands, present, or future, which if the dissolution and amalgamation had not taken place, and the Amalgamating Act had not been passed, would be incident to

or consequent on anything so done, suffered, and confirmed respectively; and with respect to all things so done, suffered, and confirmed respectively, and to all such rights, liabilities, claims, and demands, the amalgamated company shall to all intents represent the dissolved company; and the generality of this present provision shall not be deemed to be restricted by any other of the provisions of this part of this Act, or by any provision of the Amalgamating Act that does not expressly refer to this present provision, and expressly restrict the operation thereof.

CAP. XCIII.

An Act for consolidating in one Act certain provisions frequently inserted in Acts relating to waterworks.
[28th July, 1863.]

10 & 14 Vict. c. 17.

- Sec. 1. *Short title.*
2. *Application of Act and interpretation of terms.*
3. *Power for justices to inquire as to danger of reservoir.*
4. *Order of justices for immediate repair.*
5. *Order of justices on undertakers to repair reservoir. Order of justices on failure of undertakers to repair.*
6. *Form of order.*
7. *Persons acting under order not trespassers.*
8. *Order for payment of costs and expenses.*
9. *Appeal by undertakers.*
10. *Undertakers not to be responsible for consequences of order.*
11. *Provisions as to Scotland.*
12. *Supply for other than domestic purposes.*
13. *Want of supply for other than domestic purposes when excused.*
14. *Power to let meters for hire.*
15. *Power for ascertaining quantity consumed by meter, and for removing meters, &c.*
16. *Power to cut off water in certain cases.*
17. *Penalty for waste, &c. of water by non-repair of pipes, &c.*
18. *Penalty for application of water contrary to agreement.*
19. *Penalty for extension or alteration of pipes.*
20. *Penalty for use of water without agreement.*
21. *Recovery of rates by action.*

'WHEREAS The Waterworks Clauses Act, 1847, was passed in order to comprise in one Act sundry provisions which were at the time of the passing of that Act usually introduced into Acts of Parliament authorizing the construction of certain waterworks:

'And whereas sundry provisions of the like nature, but not comprised in the said Act, are now frequently introduced into Acts of Parliament relating to waterworks, and it is expedient to comprise such last-mentioned provisions also in one Act, and that as well for the purpose of avoiding the necessity of repeating such provisions in special Acts relating to waterworks as for ensuring greater uniformity in the provisions themselves:'

Be it therefore enacted by the Queen's most excellent Majesty, by and with the advice and consent of the lords spiritual and temporal, and commons, in this present Parliament assembled, and by the authority of the same, as follows:

Preliminary.

1. This Act may be cited as The Waterworks Clauses Act, 1863; and The Waterworks Clauses Act, 1847, and this Act may be cited together as The Waterworks Clauses Acts, 1847 and 1863.

2. This Act shall apply to any waterworks to which any special Act hereafter passed and incorporating this Act relates; and every such special Act is hereinafter referred to as "the Special Act."

Terms used in this Act have the same meanings as the same terms have when used in The Waterworks Clauses Act, 1847.

The provisions respecting the recovery of penalties contained in the last-mentioned Act shall be incorporated with this Act.

Security of reservoirs.

And with respect to the security of the reservoirs constructed by the undertakers, be it enacted as follows:

3. Whenever any person interested complains to two justices that any reservoir constructed by the undertakers is in a dangerous state, such justices shall forthwith make inquiry into the truth of the complaint; or two justices, on their own view, and without complaint by any person, may proceed under the present provisions as if a complaint had been so made to them.

4. If, on any such inquiry, the justices are satisfied that the complaint is well founded, and that the reservoir is in a dangerous state, and that the danger is so imminent as not to admit of delay in removing the cause of complaint, they shall order such person as they think fit to enter on the property of the undertakers, and to lower the water in the reservoir, and to execute and do all such works and things as the justices think requisite and proper for removing the cause of complaint.

5. If, on any such inquiry, the justices are satisfied that there is good cause of complaint, but are not satisfied that the reservoir is in such an imminently dangerous state as not to admit of delay in removing the cause of complaint, they shall issue their summons to the undertakers to answer the complaint; and upon hearing the parties, the justices may, or upon default of appearance of the undertakers, then in their absence the justices shall order the undertakers, within such period as the justices think reasonable and specify in the order, to lower the water in the reservoir, and to execute and do all such works and things as the justices think requisite and proper for removing the cause of complaint.

If the undertakers fail to execute or do within that period any such work or thing, the justices who made the order, or any other two justices, on being satisfied of such failure, may either order such persons as the justices think fit to enter on the property of the undertakers, and to lower the water in the reservoir, and to execute and do all such works and things as the justices think requisite and proper for removing the cause of complaint; or may, if they think fit, by order impose on the undertakers a penalty not exceeding ten pounds for every day during which such failure continues after the making of the order imposing the penalty.

6. Any order of justices made in any of the cases

aforesaid shall be in writing under their hands, and may be in the form set forth in the schedule to this Act, with such variations as circumstances require.

7. Any person acting under and in pursuance of any such order shall not be deemed a trespasser; and if any person wilfully obstructs any person lawfully acting in obedience to any such order, or wilfully does, or instigates, or suffers to be done anything in contravention thereof, he shall for every such offence be liable to a penalty not exceeding fifty pounds.

8. The justices may order all, or such part as they think fit, of the costs of and incident to the applying for and obtaining of any such order to be paid by the undertakers. and also all, or such part as the justices think fit, of the expenses of the works and things executed and done in pursuance of any such order by any person other than the undertakers, to be paid by the undertakers to such person as the justices appoint.

If the justices before whom the complaint is made think that there is no sufficient ground for the complaint, they may, if they think fit, order the complainant to pay to the undertakers the whole or any part of their costs of or incident to the complaint.

9. If the undertakers consider themselves aggrieved by any order or determination of justices under the present provisions, they may in like manner and subject to the like conditions as by The Railways Clauses Consolidation Act, 1845, are provided in the case of appeals in respect of penalties, appeal to the court of general or quarter sessions for the county or place where the cause of appeal arises; and that court may, on the hearing of the appeal, either affirm or quash the order or determination, or make such other order in the premises as may seem fit, and may make such order as to the costs, both of the original proceedings and of the appeal, as may seem fit; but the order or determination appealed against shall, pending the appeal, continue in force.

10. Notwithstanding anything in the special Act contained, the undertakers shall not be liable to pay any damages, penalties, costs, charges, or expenses for or in respect of, or be answerable or accountable for, any diminution or cessation of the supply of water, or any other breach or non-performance of their or any of their duties, liabilities, or obligations under the Special Act, that may be occasioned by or result from the execution of any such order.

11. The present provisions with respect to the security of reservoirs shall apply to *England* and *Ireland*; and they shall also apply to *Scotland*, subject to the following variations, namely,—the sheriff shall be deemed to be empowered thereby, as well as two justices; and the appeal given shall lie from two justices in manner provided by sections one hundred and fifty-one and one hundred and fifty-two of The Railways Clauses Consolidation (*Scotland*) Act, 1845, and shall lie from a sheriff substitute to the sheriff depute, where the matter comes in the first instance before a sheriff substitute; and in that case the sheriff depute shall hear and determine the appeal, and may either confirm, recal, vary, or supersede the order of the sheriff substitute as he thinks proper; and the costs of the appeal shall be in the discretion of the sheriff; and the order or judgment of the sheriff in the appeal shall be final.

Supply of Water.

And with respect to the supply of water to be furnished by the undertakers, be it enacted as follows:

12. A supply of water for domestic purposes shall not include a supply of water for cattle, or for horses, or for washing carriages where such horses or carriages are kept for sale or hire or by a common carrier, or a supply for any trade, manufacture, or business, or for watering gardens, or for fountains, or for any ornamental purpose.

13. Where the undertakers are authorized by the Special Act to supply water for other than domestic purposes, they shall not be liable, in the absence of express stipulation, under any agreement for the supply of water for other than domestic purposes, to any penalty or damages for not supplying such water, if the want of such supply arises from frost, unusual drought, or other unavoidable cause or accident.

14. Where the undertakers are authorized by the Special Act to supply water by measure, they may let for hire to any consumer of water so supplied any meter or instrument for measuring the quantity of water supplied and consumed, and any pipes and apparatus for the conveyance, reception, or storage of the water, for such remuneration in money as may be agreed upon between them and the consumer, which shall be recoverable in the same manner as rates due to the undertakers for water; and the meters, instruments, pipes, and apparatus shall not be subject to distress or to the landlord's hypothec for rent of the premises where the same are used, or be attached or taken in execution under any process of any court of law or equity, or under or in pursuance of any adjudication or order in bankruptcy, or other legal proceeding, against or affecting the consumer of the water or the occupier of the premises, or other the person in whose possession the meters, instruments, pipes, and apparatus may be.

15. The officers of the undertakers may enter any house, building, or lands to, through, or into which water is supplied by them, by measure, in order to inspect the meters, instruments, pipes, and apparatus for the measuring, conveyance, reception, or storage of water, or for the purpose of ascertaining the quantity of water supplied, or consumed, and may from time to time enter any house, building, or lands, for the purpose of removing any meter, instrument, pipe, or apparatus the property of the undertakers; and if any person hinders any such officer from entering or making such inspection or effecting such removal, he shall for every such offence be liable to a penalty not exceeding five pounds; but, except with the consent of a justice or the sheriff, this power of entry shall be exercised only between the hours of ten in the forenoon and four in the afternoon.

Protection of water.

And with respect to the waste or misuse of the water supplied by or belonging to the undertakers, be it enacted as follows:

16. If any person supplied with water by the undertakers wrongfully does or causes or permits to be done anything in contravention of any of the provisions of the Special Act, or wrongfully fails to do any-

thing which, under any of those provisions, ought to be done for the prevention of the waste, misuse, undue consumption, or contamination of the water of the undertakers, they may (without prejudice to any remedy against him in respect thereof) cut off any of the pipes by or through which water is supplied by them to him, or for his use, and may cease to supply him with water, so long as the cause of injury remains or is not remedied.

17. If any person supplied with water by the undertakers wilfully or negligently causes or suffers any pipe, valve, cock, cistern, bath, soil-pan, watercloset, or other apparatus or receptacle to be out of repair, or to be so used or contrived as that the water supplied to him by the undertakers is or is likely to be wasted, misused, unduly consumed, or contaminated, or so as to occasion or allow the return of foul air or other noisome or impure matter, into any pipe belonging to or connected with the pipes of the undertakers, he shall for every such offence be liable to a penalty not exceeding five pounds.

18. If any person—

First, not having from the undertakers a supply of water for other than domestic purposes, uses, for other than domestic purposes, any water supplied to him by the undertakers; or

Secondly, having from the undertakers a supply of water for any other than domestic purposes, uses, for any purposes other than those for which he is entitled to use the same, any water supplied to him by the undertakers,—he shall for every such offence be liable to a penalty not exceeding forty shillings, without prejudice to the right of the undertakers to recover from him the value of the water misused.

19. It shall not be lawful for the owner or occupier of any premises supplied with water by the undertakers, or any consumer of the water of the undertakers, or any other person, to affix or cause or permit to be affixed any pipe or apparatus to a pipe belonging to the undertakers, or to a communication or service pipe belonging to or used by such owner, occupier, consumer, or other person, or to make any alteration in any such communication or service pipe, or in any apparatus connected therewith, without the consent, in every such case, of the undertakers; and if any person acts in any respect in contravention of the provisions of the present section, he shall for every such offence be liable to a penalty not exceeding five pounds, without prejudice to the right of the undertakers to recover damages from him in respect of any injury done to their property, and without prejudice to their right to recover from him the value of any water wasted, misused, or unduly consumed.

20. If any person, not being supplied with water by the undertakers, wrongfully takes or uses any water from any reservoir, watercourse, conduit, or pipe belonging to the undertakers, or from any pipe leading to or from any such reservoir, watercourse, conduit, or pipe or from any cistern or like place containing water belonging to the undertakers, or supplied by them for the use of any consumer of the water of the undertakers, he shall for every such offence be liable to a penalty not exceeding five pounds.

Recovery of Rates.

And with respect to the recovery of water rates and other money, be it enacted as follows:

21. If any person refuses or neglects to pay to the undertakers any rate or sum due to them under the Special Act, they may recover the same, with costs, in any court of competent jurisdiction; and their remedy under the present section, shall be in addition to their other remedies for the recovery thereof.

SCHEDULE.

Form of Order of Justices.

To A.B. of &c.

We the undersigned, two of her Majesty's justices of the peace acting for the [county] of do hereby order and direct you [and such person and persons as you may require to aid and assist you herein] forthwith to lower the water in the [here describe the reservoir and the extent to which the water is to be lowered], and to do all such works and things as are requisite to repair and make secure the said reservoir [and you shall do as little injury as possible to the property of the] and for acting as you are hereby directed this shall be your sufficient warrant].

Given under our hands this day of
one thousand eight hundred and

A.B.
- C.D.

CAP. XCIV.

An Act to amend the law relating to the repair of turnpike roads in *England*, and to continue certain Turnpike Acts in *Great Britain*. [28th July, 1863.]

CAP. XCV.

An Act for continuing various expiring Acts.

[28th July, 1863.]

Sec. 1. *Short title.*2. *Continuance of Acts.*

'WHEREAS the several Acts mentioned in the first column of the schedule hereto are wholly, or as to certain provisions thereof, limited to expire at the times specified in respect of such Acts in the fourth column of the said schedule: And whereas it is expedient to continue such Acts, in so far as they are temporary in their duration, for the times mentioned in respect of each such Act in the fifth column of the said schedule: Be it enacted by the Queen's most excellent Majesty, by and with the advice and consent of the lords spiritual and temporal, and commons, in this present Parliament assembled, and by the authority of the same, as follows:

1. This Act may be cited for all purposes as the "Expiring Laws Continuance Act, 1863."

2. The Acts mentioned in column one of the said schedule, together with the Acts, if any, amending the same, shall in so far as such Acts or any provisions thereof are temporary in their duration, be continued until the times respectively specified in respect of such Acts in the fifth column of the said schedule.

SCHEDULE.

1. Original Acts.	2. Amending Acts.	3. How far temporary.	4. Time of Expiration of Temporary Provisions.	5. Continued until
3 & 4 Vict. c. 89 Poor Rates Stook in Trade exemp- tion.	-	Whole Act	1st October, 1863, and end of then next Session. (22 & 23 Vict. c. 44.)	1st October, 1865, and end of then next Session.
10 & 11 Vict. c. 90. Poor Laws (Ire- land).	14 & 15 Vict. c. 68.	As to powers of Com- missioners	23rd July, 1863, and end of then next Session. (25 & 26 Vict. c. 82.)	23rd July, 1864, and end of then next Session.
10 & 11 Vict. c. 98. Ecclesiastical Ju- risdiction.	-	As to Provisions con- tinued by 21 & 22 Vict. c. 50.	1st August, 1863, and end of then next Session. (22 & 23 Vict. c. 45.)	1st August, 1863, and end of then next Session.
11 & 12 Vict. c. 82. County Cess (Ire- land).	20 & 21 Vict. c. 7.	Whole Act	1st August, 1863, and end of then next Session. (24 & 25 Vict. c. 58.)	1st August, 1864, and end of then next Session.
11 & 12 Vict. c. 107. Sheep and Cattle diseased.	16 & 17 Vict. c. 72.	Whole Act	1st August, 1863, and end of then next Session. (21 & 22 Vict. c. 62.)	1st August, 1864, and end of then next Session.
14 & 15 Vict. c. 104. Episcopal and Ca- pitular Estates Management.	17 & 18 Vict. c. 116. 22 & 23 Vict. c. 46.	Whole Act	1st January, 1863, and end of then next Session. (24 & 25 Vict. c. 131.)	1st January, 1864, and end of then next Session.
25 & 26 Vict. c. 29. Landed Property Improvement (Ireland).	23 & 24 Vict. c. 124.	As to certain Powers conferred on Com- missioners of Pub- lic Works.	1st January, 1864	1st January, 1866, and end of then next Session.

CAP. XCVI.

An Act to amend the Petty Sessions (*Ireland*) Act (1851), and the Petty Sessions Clerks (*Ireland*) Act (1858). [28th July, 1863.]

Sec. 1. *Provisions of recited Acts to apply to complaints or proceedings under 3 & 4 W. 4, c. 68, and 6 & 7 W. 4, c. 38, in cases specified.*

2. *Short title.*

'WHEREAS doubts have been entertained whether complaints and proceedings in reference to the matters hereinafter specified are subject to the provisions of the Petty Sessions (*Ireland*) Act, 1851, and the Petty Sessions Clerks (*Ireland*) Act, 1858, and of any Act for the amendment of them or either of them, and it is expedient to ensure uniformity of practice at petty sessions in relation to such complaints and proceedings: Be it enacted by the Queen's most excellent

Majesty, by and with the advice and consent of the lords spiritual and temporal, and commons, in this present Parliament assembled, and by the authority of the same, as follows:

1. From and after the passing of this Act the provisions of the Petty Sessions (*Ireland*) Act, 1851, and of the Petty Sessions Clerks (*Ireland*) Act, 1858, (anything therein to the contrary notwithstanding) shall apply to all complaints or proceedings under the Act of the Third and Fourth of *William* the Fourth, chapter sixty-eight, and the Act of the 6th and 7th of *William* the Fourth, chapter thirty-eight, and every matter or thing connected therewith, relating to publicans keeping their houses of business open within prohibited hours, or to persons within such hours tipping or gaming therein, or refusing to quit the same, or resisting the entry of parties by law authorized to enter therein, or to publicans allowing illegal assemblies or societies on their premises, or hanging out flags or emblems therefrom, or to persons found drunk in any public place or thoroughfare.

2. This Act may be cited as "The Petty Sessions (*Ireland*) Amendment Act, 1863."

CAP. XCVIL

An Act to enable cities, towns, and boroughs of twenty-five thousand inhabitants and upwards to appoint stipendiary magistrates. [28th July, 1863.]

CAP. XCVIII.

An Act to confirm certain provisional orders made under an Act of the Fifteenth year of her present Majesty, to facilitate arrangements for the relief of turnpike trusts. [28th July, 1863.]

CAP. XCIX.

An Act to apply a sum out of the Consolidated Fund and the surplus of Ways and Means to the service of the year one thousand eight hundred and sixty-three, and to appropriate the supplies granted in this session of Parliament. [28th July, 1863.]

CAP. C.

An Act to render Owners of Dogs in *Scotland* liable in certain Cases for Injuries done by their Dogs to Sheep and Cattle. [28th July, 1863.]

CAP. CI.

An Act to appoint additional Commissioners for executing the Acts for granting a Land Tax and other Rates and Taxes. [28th July, 1863.]

CAP. CII.

An Act to reduce the duty on Rum in certain Cases. [28th July, 1863.]

18 & 19 Vict., c. 38.

Sec. 1. *Foreign and colonial rum may be methylated in customs warehouse.*

2. *Wood naphtha to be provided by inland reve-*

nue, and rum, when mixed, to be denominated methylated spirit.

3. *Provisions of 18 & 19 Vict., c. 38, and 24 & 25 Vict., c. 91, applied to spirits mixed under this Act.*

4. *Methylated spirit may be exported.*

WHEREAS by an Act passed in the eighteenth and nineteenth years of her Majesty's reign, chapter thirty-eight, spirit of wine is allowed to be methylated duty free, and it is expedient to allow foreign and colonial rum to be also methylated on payment of the reduced duty herein-after mentioned: be it enacted by the Queen's most excellent Majesty, by and with the advice and consent of the lords spiritual and temporal, and commons, in this present Parliament assembled, and by the authority of the same, as follows:

1. It shall be lawful for the commissioners of customs to permit and authorize any licensed rectifier of spirits, or any person who shall be duly licensed under the said recited Act, to make or mix methylated spirits, to mix in the customs warehouse, and under such conditions and regulations as the said commissioners shall direct, foreign or colonial rum of not less degree of strength than twenty *per cent.* over proof, and in a quantity not less at one time than the contents of the whole cask in which the same shall have been imported, with not less than one ninth of its bulk measure of wood naphtha or methylic alcohol, or with such other article or substance as in the said recited Act is mentioned, and thereupon such mixture shall be allowed, chargeable only with the reduced or differential duty herein-after mentioned, for use for such purposes and in such manner as is allowed by the said recited Act, or any Act amending the same, with regard to methylated spirit: provided that no such rum shall be so mixed as aforesaid until payment shall have been made to the said commissioners of customs of the difference between the duty of custom chargeable on the importation of such foreign and colonial rum respectively and the duty of excise chargeable on spirits distilled in the United Kingdom.

2. All wood, naphtha or methylic alcohol, or other such article or substance as aforesaid, to be mixed with such rum, shall be provided by the commissioners of inland revenue for and at the expense of the person proposing to make such mixture, and the said mixture shall be denominated methylated spirit, and shall be removed under the certificate of the proper officer of customs, to some approved store belonging to a rectifier of spirits, or to a licensed maker of methylated spirit.

3. All the powers, provisions, clauses, regulations, forfeitures, pains, and penalties contained in the said recited Act and in the Act passed in the twenty-fourth and twenty-fifth years of her Majesty's reign, chapter ninety-one, in relation to methylated spirit, shall be applied and put in force with respect to all spirits mixed under the provisions of this Act.

4. It shall be lawful to export any methylated spirit mixed under the provisions of this Act or of the said first-recited Act, under such regulations as the commissioners of customs or inland revenue shall respectively make in that behalf.

CAP. CIII.

An Act to amend the Law in certain Cases of Misappropriation by Servants of the Property of their Masters. [28th July, 1863.]

CAP. CIV.

An Act for confirming certain Provisional Orders made by the Board of Trade under The General Pier and Harbour Act, 1861, relating to *Blackpool, Deal and Walmer, Exmouth, Rosehearty, Ilfracombe, Instow, Bangor, Chatham, Bray, Dartmouth, and Nairn.* [28th July, 1863.]

Sec. 1. *Confirmation of orders in schedule.*

2. *Short title.*

‘WHEREAS a provisional order made by the board of trade under the General Pier and Harbour Act, 1861, is not of any validity or force whatever until the confirmation thereof by Act of Parliament:

‘And whereas it is expedient that the several provisional orders made by the board of trade under the said Act and set out in the schedule hereto should be confirmed by Act of Parliament:’

Be it therefore enacted by the Queen's most excellent Majesty, by and with the advice and consent of the lords spiritual and temporal, and commons, in this present Parliament assembled, and by the authority of the same, as follows:

1. The several provisional orders set out in the schedule hereto shall be and are hereby confirmed, and all the provisions thereof in manner and form as they are set out in the said schedule shall, from and after the passing of this Act, have full validity and force.

2. This Act may be cited as The Pier and Harbour Orders Confirmation Act, 1863.

The SCHEDULE of Provisional Orders.

BRAY.—Construction of a Pier.

Preamble.

1. *Incorporation of company.*
2. *The undertakers.*
3. *Companies Clauses Act incorporated.*
4. *Capital.*
5. *Calls.*
6. *Borrowing from time to time.*
7. *Receiver.*
8. *No interest or dividend on calls.*
9. *Money not to be used for deposit under standing orders, &c.*
10. *Money to be applied to purposes of order.*
11. *First general meeting.*
12. *Number of Directors.*
13. *Quorum of directors.*
14. *First directors.*
15. *Qualification of directors.*
16. *Power to take specified lands by agreement.*
17. *Lands Clauses Acts incorporated.*
18. *Land for extraordinary purposes.*
19. *Power to make works.*
20. *Description of pier and harbour.*
21. *Power to take rates according to schedule to this order.*
22. *Custom house officers exempt from rates.*
23. *Power for company to contract with persons for the use of the pier.*

24. *Further exemption from rates.*

25. *Meters and weighers.*

26. *Steam engines, diving bells, lighters, &c.*

27. *Pilotage, lights, buoys, and beacons.*

28. *Part V. of 24 & 25 Vict., c. 47. to apply.*

29. *Life boats, tide gauges, &c.*

30. *Short title.*

BRAY.

Provisional Order of the Board of Trade for the Construction, Maintenance, and Regulation of a Pier and Harbour at Bray, in the County of Wicklow.

Whereas, under The General Pier and Harbour Act, 1861, and the General Pier and Harbour Act, 1861, Amendment Act, the promoters of the Bray pier and harbour made application by a memorial to the Lords of the Committee of Her Majesty's Most Honourable Privy Council appointed for the consideration of matters relating to trade and foreign plantations, herein-after called the board of trade, setting forth that the construction of a pier, or piers, so as to form a harbour at Bray in the County of Wicklow, which could be used for the recreation of the inhabitants and visitors of that town, and for the embarking of passengers and other useful purposes, would be of great public and local advantage, and praying their lordships to approve of the project thus submitted, and to grant a provisional order for its execution, containing powers and privileges for the complete execution of the works, and for the levying of rates and tolls, not exceeding those mentioned in the Schedule hereto annexed, and also for the incorporation of a company:

And whereas the estimated expenditure on the proposed works is twenty thousand pounds and no more:

And whereas the promoters published the advertisements and deposited the documents which, by the last-mentioned Act they were required to publish and deposit:

And whereas the board of trade, after making such inquiries as they have thought expedient, have settled this present provisional order, and intend to cause a bill to be introduced into Parliament for the purpose of obtaining an Act for the confirmation of this provisional order (until which confirmation this provisional order will not be of any validity or force whatever):

Now, therefore, the board of trade do by this their provisional order, in pursuance of The General Pier and Harbour Act, 1861, and The General Pier and Harbour Act, 1861, Amendment Act, and by virtue and in exercise of the powers thereby respectively in them vested, and of every other power enabling them in this behalf, order—

That from and immediately after the passing of an Act of Parliament confirming this provisional order, the following provisions shall take effect and be in force:—

Bray Pier and Harbour Company.

1. The following persons, namely, the Honourable Francis Henry Needham, William Justin O'Driscoll, and Francis Reynolds, and all other persons and cor-

porations who have subscribed or may subscribe to the undertaking by this order authorized, and their executors, administrators, successors, and assigns respectively, shall be and are hereby united into a company for the purpose of making and maintaining the pier and harbour, and works by this order authorized, and for the other purposes of this order; and for those purposes shall be and are hereby incorporated by the name of The Bray Pier and Harbour Company; and by that name shall be one body corporate, with perpetual succession and a common seal, and with power to purchase, take hold, and dispose of lands and other property, for the purposes, but subject to the restrictions, of this order.

2. The Bray Pier and Harbour Company, hereinafter called the company, shall be the undertakers of the works authorized by this order.

3. The Companies Clauses Consolidation Act, 1845, shall be incorporated with this order.

4. The capital of the Company shall be 20,000*l.*, in 2,000 shares of 10*l.* each.

5. No call shall exceed 2*l.* per share; successive calls shall not be made at a less interval than three months.

6. The company may, from time to time, borrow on mortgage or bond, at interest, such sums of money as may be required for the purposes of the works authorized by this order; but no money shall be borrowed until the whole of the capital of 20,000*l.* is subscribed for or taken, and until one-half thereof is actually paid up, and until the company proves to the justice who is to certify under The Companies Clauses Consolidation Act, 1845, section 40, before he so certifies, that all such capital has been subscribed for bona fide, and is held by subscribers or their assigns, and that such subscribers or their assigns are legally liable for the same (of which proof having been given, the certificate of such justice under that section shall be sufficient evidence).

7. The mortgagees of the company may enforce the payment of the arrears of interest, or of the arrears of principal and interest, due on their respective mortgage, by the appointment of a receiver. The amount to authorize a requisition for a receiver shall be 500*l.*

8. The company shall not out of any money raised by calls or borrowing pay interest or dividend to any shareholder on the amount of calls made in respect of shares held by him; but this provision shall not prevent the company paying to any shareholder such interest on money advanced by him beyond the amount of the calls actually made as is in conformity with the Provisions of the Companies Clauses Consolidation Act, 1845.

9. The company shall not out of any money so raised pay or deposit any money that may be required to be paid or deposited in relation to any application to Parliament or the board of trade.

10. Every part of the money so raised shall be applied only for purposes by this order authorized.

11. The first general meeting of the company shall be held within three months after the passing of an Act of Parliament confirming this order.

12. The number of directors shall be seven, with power to the company to reduce the number, but not below five.

13. The quorum of a meeting of directors shall be three.

14. The three persons herein-before named, and such four other persons as the said three persons, or any two of them, shall nominate, shall be the first directors.

15. The qualification of a director elected by the shareholders, or nominated as aforesaid, shall be the possession in his own right of not less than twenty shares.

Lands.

16. For the purposes of the works authorized by this order, the company may from time to time, by agreement, enter on, take, or use all or any part of the lands shown on the deposited plans as intended to be taken for the purposes of the proposed works.

17. The Lands Clauses Consolidation Act, 1845, except with respect to the purchase and taking of lands otherwise than by agreement, and The Lands Clauses Consolidation Acts Amendment Act, 1860, shall be incorporated with this order.

18. The company shall not purchase for extraordinary purposes lands exceeding in extent in the whole four acres.

Works.

19. Subject to the provisions of this order, the company may, on the lands taken by them under this order, and in the lines and according to the levels and within the limits of deviation shown on the deposited plans and sections, make and maintain the works shown on the deposited plans.

20. The works by this order authorized comprise the following:—

A pier, or piers, harbour, and works, partly above and partly below low-water mark, at or near the place on the shore called and known as Bray's Point, which said pier, or piers, harbour, and works, will commence on the headland to the north of, and about 160 yards from, the bridge over the Dublin, Wicklow, and Wexford Railway, and will be extended towards the sea in a north-easterly direction, and will be wholly situate in the townland of Newcourt, or being extra-parochial, adjacent thereto, in the parish of Bray and county of Wicklow, together with all necessary and convenient quays, wharfs, jetties, landing places, works, and conveniences connected therewith respectively.

Rates.

21. The company may demand and receive in respect of the vessels, goods, persons, and things in the Schedule hereto described, any sums not exceeding the rates in that Schedule specified.

22. Officers of customs, being in the execution of their duty, shall at all times have free ingress, passage, and egress, on, into, along, through, and out of the piers and harbour, by land, and with their vessels, and otherwise, without payment.

23. The company may grant to foot passengers and promenaders or others pass or return tickets for the use of the piers and harbour, on such terms and for such period, not exceeding one year, as may be agreed on, but so that no preference be given to any particular person. Such a pass or return ticket shall not be transferable, and shall not be used by any per-

son except the person for whom it was granted, or by any person after the period limited for its use. If any person acts in any way in contravention of this provision, or uses or attempts to use any false or counterfeit ticket, he shall for every such offence be liable to a penalty not exceeding twenty shillings, to be recovered and applied as penalties are recoverable and applicable under The Harbours, Docks, and Piers Clauses Act, 1847, for all the purposes of which Act this order shall be deemed "the Special Act."

24. Persons *bonâ fide* engaged in launching any vessel for the purpose of going to the assistance of a vessel in distress, or persons landing from a vessel in distress, or a single parcel carried by any passenger landing at or embarking from the piers and harbour, shall be exempt from the payment of rates under this order.

General Provisions.

25. The company shall have the appointment of meters and weighers on and within the piers and harbour.

26. The company may provide such steam engines, steam vessels, piling engines, diving bells, ballast lighters, rubbish lighters, and other machinery and vessels, as they think necessary for effectuating any of the purposes of this order, and may demand and receive such sums for the use of the same as they think reasonable.

27. The company shall be a pilotage authority and a local authority within the meaning of The Merchant Shipping Act, 1854, with all the powers by that Act conferred on pilotage authorities and on local authorities.

28. Part V. of The Harbours and Passing Tolls, &c., Act, 1861, shall apply to the piers and harbour authorized by this order.

29. Sections 16, 17, 18, and 19, of The Harbours, Docks, and Piers Clauses Act, 1847, shall not be incorporated with this order.

30. This order may be cited as The Bray Pier and Harbour Order, 1863.

Board of Trade, Whitehall.

Dated this 13th day of April, 1863.

(Signed) T. H. FARRER,
Assistant Secretary.

SCHEDULE.

L.—RATES ON VESSELS USING THE PIER, OR ENTERING OR USING THE HARBOUR.

	s.	d.
For every vessel under the burden of 15 tons,		
per ton	0	4
For every vessel of the burden of 15 tons,		
and under 50 tons,	per ton	0 6
For every vessel of the burden of 50 tons,		
and under 100 tons,	per ton	0 8
For every vessel of the burden of 100 tons,		
and under 150 tons	per ton	0 10
For every vessel of the burden of 150 tons,		
and upwards	per ton	1 0
All lighters for any vessel in the roads shall be exempt from rates; but if the vessel do not use the pier, or enter or use the harbour or precincts thereof, every lighter shall pay for each trip	per ton	0 2

All boats entirely open, landing or taking on board goods or dried or salted fish	each	0 6
All drave or large boats using the pier, or entering or using the harbour or precincts thereof with fresh fish	each	0 4
For every vessel remaining in the harbour or precincts thereof, more than one calendar month, for every ton register measurement		0 1
And every fraction of a calendar month over and above one calendar month shall be considered as one calendar month.		

II. RATES ON GOODS SHIPPED OR UNSHIPPED AT THE PIER OR HARBOUR.

		s.	d.
Ale	per hoghead	0	6
Ale (bottled)	per barrel bulk	0	3
Anchor	per cwt.	0	9
Anchor stock	per foot run	0	2
Bark	per ton	1	0
Bedding (seamen's)		0	3
Beef or pork	per ton	1	4
Beef or pork	per barrel	0	2
Blubber	per ton of 250 gallons	1	0
Bone dust	per ton	0	8
Bones of cattle	per ton	0	6
Bottles	per gross	0	2
Bricks	per 1,000	0	8
Butter	per barrel	0	4
Casks (empty), not being returned packages	per puncheon	0	3

Other casks in proportion.

Cattle:			
Bulls	each	0	3
Cows and oxen	each	0	2
Calves	each	0	0½
Horses	each	0	2
Pigs	each	0	0½
Sheep	per score	0	6
Lambs	per score	0	3
Chalk	per ton	0	8
Cheese	per cwt.	0	4
Chimney cans	per 100	1	4
Clay (fire manufactured)	per ton	0	6
Clay (common)	per ton	0	2
Cloth, haberdashery, &c.	per barrel bulk	0	2
Coaches:			
Chaises and other four-wheeled carriages	each	0	8
Gigs, carts, and other two-wheeled carriages	each	0	6
Coals (Scotch, English, smithy, and culm)	per ton	0	4
Copper	per ton	1	4
Corks	per barrel bulk	0	2
Corn:			
Wheat and malt	per quarter	0	3
Barley, beans, peas, tares, oats, rye, buckwheat, and Indian corn, per quarter		0	2
Crystal	per barrel bulk	0	2
Dissolved bones and other artificial manures	per ton	0	8
Dogs (sporting only)	each	0	2
Drugs	per barrel bulk	0	3
Earthenware	per crate	0	8
Eggs	per barrel bulk	0	2

ish (dried and salted)	per ton	1	4	All above 4 barrels bulk	per barrel bulk	0	3
Haddocks, cod, salmon, and all fresh				Peats	per ton	0	3
fish not enumerated	per barrel bulk	0	2	Pitch	per barrel	0	3
lax	per ton	1	4	Porter	per hogshead	0	4
lour	per sack	0	2	Porter (bottled)	per barrel bulk	0	2
lour	per barrel	0	1½	Potatoes	per ton	0	6
ruit	per bushel or sieve	0	2	Poultry, including pigeons, game, &c.	per dozen	0	1
lass	per barrel bulk	0	3	Any less quantity		0	0½
roceries, viz.:				Rags (linen)	per ton	1	4
Almonds, figs, cinnamon, currants, pep-				Other rags, old rope, and the like	per ton	0	10
per, pimento, plums, prunes, raisins,				Rape cakes	per ton	0	8
and the like	per barrel bulk	0	3	Salt	per ton	0	10
eano	per ton	0	8	Seeds:			
onpowder	per barrel	0	3	Flax and rape	per hogshead	0	6
ams, bacon, or tongues	per cwt.	0	3	Flax	per barrel	0	3
ardware	per barrel bulk	0	3	Flax, in bulk	per quarter	0	2
ares and rabbits	per dozen	0	2	Clover	per ton	1	4
Any less quantity		0	1	Garden	per ton	1	4
ay	per ton	0	8	Hemp and canary	per ton	1	4
lemp	per ton	1	4	Rye grass	per 8 bushel	0	2
errings (fresh)	per cran	0	1	Shrimp baskets	each	0	2
errings (cured)	per barrel	0	3	Skin, seal	per 120	0	8
ides:				Slates, under size	per 1,000	0	6
Ox, cow, or horse (salted or dried)	per ton	1	4	Sizeable	per 1,000	0	10
Calf skins	per 120	0	10	Over size	per 1,000	1	4
Sheep skins	per 120	0	10	Spirits (Foreign and British)	per hogshead of 56 gallons	0	8
Lamb skins	per 120	0	5	Stones:			
Hoops of wood	per 1,500	1	0	Rubble	per ton of 16 cubic feet	0	2
Household furniture (new)	per barrel bulk	0	1	Hewn ashlar freestone	per ton of 16 cubic feet	0	4
Household furniture (belonging to parties				Rough ashlar freestone	per ton of 16 cubic feet	0	3
changing their residences only)	per 10 barrels bulk	0	6	Pavement not exceeding 3 inches thick	per 70 feet	0	4
Hasbandry utensils	per ton	1	4	Pavement above 3 inches thick	per 16 cubic feet	0	4
Hasbandry utensils	per barrel bulk	0	2	Scythe stones	per score	0	1
ron:				Mill stones	each	0	8
Bar, bolt, and rod	per ton	1	4	Steel	per ton	1	4
Pig and old	per ton	0	8	Sugar	per ton	1	4
Manufactured, cast, and wrought	per cwt.	0	2	Tallow	per ton	1	4
Chain cables	per ton	1	4	Tar	per barrel	0	2
elp	per ton	0	8	Tea	per chest	0	3
ead (all kinds)	per ton	1	4	Tiles (roofing)	per 1,000	0	9
eather (tanned and dressed)	per ton	1	4	Tiles or piping for draining	per 1,000	0	8
ime	per chaldron of 16 bolls	1	4	Tin of all kinds	per ton	1	4
imestone	per ton	0	3	Tobacco	per ton	2	6
eam or moulding sand	per ton	0	3	Treenails, under two feet in length	per 1,000	0	6
achinery	per ton	1	4	Treenails, exceeding two feet in length	per 1,000	1	0
achinery	per barrel bulk	0	3	Turnips	per ton	0	6
anure (street)	per ton	0	2	Turpentine	per hogshead	0	8
asts and spars, 10 inches in diameter and				Vegetables	per cartload	0	2
upwards	each	4	6	Vinegar	per hogshead	0	6
Under 10 inches	each	3	0	Vitriol	per carboy	0	2
cal	per bag of 280 lbs.	0	2	Whalebone	per ton	2	6
eat (fresh)	per ton	1	4	Wine	per hogshead	0	8
eat (fresh)	per barrel	0	2	Wine (bottled)	per barrel bulk	0	4
lik	per 3 large pitchers	0	0½	Wood:			
fiscal instruments	per barrel bulk	0	3	Fir, pine, and other descriptions not			
ils	per ton	1	0	enumerated	per load of 50 feet	0	10
ires:				Oak or wainscot	per load of 50 feet	1	0
Copper, iron, lead, and other ores	per ton	0	8				
ysters	per bushel	0	3				
assengers luggage, not exceeding 4 barrels							
bulk	free.						

Firewood	per fathom	0	6
Laths and lathwood			
per fathom of 216 cubic feet	2	6	
Handspokes	per 120	0	10
Oars	per 120	2	6
Spars, under 22 feet in length, above 2½ and under 4 inches in diameter	per 120	2	6
Spars, 2½ inches in diameter and under	per 120	1	4
Spars, 22 feet in length and upwards, and not exceeding 4 inches in diameter	per 120	6	6
Spars of all lengths, above 4 and under 6 inches in diameter	per 120	12	0
Spokes of wheels not exceeding two feet in length	per 120	0	4
Exceeding two feet in length	per 120	0	6
Wedges	per 1,000	1	0
Pipe staves, and others in proportion			
per standard hundred	1	0	
Lignum vitæ, fustic, logwood, mahogany, and rosewood	per ton	1	4
Wool	per cwt.	0	2
Yarn	per ton	1	4
Zinc	per ton	1	4
<i>All other Goods not particularly enumerated in the above Table.</i>			

	<i>s.</i>	<i>d.</i>
Light goods	per barrel bulk	0 2
Heavy goods	per ton	1 4

In charging the rates on goods, the gross weight or measurement of all goods to be taken, and for any less weights, measures, and quantities than those above specified, a proportion of the respective rates shall be charged.

Five cubic feet, not exceeding 2½ cwt., to be rated as a barrel bulk; but when the weight of 5 cubic feet is greater than 2½ cwt., then 2½ cwt. to be rated as a barrel bulk.

III.—RATES FOR USE OF CRANES, WEIGHING MACHINES, AND SHEDS.

1st. Rates of Craneage.

	<i>s.</i>	<i>d.</i>
All goods or packages not exceeding 1 ton	0	3
Exceeding 1 ton and not exceeding 2 tons	0	4
Exceeding 2 tons and not exceeding 3 tons	0	6
Exceeding 3 tons and not exceeding 4 tons	0	8
Exceeding 4 tons and not exceeding 5 tons	0	10
Exceeding 5 tons and not exceeding 6 tons	1	0
Exceeding 6 tons and not exceeding 7 tons	1	2
Exceeding 7 tons and not exceeding 8 tons	1	4
Exceeding 8 tons and not exceeding 9 tons	1	8
Exceeding 9 tons and not exceeding 10 tons	2	0
Exceeding 10 tons	3	0

2nd. Weighing Machines.

For goods weighed, for each ton or part of a ton 0 1

3rd. Shed Dues.

For each ton of goods of 8 barrels bulk, or for each ton of goods of 20 cwt., which shall remain in the sheds or works of the pier,

for a longer period than 48 hours, the sum of 3d.; and the sum of 1½d. per ton for each day during which such goods shall remain after the first 48 hours.

For any portmanteau, trunk, parcel, or other article of passengers luggage, for each day or part of a day, per package 0 2

IV.—RATES ON PASSENGERS LANDING ON OR EMBARKING FROM THE PIER OR HARBOUR.

For every passenger or other person who £ s. d. shall land from, or embark on board of, any ship, vessel, packet, or passage boat, not being boats or vessels used for pleasure only, for each and every time, any sum not exceeding 0 0 2

For every person who shall land from, or embark on board of, any boat or vessel used for pleasure only, for each and every time, any sum not exceeding 0 0 6

For every person who shall use the said pier or harbour for the purpose of walking for exercise, pleasure, or any other purpose, except for embarking or disembarking, for each and every time, any sum not exceeding 0 0 2

For every master of any vessel, boat or wherry, being an inhabitant of the town of Bray or parish of Bray, and using the said pier, harbour, or works, for the purpose of going to or returning from his own vessel, boat, or wherry, an annual sum not exceeding 1 0 0

CAP. CV.

An Act to remove certain restrictions on the negotiation of promissory notes and bills of exchange under a limited sum. [28th July, 1863.]

CAP. CVI.

An Act to further amend the law relating to the conveyance of land for charitable uses. [28th July, 1863.]

CAP. CVII.

An Act to indemnify such persons in the United Kingdom as have omitted to qualify themselves for offices and employments, and to extend the time limited for those purposes respectively. [28th July, 1863.]

CAP. CVIII.

An Act to extend and make compulsory the practice of vaccination in Scotland. [28th July, 1863.]

CAP. CIX.

An Act for remedying certain defects in the law relating to the removal of prisoners in Scotland. [28th July, 1863.]

CAP. CX.

An Act to amend the Lunacy Acts in relation to the building of asylums for pauper lunatics. [28th July, 1863.]

CAP. CXI.

An Act to amend the Naval Medical Supplemental Fund Society Winding-up Act, 1861.

[28th July, 1863.]

CAP. CXII.

An Act to regulate the exercise of powers under Special Acts for the construction and maintenance of telegraphs.

[28th July, 1863.]

Sec. 1. *Short title.*

2. *Application of this Act to all future telegraph companies, and also, subject to certain exceptions, to all existing telegraph companies.*
3. *Interpretation of terms.*
4. *Recovery of damages, costs, expenses, and penalties.*
5. *Provisions as to notices and consents.*
6. *General description of works which a telegraph company may execute, subject to the restrictions of this Act.*
7. *Provision as to compensation.*
8. *Provision as to gas and water pipes.*
9. *Not to place telegraphs under streets in metropolis and large towns without consent.*
10. *Depth, course, &c. of underground works to be agreed on between street or road authority and company, or else to be determined by justices or sheriff.*
11. *Underground tubes to have distinguishing mark.*
12. *Company not to place a telegraph along a street or road without consent of body having control of street, &c. As to where a public road passes through parks, pleasure-grounds, &c.*
13. *Where land-owner, &c. is liable to repair of streets, &c. company not to place works in such street, &c. without consent. Proviso.*
14. *In case of abandonment of works, &c. street or road authority or owner of land may remove them.*
15. *In event of alteration of street or road, company to remove and replace the works under or over the same.*
16. *Removal of dangerous posts placed before passing of this Act.*
17. *Streets and public roads to be opened only after notice and under superintendence.*
18. *Streets and public roads to be restored and kept in repair for six months. Penalty.*
19. *Power to street or road authorities to execute works and charge the expenses to the company.*
20. *Restrictions on impediments to traffic.*
21. *As to works affecting Crown property.*
22. *Company not to place telegraphs above ground, and posts, within certain distance of dwelling-houses, without consent of occupier, &c.*
23. *Notices to be published, and left at dwelling-houses, of intended telegraph along street or public road, after consent of street or road authority obtained.*
24. *Power to owner or occupier of adjoining land or building to object.*

25. *Until objection settled works to be stayed.*
26. *Examination and inquiry to be made by Board of Trade.*
27. *Powers of Board of Trade respecting the objection.*
28. *Decision of Board of Trade final.*
29. *Costs.*
30. *For building or other purposes owner, &c. may require removal of works.*
31. *Removal of injurious works constructed before this Act.*
32. *For works affecting railways, canals, &c. consent of directors, &c. requisite.*
33. *Access from future docks to canal.*
34. *Board of Trade may in any case appoint arbitrator.*
35. *For works on seashore, consent of proprietors of shore and conservancy or other authorities requisite.*
36. *Plan of such works to be subject to approval of Board of Trade.*
37. *Lights and signals for such works.*
38. *Power of Board of Trade as to such works if disused, &c.*
39. *Local survey of such works by Board of Trade.*
40. *Recovery of expenses by Board of Trade in such cases.*
41. *Telegraph to be open for all messages without preference, subject to leases.*
42. *Company to be responsible for all damages.*
43. *Sale, &c. of undertaking and leases of wires (with exceptions) prohibited, except with consent of Board of Trade.*
44. *Registered office of company for service of documents.*
45. *Punishment of officers of company for misconduct respecting messages.*
46. *Saving for effect of future general Acts.*
47. *Certain enactments in special Acts not affected by this Act.*
48. *Messages on her Majesty's service to have priority.*
49. *On request of Board of Trade company to place telegraph.*
50. *On refusal or neglect of company, power to Board of Trade to place such telegraph.*
51. *Remuneration of company for placing such telegraph.*
52. *In emergencies telegraph may be taken possession of for her Majesty's service.*
53. *Power to proceed against company given to law officers of Crown on certificate of Board of Trade.*

‘Be it enacted by the Queen’s most excellent majesty, by and with the advice and consent of the lords spiritual and temporal, and commons, in this present Parliament assembled, and by the authority of the same, as follows:

Preliminary.

1. This Act may be cited as The Telegraph Act, 1863.
2. This Act shall apply—

(1.) To every company to be hereafter authorized by Special Act of Parliament to construct and maintain telegraphs:

(2.) To every company so authorized before the passing of this Act by any such Special Act, notwithstanding anything in any such Special Act contained,—but so that, except as hereinafter expressly provided, nothing in this Act shall give to any owner, lessee, or occupier of land, or other person, or to any body, as against any such company as last aforesaid, in respect of anything lawfully done before the passing of this Act by such company under any such Special Act, any further or other right, power, jurisdiction, authority, or remedy than he or they would have had if this Act had not been passed: Provided also, that nothing in this Act shall interfere with the maintenance or repair, under any such Special Act, of any work lawfully constructed before the passing of this Act by any such company under any such Special Act, or with the increasing of the number of the wires forming part of any such work; and that nothing in this Act shall relieve any such company from any obligation or liability under any agreement made before the passing of this Act, or shall make lawful any work constructed by the company before the passing of this Act which is the subject of any proceedings at law or in equity pending at the passing of this Act, or which has been constructed without such consent as was required for the construction thereof before the passing of this Act.

3. In this Act—

The term “the company” means any company to be hereafter authorized as aforesaid (hereinafter distinguished by the term “future company”), or any company already so authorized (hereinafter distinguished by the term “existing company”):

The term “telegraph” means a wire or wires used for the purpose of telegraphic communication, with any casing, coating, tube, or pipe inclosing the same, and any apparatus connected therewith for the purpose of telegraphic communication:

The term “post” means a post pole, standard, stay, strut, or other above-ground contrivance for carrying, suspending, or supporting a telegraph:

The term “work” includes telegraphs and posts:

The term “street” means a public way situate within a city, town, or village, or between lands continuously built upon on either side, and repaired at the public expense, or at the expense of any turnpike or other public trust, or *ratione tenuræ*, including the footpaths of such way, and any bridge forming part thereof:

The term “public road” means a public highway for carriages being repaired at the public expense, or at the expense of any turnpike or other public trust, *ratione tenuræ*, and not being a

street, including the footpaths of such public highway, and any bridge forming part thereof, and also any land by the side and forming part of such a public highway, but not including a railway or canal:

The term “railway” includes any station, work, or building connected with a railway:

The term “canal” includes navigation or navigable river, and any dock, basin, towing-path, wharf, work, or building, connected with a canal:

The term “land” means land not being a street or public road, and not being land by the side and forming part of a public road, and includes land laid out for and proposed by the owner to be converted into a street or public road:

The term “body” includes a body of trustees or commissioners, municipal corporation, grand jury, board, vestry, company, or society, whether incorporated or not; and any provision referring to a body applies to a person, as the case may require:

The term “person” includes corporation aggregate or sole:

The term “the Board of Trade” means the Lords of the Committee of her Majesty’s Privy Council for the time being appointed for the consideration of matters relating to trade and foreign plantations:

The term “justice” means justice of the peace acting for the place where the matter requiring the cognizance of any such justice arises:

The term “two justices” means two or more justices met and acting together, or any one police magistrate or justice having by law authority to act alone for any purpose with the powers of two justices:

The term “sheriff” means the sheriff depute of the county or ward of a county in *Scotland*, and the steward depute of the *stewartry* in *Scotland*, in which the matter submitted to the cognizance of the sheriff arises, and includes the substitutes of such sheriff depute and steward depute respectively:

4. The provisions of The Railways Clauses Consolidation Act, 1845, with respect to the recovery of damages not specially provided for, and of penalties, and to the determination of any other matter referred to justices, and the provisions of The Railways Clauses Consolidation (*Scotland*) Act, 1845, with respect to the recovery of damages not specially provided for, and to the determination of any other matter referred to the sheriff or to justices shall, so far as the same are applicable, and save so far as the same are inconsistent with any express provision of this Act, be incorporated with this Act; and terms used in those provisions shall be interpreted as the same terms are directed to be interpreted in this Act.

5. The following provisions shall apply to notices and consents under this Act:

(1.) Every notice or consent shall be in writing or print, or partly in writing and partly in print:

(2.) Any notice to or by the company or a body having the control of a street or public road, or of the sewerage or drainage thereunder,

may be given to or by the secretary, clerk, or surveyor, or other like officer (if any) of the company or of such body, as the case may be:

- (3.) Any consent may be given on such pecuniary or other terms or conditions (being in themselves lawful) or subject to such stipulations as to the time or mode of execution of any work, or as to the removal or alteration, in any event, of any work, or as to any other thing connected with or relative to any work, as the person or body giving consent thinks fit.

General Powers of Company.

6. Subject to the restrictions and provisions herein-after contained, the company may execute works as follows:

- (1.) They may place and maintain a telegraph under any street or public road, and may alter or remove the same:
- (2.) They may place and maintain a telegraph over, along, or across any street or public road, and place and maintain posts in or upon any street or public road, and may alter or remove the same:
- (3.) They may, for the purposes aforesaid, open or break up any street or public road, and alter the position thereunder of any pipe (not being a main) for the supply of water or gas:
- (4.) They may place and maintain a telegraph and posts under, in, upon, over, along, or across any land or building, or any railway or canal, or any estuary or branch of the sea, or the shore or bed of any tidal water, and may alter or remove the same:

Provided always, that the company shall not be deemed to acquire any right other than that of user only in the soil of any street or public road under, in, upon, over, along, or across which they place any work.

7. In the exercise of the powers given by the last foregoing section the company shall do as little damage as may be, and shall make full compensation to all bodies and persons interested for all damage sustained by them by reason or in consequence of the exercise of such powers, the amount and application of such compensation to be determined in manner provided by The Lands Clauses Consolidation Act, 1845, and The Lands Clauses Consolidation (Scotland) Act, 1845, respectively, and any Act amending those Acts, for the determination of the amount and application of compensation for lands taken or injuriously affected.

8. In the exercise of the aforesaid powers the company shall also be subject to the following restrictions:—

- (1.) They shall cause as little detriment or inconvenience as circumstances admit to the body or person to or by whom any pipe for the supply of water or gas belongs or is used:
- (2.) Before they alter the position of any such pipe they shall give to the body to whom the same belongs notice of their intention

to do so, specifying the time at which they will begin to do so, such notice to be given twenty-four hours at least before the commencement of the work for effecting such alteration:

- (3.) The company shall not execute such work except under the superintendence of the body to whom such pipe belongs, unless such body refuses or neglects to give such superintendence at the time specified in the notice for the commencement of the work, or discontinues the same during the work; and the company shall execute such work to the reasonable satisfaction of such body:
- (4.) The company shall pay all reasonable expenses to which such body may be put on account of such superintendence:

And the body to whom any such pipe belongs may, when and as occasion requires, alter the position of any work of the company already constructed, or to be hereafter constructed, under, in, or upon a street or public road, on the same conditions as are by the last foregoing and present sections imposed on the company in relation to such a body, *mutatis mutandis*.

Restrictions as to Telegraphs under Streets and Public Roads.

9. The company shall not place a telegraph under any street within the limits of the district over which the authority of the Metropolitan Board of Works extends, or of any city or municipal borough or town corporate, or of any town having a population of thirty thousand inhabitants or upwards (according to the latest census), except with the consent of the bodies having the control of the streets within such respective limits.

10. Where the company has obtained consent to the placing, or by virtue of the powers of the company under this Act intends to proceed with the placing, of a telegraph under a street or public road, the depth, course, and position at and in which the same is to be placed shall be settled between the company and the following bodies:

The body having the control of the street or public road:

The body having the control of the sewerage or drainage thereunder:

But if such settlement is not come to with any such body, the following provisions shall take effect:

- (1.) The company may give to such body a notice specifying the depth, course, and position which the company desires:
- (2.) If the body to whom such notice is given does not, within twenty-eight days after the giving of such notice, give to the company a counter-notice objecting to the proposal of the company, and specifying the depth, course, and position which such body desires, they shall be deemed to have agreed to the proposal of the company:
- (3.) In the event of ultimate difference between the company and such body, the depth, course, and position shall be determined in

England or Ireland by two justices, and in *Scotland* by two justices or the sheriff.

11. Every underground tube or pipe of the company shall be so marked as to distinguish it from tubes or pipes of every other company.

12. The company shall not place a telegraph over, along, or across a street or public road, or a post in or upon a street or public road, except with the consent of the body having the control of such street or public road; and where a public road passes through or by the side of any park or pleasure grounds, and where a public road crosses, by means of a bridge or viaduct, or abuts on any ornamental water belonging to any park or pleasure grounds, and where a public road crosses or abuts on a private drive through any park or pleasure grounds, or to any mansion, the company shall not without or otherwise than in accordance with the consent of the owner, lessee, and occupier of such park, pleasure grounds, or mansion, place any work above ground on such public road.

13. Where any landowner or other person is liable for the repair of any street or public road (notwithstanding that the same is dedicated to the public), the company shall not place any work under, in, upon, over, along, or across such street or public road, except with the consent of such landowner or other person, in addition to the consent of the body having the control of such street or public road, where under this Act such last mentioned consent is required: Provided that where the company places a telegraph across or over any street or public road they shall not place it so low as to stop, hinder, or interfere with the passage for any purpose whatsoever along the street or public road.

Removal of Works affecting Streets and public Roads.

14. In the following cases—

- (1.) If any part of the company's works is abandoned, or suffered to fall into decay;
- (2.) If the company is dissolved, or ceases for six months to carry on business,

the body having the control of any street or public road, or the owner of any land or building affected (in the former case) by such part of the company's works as aforesaid, or (in the latter case) by any of the company's works, may give notice to the company, or leave a notice at the last known office or place of business of the company, to the effect that if such works as are specified in the notice are not removed within one month after the notice given or left, the same will be removed by the body having such control, or by such owner; and in every such case, unless such works are removed accordingly, the body having such control or such owner may, without prejudice to any remedy against the company, remove such works or any part thereof, and sell the materials thereof or of any part thereof, and out of the proceeds of such sale reimburse themselves their expenses relative to such notice, removal, and sale, and consequent thereon (rendering the overplus, if any, to the company), and may recover any unpaid residue of such expenses from the company. The present section shall apply to an existing company in respect of any work already constructed, or to be hereafter constructed, as well as to a future company.

15. In case the body having the control of any

street or public road at any time hereafter resolves to alter the line or level of any portion of such street or road under, in, upon, over, along, or across which any work of the company constructed either before or after the passing of this Act is placed, the company shall from time to time be bound on receiving one month's notice of such intended alteration, and at their own expense, to remove such work, and to replace the same in such position and manner in all respects as may be required by such body, or in the event of difference between such body and the company, in such position and manner in all respects as may be determined in *England or Ireland* by two justices, and in *Scotland* by two justices or the sheriff.

16. Where the company has, before the passing of this Act, placed posts in or upon a street or public road, and the body having the control of the street or road considers the position of any such post to be dangerous or inconvenient, the following provisions shall take effect:—

- (1.) Such body may give to the company a notice requiring them to remove or alter the position of such post, and specifying the grounds of such requisition:
- (2.) The company either shall, within fourteen days after receipt of such notice, remove or alter the position of the post in accordance with the notice; or else, if they do not intend to remove or alter the position of the post in accordance with the notice, shall, within one week after receipt of the notice, deliver to such body a counter-notice specifying their objection to such removal or alteration:
- (3.) Such body may send copies of the notice and counter notice to the Board of Trade;
- (4.) As soon as may be after receipt of such copies the Board of Trade shall (unless the difference between the body giving the notice and the company is arranged) make inquiry and examination, and hear and determine the matter of the notice and counter-notice:
- (5.) On hearing any such matter the Board of Trade may direct that the company shall comply with the notice, wholly or in part, or subject to any such modifications as the Board of Trade prescribes, or on condition that the body giving the notice shall afford to the company all reasonable and proper facilities in their power for substituting some other work for that to which the notice relates, or on any such other condition as to the Board of Trade seems, according to the circumstances of the case, just and expedient, and the expenses incurred in or about such removal or alteration shall be borne and paid by the company or by the body giving the notice, or partly by each and partly by the other, as to the Board of Trade seems, according to the circumstances of the case, just and expedient, the amount of such expenses to be determined in case of difference by the Board of Trade.

Restrictions as to the opening of streets and Public Roads.

17. Subject to any special stipulations made with a company by the body having the control of a street or public road, and to any determinations, orders, or directions of the justices, or sheriff as aforesaid, where the company proceeds to open or break up a street or public road, the following provisions shall take effect:—

- (1.) The company shall give to the bodies between whom respectively and the company the depth, course, and position of a telegraph under such street or public road are herein-before required to be settled or determined, notice of their intention to open or break up such street or public road, specifying the time at which they will begin to do so,—such notice to be given, in the case of an underground work, ten days at least, and in the case of an aboveground work five days at least, before the commencement of the work; except in case of emergency, in which case notice of the work proposed shall be given as soon as may be after the commencement thereof:
- (2.) The company shall not (save in case of emergency) open or break up any street or public road, except under the superintendence of the bodies to whom respectively notice is by the present section required to be given, unless such bodies respectively refuse or neglect to give such superintendence at the time specified in the notice for the commencement of the work, or discontinue the same during the work:
- (3.) The company shall pay all reasonable expenses to which such bodies respectively may be put on account of such superintendence.

18. Subject to any such special stipulations as aforesaid, after the company has opened or broken up a street or public road they shall be under the following further obligations:—

- (1.) They shall, with all convenient speed, complete the work on account of which they opened or broke up the same, and fill in the ground, and make good the surface, and generally restore the street or public road to as good a condition as that in which it was before being opened or broken up, and carry away all rubbish occasioned thereby:
- (2.) They shall in the meantime cause the place where the street or public road is opened or broken up to be fenced and watched, and to be properly lighted at night:
- (3.) They shall pay all reasonable expenses of keeping the street or public road in good repair for six months after the same is restored, so far as such expenses may be increased by such opening or breaking up:

If the company fails to comply in any respect with the provisions of the present section, they shall for every such offence (without prejudice to the right of any person to enforce specific performance of the re-

quirements of this Act, or to any other remedy against them,) be liable to a penalty not exceeding twenty pounds, and to a further penalty not exceeding five pounds for each day during which any such failure continues after the first day when such penalty was adjudged; and any such penalty shall (notwithstanding anything herein-before, or in any Act relating to municipal corporations, or to the metropolitan police force, or in any other Act contained) go and belong to the body having the control of the street or public road, and shall form part of the funds applicable by them to the maintenance of the street or public road.

19. Whenever the permanent surface or soil of any street or public road is broken up or opened by the company, it shall be lawful for the body having the control of the street or road, in case they think it expedient so to do, to fill in the ground, and to make good the pavement or surface or soil so broken up or opened, and to carry away the rubbish occasioned thereby, instead of permitting such work to be done by the company; and the costs and expenses of filling in such ground, and of making good the pavement or soil so broken up or opened, shall be repaid on demand to the body having the control of the street or road by the company, and in default thereof may be recovered by the body having the control of the street or road from the company as a penalty is or may be recoverable from the company.

20. The company shall not stop or impede traffic in any street or public road, or into or out of any street or public road, further than is necessary for the proper execution of their works. They shall not close against traffic more than one third in width of any street or public road, or of any way opening into any street or public road, at one time; and in case two-thirds of such street or road are not wide enough to allow two carriages to pass each other, they shall not occupy with their works at one time more than fifty yards in length of the one-third thereof, except with the special consent of the body having the control thereof.

Restrictions as to Works affecting private or Crown Property.

21. The company shall not place any work by the side of any land or building, so as to stop, hinder, or interfere with ingress or egress for any purpose to or from the same, or place any work under, in, upon, over, along, or across any land or building, except with the previous consent in every case of the owner, lessee, and occupier, of such land or building, which consent, in case of any land or building belonging to or enjoyed by the Queen's most excellent Majesty in right of her Crown, may be given by the commissioners for the time being of her Majesty's woods, forests, and land revenues, or one of them on behalf of her Majesty; provided always, that with respect to lands and buildings situate within the limits of the district over which the authority of the metropolitan board of works extends (herein-after referred to as the metropolis), or within the limits of any city or municipal borough or town corporate, or any town having a population of thirty thousand inhabitants or upwards, according to the latest census (herein-after referred to as a city or large town), if the body hav-

ing the control of any street in the metropolis or a city or large town, consents to the placing of works by the company in, upon, over, along, or across that street, then and in every such case that consent shall (unless it is otherwise provided by the terms thereof), be sufficient authority for the company, without any further consent, except as to any land or building belonging to or enjoyed by her Majesty in right of her Crown, to place and maintain a telegraph over, along, or across any building adjoining to or near the street, and situate within the limits of the district over which the powers of the consenting body extend, or over, along, or across any land, not being laid out as building land, or not being a garden or pleasure ground, adjoining to or near the street and situate within the same limits, subject nevertheless to the following provisions:—

- (1.) Twenty-one days at least before the company proceeds to place a telegraph by virtue of the authority so conferred, they shall publish a notice stating they have obtained the consent of such body as aforesaid, and describing the intended course of such telegraph:
- (2.) Where the company by virtue of the authority so conferred places a telegraph directly over any dwelling house, they shall not place it at a less height above the roof thereof than six feet, if the owner, lessee, or occupier thereof objects to their placing it at a less height:
- (3.) If at any time the owner, lessee, or occupier of any building or land adjoining to a building, directly over which building or land the company by virtue of the authority so conferred places a telegraph, desires to raise the building to a greater height, or to extend it over such land, the company shall increase the height or otherwise alter the position of the telegraph, so that the same may not interfere with the raising or extension of the building, within fourteen days after receiving from the owner, lessee, or occupier a notice of his intention to raise or extend the building, or in case of difference between the company and the owner, lessee, or occupier as to his intention, then within fourteen days after receiving a certificate, signed by a justice of the peace, certifying that he is satisfied of the intention of the owner, lessee, or occupier to raise or extend the building:
- (4.) The company shall make full compensation to the owner, lessee, and occupier of any land or building over, along, or across which the company by virtue of the authority so conferred places a telegraph, and which may be shown to be in any respect prejudicially affected thereby, the amount of such compensation to be determined in manner provided by the said Lands Clauses Consolidation Acts respectively and any Acts amending those Acts for the determination of the amount of compensation with respect to lands injuriously affected:

Provided also, that the consent of any person occupying as a tenant from year to year only shall not be required, nor shall any person so occupying be entitled to such compensation as aforesaid.

22. Subject and without prejudice to the foregoing provisions, the company shall not place a telegraph above ground, or a post, within ten yards of a dwelling house, or place a telegraph above ground, across an avenue or approach to a dwelling house, except subject and according to the following restrictions and provisions:—

- (1.) They shall in each such case obtain the consent of the occupier (if any) of such dwelling house, and if there is no occupier, then of the lessee entitled to possession, and if there is none, then of the owner:
- (2.) The consent of an occupier shall be effective only during the continuance of his occupation:
- (3.) On the termination of the occupation of any occupier the lessee or owner entitled to possession, if he did not consent to the placing of the telegraph or post, may give notice to the company that he requires it to be removed:
- (4.) The company shall remove the same accordingly within one month after receiving such notice:
- (5.) If any question arises between a lessee or owner and the company as to such removal, or the time or mode thereof, the same shall be referred to the determination in *England or Ireland* of two justices, and in *Scotland* of two justices or the sheriff, which justices or sheriff may give such directions as to such removal, and the time and mode thereof, as may seem reasonable, and may impose on the company for not carrying such directions into effect such penalty not exceeding five pounds a day as may seem just.

23. Before the company proceeds to place a telegraph over, along, or across a street (not being a street in the metropolis or in a city or large town), or a public road, or to place posts in or upon a street (not being such a street as aforesaid) or a public road, they shall publish a notice stating that they have obtained the consent in that behalf of the body having the control of the street or public road, and describing the intended course of the telegraph,—

- (1.) By affixing such notice on some conspicuous places by the side of the part of the street or road affected, at distances of not more than one mile apart:
- (2.) By leaving such notice at every dwelling house fronting on the part of the street or road affected, and being within fifty feet thereof:
- (3.) By inserting such notice as an advertisement once at least in each of two successive weeks in some one and the same local newspaper circulating in the neighbourhood of the part of the street or road affected:

And they shall not so place any such telegraph or

post until the expiration of twenty-one days from the last publication of such advertisement.

24. At any time during such twenty-one days, the owner, lessee, or occupier of any land or building adjoining to either side of such street or road may give to the company notice of his objection to their intended works as prejudicially affecting such land or building, and send to the board of trade a copy of his notice of objection.

25. Until such objection is settled, or is determined in manner herein-after provided, the company shall not execute that part of their intended works to which the objection relates.

26. As soon as may be after the receipt of such copy of notice of objection, the board of trade shall (unless the difference between the company and the person objecting is arranged) make inquiry and examination, and hear and determine the matter of the objection.

27. On hearing any such objection the board of trade—

- (1.) may allow the objection, wholly or in part; or
- (2.) may authorise the company to proceed with their works, subject to the provisions of this Act, according to their published notice, paying to the owner, lessee, or occupier objecting full compensation (the amount thereof to be determined, in case of difference, by the board of trade) for any damage done to him; or
- (3.) may authorise the company so to proceed subject to any such conditions as to the time or mode of execution of any work, or as to the removal or alteration in any event of any work, or as to any other thing connected with or relative to any work, as the board of trade thinks fit; or
- (4.) may authorize the company to so proceed subject to any such modification of any intended work as the board of trade prescribes; but so that in that case such notice and opportunity of objecting and being heard as the board of trade directs shall be given to any owner, lessee, or occupier whom such modification may affect.

28. The determination of the board of trade on the matter of any such objection shall be final and conclusive.

29. The board of trade may allow to any owner, lessee, or occupier so objecting such costs as seem just, to be paid by the company.

Removal or Alteration of Works affecting Land or Buildings.

30. Where at any time before or after the passing of this Act the company has constructed any work under, in, upon, over, along, or across any land or building, or any street or public road adjoining to or near any land or building, and any owner, lessee, or occupier of such land or building, or any lord of a manor, or other person having any interest in such land or building, desires to build upon or inclose such land, or in any manner to improve or alter such land or building, or to use such land or building in some manner in which it was not actually used at the time

of the construction of such work by the company, and with which the continuance of such work would interfere, then and in every such case the following provisions shall take effect:

- (1.) Such owner, lessee, occupier, lord of a manor, or other person interested may give to the company a notice specifying the nature of such intended building) inclosure, improvement, alteration, or other use of the land or building, including ingress or egress thereto or therefrom, and requiring the company to remove or alter their work so that the same may not interfere therewith:
- (2.) Within fourteen days after the receipt of such notice, or in case of difference between the company and the person giving the same as to his intention, then within fourteen days after the receipt of a certificate, signed by a justice of the peace, certifying that he is satisfied of the intention of such person to make such building, inclosure, improvement, alteration, or other use of the land or building, and that the continuance of such work would interfere therewith, the granting of such certificate being deemed to be a matter referred to the determination of the justice so certifying, the company shall remove or alter their work so that the same shall not interfere with such intended building, inclosure, improvement, alteration, or other use of the land or building:
- (3.) When such certificate is required by the company the costs thereof, when obtained, shall be paid by the company to the person giving the notice:
- (4.) Nothing herein shall empower any person to obtain the removal or alteration of any work contrary to the terms of any grant or consent in writing made or given by him, or by any person through whom he takes his estate or interest.

31. Where the company has, before the passing of this Act, constructed any work under, in, upon, over, along or across a street or public road, and the owner, lessee, or occupier of any land or building adjoining to or near the street or public road considers such land or building to be prejudicially affected by such work, then the following provisions shall take effect:

- (1.) Such owner, lessee, or occupier may give to the company a notice requiring them to remove or alter such work, and specifying the grounds of such requisition:
- (2.) The company either shall, within one month after receipt of such notice, remove or alter the work in accordance with the notice, or else, if they do not intend to remove or alter the work in accordance with the notice, shall, within one week after receipt of the notice, deliver to the person giving the notice a counter-notice, specifying their objection to such removal or alteration;
- (3.) The person giving the notice may send copies of the notice and counter-notice to the board of trade:
- (4.) As soon as may be after receipt of such co-

ples the board of trade shall (unless the difference between the person giving the notice and the company is arranged) make inquiry and examination, and hear and determine the matter of the notice and counter-notice:

- (5.) Such owner, lessee, or occupier shall be entitled to obtain a direction from the board of trade for the removal or alteration of such work in every case where it appears to the board of trade that such land or building is prejudicially affected by such work, and that the removal or alteration thereof may be effected consistently with a due regard to the efficient working of the company's telegraphs, such directions nevertheless to be given on such terms and conditions as to the board of trade seem, according to the circumstances of the case, just and expedient, including, if it seems expedient, the condition of the payment by such owner, lessee, or occupier of any expense incurred by the company in or about such removal or alteration, the amount thereof to be determined in case of difference by the board of trade:
- (6.) Nothing herein shall empower any person to obtain the removal or alteration of any work contrary to the terms of any grant or consent in writing made or given by him, or by any person through whom he takes his estate or interest.

Restrictions as to Works affecting Railways and Canals.

32. The company shall not place any work under, in, upon, over, along, or across any railway or canal, except with the consent of the proprietors or lessees, or of the directors or persons having the control thereof. But this provision shall not restrict the company from placing any work (subject and according to the other provisions of this Act) under, in, upon, over, along, or across any street or public road, although such street or public road may cross or be crossed by a railway or canal, so that such work do not damage the railway or canal, or interfere with the use, alteration, or improvement thereof.

33. If at any time after the company has placed any work under, in, upon, over, along, or across any canal, any person having power to construct docks, basins, or other works upon any land adjoining to or near such canal constructs any dock, basin, or work on such land, but is prevented by the company's work from forming a communication for the convenient passage of vessels with or without masts between such dock, basin, or other work, and such canal, or if the business of such dock, basin, or other work is interfered with by reason or in consequence of any such work of the company, then the company, at the request of such person, and on having reasonable facilities afforded them by him for placing a telegraph round such dock, basin, or other work, under, in, upon, over, along, or across land belonging to or under his control, shall remove and place their work accordingly. If any dispute arises between the com-

pany and such person as to the facilities to be afforded to the company, or as to the direction in which the telegraph is to be placed, it shall be determined by the board of trade.

Appointment of Arbitrator by Board of Trade.

34. If in any case where any matter is herein-before authorized or directed to be determined by the board of trade it appears to the board of trade to be expedient, for convenience of local investigation or for any other reason, that the matter should be determined by an arbitrator, the board of trade may, notwithstanding anything herein-before contained, as whether the board of trade has entered on the investigation or not, refer the matter to some competent and impartial person as arbitrator; and with respect to the matter so referred any such arbitrator shall have the like authority and jurisdiction as the board of trade has under this Act, and his determination shall have the same effect as the determination of the board of trade under this Act. The reasonable expenses and remuneration of the arbitrator (to be settled in case of difference by the board of trade) shall be paid by the company.

Restrictions as to Works affecting Seashore.

35. The company shall not place any work under, in, upon, over, along, or across any estuary or branch of the sea, or the shore or bed of any tidal water except with the consent of all persons and bodies having any right of property, or other right, or power, jurisdiction, or authority in, over, or relating to the same, which may be affected or be liable to be affected by the exercise of the powers of the company (which consent, where her Majesty in right of the Crown is interested, may be given on behalf of her Majesty by the commissioners for the time being of her Majesty's woods, forests, and land revenues, or one of them, in writing signed by them or him).

36. Before commencing the construction of any such work as last aforesaid, or of any buoy or sea mark connected therewith, except in cases of emergency for repairs to any work previously constructed or laid, and then as speedily after the commencement of such work as may be, the company shall deposit at the office of the board of trade a plan thereof, for the approval of the board of trade. The work shall not be constructed otherwise than in accordance with such approval. If any work is constructed contrary to this provision, the board of trade may, at the expense of the company, abate and remove it, or any part of it, and restore the site thereof to its former condition.

37. Notwithstanding anything in The Merchant Shipping Act, 1854, or any Act amending the same contained, the company may, in or about the construction, maintenance, or repair of any such work, use of board ship or elsewhere any light or signal allowed by any regulation to be made in that behalf by the board of trade.

38. If any such work, buoy, or sea mark is abandoned, or suffered to fall into decay, the board of trade may, if and as they think fit, at the expense of the company, either repair and restore it or any part of it, or abate and remove it, or any part of it, and restore the site thereof to its former condition.

39. The board of trade may at any time, at the expense of the company, cause to be made a survey and examination of any such work, buoy, or sea mark, or of the site thereof.

40. Whenever the board of trade, under the authority of this Act, does, in relation to any such work, any act or thing which they are by this Act authorized to do at the expense of the company, the amount of such expense shall be a debt due to the Crown from the company, and shall be recoverable as such, with costs, or the same may be recovered, with costs, as a penalty is or may be recoverable from the company.

General obligations and Liabilities of Company and their Servants.

41. Every telegraph of the company shall be open for the messages of all persons alike, without favour or preference; but this provision shall not prejudicially affect the operation of any lease or agreement authorized by this Act.

42. The company shall be answerable for all accidents, damages, and injuries happening through the act or default of the company or of any person in their employment by reason or in consequence of any of the company's works, and shall save harmless all bodies having the control of streets or public roads, collectively and individually, and their officers and servants, from all damages and costs in respect of such accidents and injuries.

43. The company shall not sell, transfer, or lease their undertaking or works, or any part thereof, to any other company or to any body or person, except with the consent of the board of trade previously obtained for such sale, transfer, or lease; but this provision shall not, as far as it relates to leases, apply to the Universal Private Telegraph Company, constituted by the Special Act of 1861 in the Schedule to this Act mentioned, and shall not restrict the granting of any lease by any company in pursuance of any agreement in that behalf made before the twelfth day of February one thousand eight hundred and sixty-three, and shall not restrict the making or carrying into effect by any company of any arrangement with any person for providing any work for his private use only.

44. The company, before exercising any power for the construction of works or the opening or breaking up of streets or public roads in any one of the three parts of the United Kingdom, shall give to the registrar of joint stock companies acting for that part of the United Kingdom under the Companies Act, 1862, notice of the situation of some office where notices may be served on the company within that part of the United Kingdom; and the company shall from time to time give to such registrar notice of any change in the situation of such office: Every such notice shall be recorded by the registrar, and the record thereof may be inspected from time to time by any person: The delivery at the office of which notice is so given of any notice, writ, summons, or other document addressed to the company shall, for the purposes of this Act and all other purposes, be deemed good service on the company: The company shall, on giving each notice to the registrar under the present section, pay such fee as is payable under the last-mentioned Act

on registration of any document by that Act required or authorized to be registered, other than a memorandum of association; and every person inspecting the record of such notice with the registrar shall pay such fee as is for the time being payable under the last-mentioned Act for inspection of documents kept by the registrar under that Act.

45. If any person in the employment of the company—

Willfully or negligently omits or delays to transmit or deliver any message;

Or by any wilful or negligent act or omission prevents or delays the transmission or delivery of any message;

Or improperly divulges to any person the purport of any message,—

He shall for every such offence be liable to a penalty not exceeding twenty pounds.

46. Nothing in this Act, and nothing in any future Special Act, except so far as express provision to the contrary hereof may be thereby made, shall relieve the company from being subject to any restrictions, regulations, or provisions which may hereafter be made by Act of Parliament respecting telegraphs or telegraph companies or their charges.

Saving as to Restrictions on and Duties of existing Companies.

47. Nothing in this Act shall affect any of the enactments specified in the schedule to this Act.

Powers of her Majesty's Government over Company.

48. If one of her Majesty's principal Secretaries of State, or the Board of Trade, or other department of her Majesty's Government, requires the company to transmit any message on her Majesty's service, such message shall (notwithstanding anything hereinbefore contained) have priority over all other messages; and the company shall as soon as reasonably may be, transmit the same, and shall, until transmission thereof, suspend the transmission of all other messages.

49. On the request of the Board of Trade the company shall from time to time place and shall maintain such a telegraph as the Board of Trade appoints, to be for the exclusive use of her Majesty, and to be applied to such purposes, whether for the immediate service of her Majesty or otherwise, as her Majesty thinks fit.

50. If the company refuses or neglects to place a telegraph in accordance with such request the Board of Trade may cause such a telegraph to be placed in connexion with any of the company's works by such persons and in such manner as the Board of Trade thinks fit, and for that purpose shall have and may exercise all the powers under this Act or otherwise vested in the company; subject, nevertheless, to the restrictions and provisions under this Act or otherwise applicable to the company, and without prejudice to the exercise by the company of the powers under this Act or otherwise vested in them.

51. Where the company places a telegraph, in pursuance of such request of the Board of Trade, the Commissioners of her Majesty's Treasury shall pay to the company, as remuneration for the same, out of

money to be provided by Parliament for the purpose, such sum, annual or in gross, or both, as may be settled by the Board of Trade and the company by agreement, or, in case of difference, by arbitration, such arbitration to be conducted as follows:

- (1.) The Board of Trade and the company shall each, within fourteen days after the delivery by one to the other of a demand in writing for an arbitration, nominate an arbitrator:
- (2.) The two arbitrators nominated shall, before entering on the arbitration, nominate an umpire:
- (3.) If either party or arbitrator makes default in nominating an arbitrator or umpire within fourteen days after receiving from the other a demand in writing for such nomination, the Lord Chief Justice of her Majesty's Court of Common Pleas at *Westminster* may, on the request of the Board of Trade, or of the company, by writing under his hand, nominate an arbitrator or umpire:
- (4.) The arbitrators shall make their award within twenty-eight days after their nomination, otherwise the matter shall be left to be determined by the umpire:
- (5.) The umpire shall make his award within twenty-eight days after notice from the arbitrators or of one of them that the matter is left to be determined by him; or, on default, a new umpire shall be appointed as nearly as may be in manner aforesaid, who shall make his award within the like time, or on default be superseded; and so *toties quoties*:

The award of the arbitrators or umpire shall be final and conclusive as between the Board of Trade and the company.

52. Where, in the opinion of one of her Majesty's Principal Secretaries of State, an emergency has arisen in which it is expedient for the public service that her Majesty's Government should have control over the transmission of messages by the company's telegraphs, the Secretary of State, by warrant under his hand, may direct and cause the company's works, or any part thereof, to be taken possession of in the name and on behalf of her Majesty, and to be used for her Majesty's service, and subject thereto, for such ordinary service as may seem fit; or may direct and authorize such persons as he thinks fit to assume the control of the transmission of messages by the company's telegraphs, either wholly or partly, and in such manner as he directs. Any such warrant shall not have effect for a longer time than one week from the issuing thereof; but the Secretary of State may issue successive warrants from week to week as long as, in his opinion, such emergency continues. The Commissioners of her Majesty's Treasury shall pay to the company, as compensation for any loss of profit sustained by the company by reason of the exercise by the Secretary of State of any of the powers of the present section, out of money to be provided by Parliament for the purpose, such sum as may be settled between the Secretary of State and the company by agreement, or, in case of difference, by arbitration,—such arbitration to be conducted in manner provided

in the last foregoing section, the Secretary of State being only substituted for the Board of Trade.

53. Where it appears to the Board of Trade that any provision of this Act has not been complied with on the part of the company, and that it would be for the public advantage that compliance therewith should be enforced, the Board of Trade may certify accordingly to her Majesty's Attorney-General for *England* or for *Ireland*, or to the Lord Advocate for *Scotland*, as the case may require; and thereupon the Attorney-General or Lord Advocate may, by such civil or criminal proceeding as the case may require, enforce compliance with such provision by the recovery of penalties, or otherwise according to law. But no such certificate shall be made by the Board of Trade until the expiration of twenty-one days after they have given notice to the company of their intention to make the same. This provision shall be deemed to be cumulative, and to be without prejudice to any other remedy or process against the company on the part of her Majesty or of any person or body.

SCHEDULE.

Enactments in Special Acts of existing Companies which are not to be affected by this Act.

[The parts printed in Italics shew the portion of the enactments to which Saving extends.]

16 & 17 Vic. c. clix.—The British Electric Telegraph Company's Act, 1863.—*Section forty-three* (relating to works affecting the Thames).

16 & 17 Vic. c. cciii.—The Electric Telegraph Company's Act, 1863.—*Section fifty-six* (relating to works affecting the Thames).

24 & 25 Vic. c. lxi.—The Universal Private Telegraph Company's Act, 1861.—*Section twenty-seven* (relating to works affecting the Mersey dock estate).

24 & 25 Vic. c. xcii.—Bonelli's Electric Telegraph Act, 1861.—*Sections twenty-five, twenty-six, twenty-seven* (relating to works affecting the Thames), and *thirty-eight and thirty-nine* (relating to works affecting the Mersey, and to the Mersey and Irwell navigation).

25 & 26 Vic. c. cxxxi.—United Kingdom Electric Telegraph Act, 1861.—*Sections fifty-three, fifty-four, fifty-five* (relating to works affecting the Thames), *fifty-seven, fifty-eight* (relating to works affecting the Mersey, and to the Mersey and Irwell navigation), *seventy-four* (relating to a sale, transfer, or lease), and *seventy-six* (relating to works in Scotland).

CAP. CXIII.

An Act to prohibit the Sale and Use of poisoned Grain or Seed. [28th July, 1863.]

Sec. 1. *Short title of Act.*

2. *Penalty for selling poisoned grain, seed, or meal.*

3. *Penalty for sowing, &c. poisoned grain, seed, or meal.*

4. *Solutions or infusions, &c. allowed for use in agriculture.*

5. *Recovery of penalties. Application of 11 & 12 Vict. c. 43, and 14 & 15 Vict. c. 93, to this Act. Informers (not a constable) entitled to moiety of penalty: Indemnity to witnesses, &c.*

'WHEREAS it is expedient to prohibit the sale and use of poisoned grain or seed: 'Be it enacted by the Queen's most excellent majesty, by and with the advice and consent of the lords spiritual and temporal, and commons, in this present Parliament assembled, and by the authority of the same, as follows:

1. This Act may be cited for all purposes as "The Poisoned Grain Prohibition Act, 1863."

2. Every person who shall offer or expose for sale or sell any grain, seed, or meal which has been so steeped or dipped in poison, or with which any poison or any ingredient or preparation has been so mixed, as thereby to render the same poisonous, and calculated to destroy life, shall in either case for every such offence, upon summary conviction, as hereinafter provided, forfeit any sum not exceeding ten pounds.

3. Every person who shall knowingly and wilfully sow, cast, set, lay, put, or place, or cause to be sown, cast, set, laid, put, or placed, into, in, or upon any ground or other exposed place or situation, any such grain, seed, or meal which has been so steeped or dipped in poison, or with which poison or any ingredient or preparation has been so mixed as thereby to render such grain, seed, or meal poisonous, and calculated to destroy life, shall, upon a summary conviction thereof as hereinafter provided, forfeit any sum not exceeding ten pounds.

4. Nothing in this Act shall prohibit the offering or exposing for sale or selling or the use of any solution or infusion, or any material or ingredient for dressing, protecting, or preparing any grain or seed for *bona fide* use in agriculture only, or the sowing of such last-mentioned grain or seed so prepared.

5. All penalties imposed by this Act may be recovered in *England* and *Ireland* before two justices of the peace, and in *Scotland* before two justices of the peace or the sheriff; and for that purpose in *England* and *Scotland* the provision of the Act of the eleventh and twelfth years of her present Majesty, chapter forty-three, and in *Ireland* the "Petty Sessions (*Ireland*) Act, 1851," shall extend and apply to this Act, and to all proceedings in relation thereto; and it shall not in any such proceedings be necessary to allege or prove the ground or other place where an offence is committed to be the property of or occupied by any person: Provided always, that the convicting justices or sheriff may, if they or he shall think fit, award to the informer or prosecutor (not being a police constable or peace officer) in any such proceedings any portion not exceeding one moiety of any penalty recovered under the aforesaid enactments: Provided also that every informer or prosecutor, and every person who shall give evidence against any other person proceeded against under this Act, shall be freed and discharged from any such penalty which he may have incurred for or by reason of his having participated or aided in the commission of the offence with respect to which he shall so inform or prosecute or give evidence, provided the information against such other person has been laid, or such evidence has been given, before the laying of any information (if any) against such informer, prosecutor, or witness for the recovery of any penalty he may have so incurred.

CAP. OXIV.

An Act to amend the Laws relating to Fisheries in *Ireland*. [28th July, 1863.]

Sec. 1. *Short title.*

2. *Application of Act.*
3. *Prohibition of bag-nets in certain places.*
4. *Penalty on new fixed nets.*
5. *Commissioners to inquire as to fixed nets.*
6. *Certificate as to certain fixed nets.*
7. *Commissioners to inquire as to fishing weirs.*
8. *Persons unlawfully erecting or keeping up any fishing weir upon a river after notice to forfeit £50, with costs of suit.*
9. *As to construction of free gaps.*
10. *As to construction of boxes and cribs in Fishing weirs and fishing milldams.*
11. *Extension of weekly close time when inexpedient to make a free gap.*
12. *Rules for enforcing free gaps in fishing weirs.*
13. *Proceedings for abatement of illegal nets and weirs.*
14. *Appeal from decision of Special Commissioners.*
15. *Transfer of powers to new commissioners.*
16. *Fishing with nets near milldam.*
17. *Power to define estuaries and mouths of rivers.*
18. *Forfeiture of boat in illegal fishing.*
19. *Declaration as to meaning of certain terms.*
20. *Weekly close season.*
21. *Alteration of annual close time.*
22. *Exception of salmon or trout caught or kept for certain purposes.*
23. *Season for angling with single rod and line.*
24. *As to use of salmon nets during certain hours in rivers.*
25. *As to scaring or obstructing the free passage of salmon or trout during weekly close season.*
26. *Additional licence duties on fixed engines.*
27. *Magistrates paying duty to be ex officio members of board.*
28. *New elections of conservators.*
29. *Residence or qualifications of conservators.*
30. *As to use of hydraulic machines.*
31. *Salmon passes and fish ladders to be open to inspection.*
32. *Appointment of commissioners under sign manual.*
33. *Commissioners to have a common seal.*
34. *Commissioners not to sit in Parliament.*
35. *Acts of the commissioners.*
36. *The treasury to fix salaries, &c. and appoint additional officers.*
37. *Duration of office of commissioners.*
38. *Powers of commissioners.*
39. *Penalty for false swearing.*
40. *Proceedings before commissioners not to be restrained by injunction, &c.*
41. *Proceedings not to abate by death, &c.*
42. *Provision on determination of office of Special Commissioners.*
43. *Courts may award costs.*
44. *Construction of Act.*

- 45. *Recovery of penalties.*
- 46. *Saving clause.*
- 47. *As to fixed engines now in use.*

‘WHEREAS it is expedient to make further provision for carrying into effect the law relating to the salmon fisheries in *Ireland*:’ Be it therefore enacted by the Queen’s most excellent Majesty, by and with the advice and consent of the lords spiritual and temporal, and commons, in this present Parliament assembled, and by the authority of the same as follows:

Preliminary.

- 1. This Act may be cited for all purposes as “The Salmon Fishery (*Ireland*) Act, 1863.”
- 2. This Act shall not apply to *England* or *Scotland*.

Regulations as to fixed Engines.

3. After the passing of this Act no bag-net shall be placed or allowed to continue in any river or the estuary of any river, as such river or estuary has been defined by the Commissioners of Fisheries or shall be defined by the Commissioners under this Act, or within a distance of less than three statute miles from the mouth of any river as defined as aforesaid.

Any bag-net placed or continued in contravention of this section shall be deemed to be a common nuisance and may be taken possession of or destroyed; and any bag-net so placed or continued, and any salmon taken by such bag-net, shall be forfeited, and, in addition thereto, the owner of a bag-net placed or continued in contravention of this section shall, for each day of so placing or allowing the same to be continued, incur a penalty of not less than five pounds and not exceeding twenty pounds.

But no person shall incur any penalty under this section in respect of any bag-net if he removes the same within fourteen days after the passing of this Act: Provided always, that no bag-net now legally existing shall be liable to be abated or removed, or be deemed illegal under this Act, by reason of its being within three miles of the mouth of a river in the whole of which, including all tributary rivers and lakes upon its course, the proprietor of such bag-net has the exclusive right of catching salmon.

4. No fixed net that was not legally erected for catching salmon or trout during the open season of one thousand eight hundred and sixty-two shall be placed or used for catching salmon or trout in any inland or tidal waters.

Any net placed or used in contravention of this section shall be deemed to be a common nuisance, and may be taken possession of or destroyed; and any net so placed or used, and any salmon taken by such net, shall be forfeited; and, in addition thereto, the owner of a net placed or used in contravention of this section shall, for each day of so placing or using the same, incur a penalty of not less than five pounds and not exceeding twenty pounds.

5. Subject to such appeal as is hereinafter mentioned, the Special Commissioners appointed under this Act, hereinafter referred to as the Commissioners, shall abate and remove all fixed nets erected or used for catching salmon or trout in *Ireland* that are in their judgment injurious to navigation, and shall in-

quire into the legality of, and if satisfied of their illegality, remove all such other fixed nets erected or used as aforesaid as are in contravention of any Act of Parliament or law in force in *Ireland*.

6. Where any fixed net other than a bag-net prohibited by this Act is in use at the time of the passing of this Act, and any person claims to have erected the same in pursuance of the Act of the session of the fifth and sixth years of the reign of her present Majesty, chapter one hundred and six, the commissioners may, on proof being given to their satisfaction that such fixed net has been erected in pursuance of the said provisions, certify to that effect, stating in the certificate the situation, size, and description of the net, and the person who has the right to erect the same, in pursuance of such last-mentioned provisions. A certificate given in pursuance of this notice shall be deemed to be an order of the commissioners, and to be subject to appeal as such. If unappealed from, or as confirmed or amended on appeal, such certificate shall be conclusive evidence that the person therein named is the person specified in the said Act as entitled to exercise the right therein given, but it shall not render any net legal that would be otherwise illegal by reason of its being injurious to navigation, a common nuisance to the public right of fishing, or otherwise in violation of common law or any Act of Parliament.

7. Subject to such appeal as is hereinafter mentioned, the commissioners shall inquire into the legality of all fishing weirs throughout *Ireland*, and shall remove such as are in contravention of any Act of Parliament or law in force in *Ireland*, with this qualification that where a fishing weir is illegal only by reason of its not having a free gap, as required by law, this section shall not empower the commissioners to remove such fishing weir, if an undertaking be entered into to the satisfaction of the commissioners, by the owner or other person interested in such weir, to make a legal free gap therein within a time to be prescribed by the commissioners, and a free gap is made accordingly.

8. If any person has unlawfully erected or kept up, or shall unlawfully erect or keep up, any fishing weir upon any river, and a notice shall be served in writing upon the proprietor or occupier of such weir, or his known agent, by the owner or occupier of any grounds on the banks of such river on which such weir has been or shall be erected, requiring him to prostrate or open the same within the space of thirty days from the service of such notice; if such proprietor or occupier of such weir shall not within that time abate or prostrate the same, he shall forfeit a sum of fifty pounds, together with costs of suit, to be recovered by action of debt in any of her Majesty’s courts of record, one moiety thereof to be to the use of the person who shall sue for the same, and the other to the use of the conservators of the district in which such weir has been or shall be unlawfully erected or kept up; and the said court shall adjudge such weir to be abated at the expense of the defendant in such section: Provided always, that nothing in this section contained shall restrict the powers by this Act given to the commissioners.

9. In every fishing weir there shall be a free gap

or opening in accordance with the regulations following, under the powers of this Act; (that is to say)

- (1.) The free gap shall be situate in the deepest part of the stream:
- (2.) The sides of the gap shall be in a line with and parallel to the direction of the stream at the weir:
- (3.) The bottom of the gap shall be level with the natural bed of the stream above and below the gap:
- (4.) The width of the gap in its narrowest part shall be not less than one tenth part of the width of the stream: Provided always, that such gap shall not be required to be wider than fifty feet, and shall not in any case be narrower than three feet; and provided also, that no existing gap in any weir shall be reduced in width, or a gap of less width substituted in lieu thereof, or any alteration made therein so as to reduce the flow of water through such gap:

Provided always, that no person shall be entitled to any compensation by reason of the enforcing of any free gap in any weir, anything to the contrary in any Act notwithstanding.

10. The following rules shall be observed in relation to the construction of boxes and cribs in fishing weirs and fishing milldams; (that is to say)

- (1.) The upper surface of the sill shall be level with the bed of the river:
- (2.) The bars or inscales of the heck or upstream side of the box or crib shall not be nearer each other than two inches, and shall be capable of being removed, and shall be placed perpendicularly: The boxes, cribs, or cruives shall not be built over, or in any other manner hidden from public inspection:

And the owner of any fishing weir or fishing milldam that has attached thereto any box or crib in contravention of this Act shall bring the same into conformity with this Act within six months after the commencement of this Act; and he shall incur a penalty of not less than five pounds and not exceeding twenty pounds for every day after the expiration of such period of six months during which he fails to comply with the provisions of this section; and any owner failing so to maintain the same shall incur a penalty not less than one pound and not exceeding five pounds for every day during which such failure continues.

11. In any case where the breadth of the river where any chartered or patent fishing weir now exists shall not exceed forty feet, and it might be inexpedient to require a free gap to be made therein, the commissioners may, if they think fit, instead thereof, direct by their order the extension of the weekly close time for a period of twenty-four hours.

12. The following rules shall be observed for the purpose of enforcing efficient free gaps in fishing weirs; (that is to say)

- (1.) Where a weir is without a legal free gap at the time of the commencement of this Act, the owner of such weir shall within twelve months after the commencement of this Act

make such a gap, and if he does not he shall incur a penalty not less than five pounds and not exceeding fifty pounds for every day after the expiration of such period of twelve months during which he does not make such gap:

- (2.) Where a free gap has been made in a weir, but the same is not maintained in accordance with this Act, the owner of such weir shall incur a penalty not exceeding five pounds a day for each day he is in default:
- (3.) No alteration shall be made in the bed of any river in such manner as to reduce the flow of water through a free gap: If it is, the person making the same shall incur a penalty not less than five pounds and not exceeding fifty pounds, and a further penalty of one pound a day until he restores the bed of the river to its original state:
- (4.) No person shall place any obstruction, use any contrivance, or do any act whereby fish may be scared, deterred, or in any way prevented from freely entering and passing up and down a free gap at all periods of the year, or shall use any nets or other engines within fifty yards above or below any free gap; and any person placing any obstruction, using any contrivance, net, or engine, or doing any act in contravention of the regulation lastly hereinbefore contained, shall incur a penalty not less than five pounds and not exceeding twenty pounds for the first offence, and not less than ten pounds and not exceeding fifty pounds for each subsequent offence.

13. Before removing any illegal fixed net or illegal fishing weir, the commissioners shall take the same proceedings as to summoning the parties interested in such net or weir, and as to hearing such parties, and any evidence they may produce, as the commissioners under the Salmon Fisheries Acts are thereby required to take where any parties complain of the erecting, maintaining, or using any fixed engine; and a summons issued by the commissioners shall, in respect of the proceedings to be taken by the commissioners, be deemed to be equivalent to a complaint made under the said section.

14. If any person feels aggrieved with any decision of the commissioners (and for the purposes of an appeal a dismissal of a complaint shall be deemed to be a decision), the person aggrieved may appeal as follows, and not in manner provided by the Salmon Fisheries Acts; that is to say,

1. The appeal shall be to the Court of Queen's Bench in *Ireland*.
2. The appeal shall be by special case stating the facts and the grounds for the decision.
3. The special case shall be settled by the commissioners upon the application of the appellant to be made in writing within seven days after the delivery of the decision, and not afterwards.
4. The application for a case shall not be entertained by the commissioners unless the appel-

lant at the time of making the same enter into a recognizance before the said commissioners or a justice of the peace, with or without sureties, and in such sum as the commissioners or the justice think fit, conditioned to prosecute without delay the appeal, and to submit to the judgment of the Court of Queen's Bench, and to pay such costs as may be awarded.

5. The special case shall be signed by the commissioners, and shall be delivered to the appellant by the commissioners on payment by him of such fees as are hereinafter mentioned.
6. On the receipt of the special case the appellant shall within three days serve a copy on the other party to the proceedings, and transmit by post or otherwise the original case to the proper officer of the Court of Queen's Bench in Ireland.
7. The fees to be charged in respect of the preparation of the special case shall be the same fees as are chargeable for the preparation of a special case by the Act passed in the session of the twentieth and twenty-first years of the reign of her present Majesty, chapter forty-three, intituled *An Act to improve the Administration of the Law so far as respects summary Proceedings before Justices of the Peace*, and hereinafter referred to as "The Summary Jurisdiction Act."
8. The commissioners may refuse to state a case when they are of opinion that the application is frivolous, but if they so refuse they shall, on the request of the appellant, give him a certificate stating the ground of their refusal.
9. When a party gives in good faith notice of an appeal under this section, but omits through mistake to do some act necessary to perfect the appeal, the Appellate Court may permit an amendment on such terms as it thinks just.
10. After the decision of the Court of Queen's Bench has been given on a case stated as aforesaid, the commissioners shall have the same powers to enforce that decision, when affirmed or amended, as they would have had to have enforced their original decision if it had not been appealed from.
11. Save as hereinbefore varied, the provisions of the Summary Jurisdiction Act as to the powers of the Superior Court, as to directing a special case to be stated, as to the enforcing of recognizances, and as to all other matters, shall apply to an appeal under this section in the same manner as if the words "justice or justices" in the said Summary Jurisdiction Act included "the special commissioners appointed under this Act."
12. Any act required by this section to be done by the commissioners may be done by two of them, of whom the barrister herein after mentioned shall be one.
13. The decision of the Court of Queen's Bench in respect of any case brought before them under this section shall, unless the Court otherwise directs, be final.
15. All powers, rights, privileges, and jurisdictions

vested in or exercised by the commissioners of public works and the inspecting commissioners of fisheries, or any of them, by any Act relating to salmon fisheries, with the exception of the powers relating to oysters and white sea fish, shall be transferred to and vest in the commissioners appointed under this Act during their continuance in office, and may be exercised by them.

Miscellaneous.

16. Notwithstanding anything contained in the said Salmon Fisheries Acts, it shall not be lawful for any person or persons, although lawfully possessed of a several fishery for twenty years next before the passing of the Act of the session of the thirteenth and fourteenth years of the reign of her present Majesty, chapter eighty-eight, to use any box, crib, cruir, net, instrument, or device for taking fish (save and except rods and lines only) at or within fifty yards, either above or below a milldam, unless there is attached to such milldam a fish-pass of such form and dimensions as may be approved of by the commissioners, nor unless such fish-pass has constantly running through it such a flow of water as will enable salmon to pass up and down it; any person offending against this clause shall for each offence incur a penalty of not less than five pounds, and not exceeding twenty pounds, recoverable by any one who will sue for the same.

17. Notwithstanding anything contained in the Salmon Fisheries Acts, or any definition of the commissioners acting in pursuance of those Acts, the commissioners under this Act shall mark out, by reference to maps or otherwise, what are to be the boundaries of mouths of rivers and estuaries, and the boundaries between the tidal and fresh water portions of every river, for the purposes of this Act and the said Salmon Fisheries Acts, with power where several streams flow into a common mouth or estuary to declare that the outlets of such streams form separate mouths or estuaries. The commissioners may also define the point or points of mouths of rivers or estuaries from which distances are to be measured under this Act and the Salmon Fisheries Acts.

18. If it be proved to the satisfaction of the justices that any boat, cot, or curragh found on or near waters frequented by salmon or trout has been used for the capture of salmon or trout during any part of the annual or weekly close time, the person or persons who shall be proved to have used such boat, cot, or curragh for the capture of salmon or trout during the annual or weekly close time shall for the first offence be subject to a penalty not exceeding five pounds, and for the second or any subsequent offence, in addition to the foregoing penalty, the boat, cot, or curragh so used may be seized and forfeited; but this section, so far as relates to the forfeiture of the boat, cot, or curragh, shall not come into operation where a boat is used by some person other than the owner thereof, and the owner proves to the satisfaction of the justices that it was so used without his knowledge or consent.

19. It is hereby declared, that for the purposes of the said Salmon Fisheries Acts and of this Act "Jenkin" and "Gravelling" are deemed to be "salmon," and "spring tides" mean "ordinary spring tides."

20. There shall be repealed so much of the said Salmon Fisheries Acts as provides that it shall not be lawful to take or kill any salmon or trout between six of the clock on *Saturday* evening and six of the clock on *Monday* morning, or between the low waters next in point of time to those periods respectively, and the said Acts shall be construed as if it had been enacted therein that no salmon or trout shall be fished for or taken in any way, except by single rod and line, between six of the clock on *Saturday* morning and six of the clock on the succeeding *Monday* morning; and all penalties imposed by the said Salmon Fisheries Acts, and the provisions made for enforcing the prohibition contained in the said Acts, and providing for the free passage of salmon and trout during the times therein in that behalf mentioned, shall apply accordingly, with this addition, that any net or other instrument, or the inscales or gates and rails of any crib, box, or cruive used between the times aforesaid shall be forfeited, and also that when any salmon or trout is taken at any fishing weir during the weekly close season in contravention of this Act and the said Salmon Fisheries Acts, or when any box, crib, or cruive is during the weekly close season left unopened or otherwise left not in conformity with the said Acts, the penalty in that behalf imposed by the said Acts shall be payable in respect of each box, crib, or cruive in the weir in which any fish is so illegally taken, or which is left as aforesaid unopened or not in conformity with the said Acts.

21. There shall be repealed so much of the thirty-third section of the Act of the session of the fifth and sixth years of the reign of her present Majesty, chapter one hundred and six, as provides that the annual close season, or period during which it shall not be lawful to take salmon, shall not comprise fewer than one hundred and twenty-four days in each year; and in lieu thereof be it enacted, that such annual close season or period during which it shall not be lawful to take salmon shall not comprise fewer than one hundred and sixty-eight days in each year; and until an alteration is made by the commissioners in pursuance of the powers given to them by the Salmon Fisheries Acts and this Act, there shall be added at the end of the close time now established for each fishery such number of days, if any, as may be required to make the number of close days constituting the annual close time in that fishery amount to one hundred and sixty-eight days.

22. Nothing in this Act contained shall apply to any person who shall catch or attempt to catch, or shall have in his possession, any salmon or trout for the purposes of artificial propagation or other scientific purposes; and nothing in this Act contained shall prejudice the legal right of any owner to take materials from any stream.

23. Nothing in this Act shall be construed to affect angling with single rod and line, the close season for which shall be from the first day of *November* in each year to the first day of *February* in the year following.

24. From and after the passing of this Act, it shall not be lawful for any person to use any net except a landing net, for the capture of salmon or trout in the fresh-water portion of any river, as defined by the commissioners under this Act, between the hours of

eight o'clock in the evening and six o'clock in the morning, except so far as the same may have heretofore been used within the limits of a several fishery next above the tidal flow, and held under grant or charter, or by immemorial usage; and every person offending against the provisions of this section shall be subject to a penalty not exceeding ten pounds, and to the forfeiture of all boats, nets, and gear used in such illegal fishing.

25. No person shall in any manner whatever scare, impede, or obstruct the free passage of salmon or trout during the weekly close season; and any person acting in contravention of this section shall forfeit any fish taken by him, and any net or instrument used by him, and in addition thereto shall incur a penalty not less than two pounds and not exceeding ten pounds; but this section shall not apply to any person who takes fish legally by the single rod and line during the weekly close season.

26. The Salmon Fisheries Acts shall be construed as if in the Schedule annexed to the Act of the eleventh and twelfth years of the reign of her present Majesty, chapter ninety-two, so far as relates to fixed engines, there had been inserted instead of the duties therein mentioned the duties following; (that is to say,)

Bag nets	£ 10
Stake nets, fly nets, or stake weirs (<i>Scotch</i>)	30
Head weirs	6

For every box, crib, cruive, or drum net in any weir for taking salmon or trout . . . 10

and the boards of conservators shall not have authority to reduce or diminish the same, anything in the said Act or any other Act to the contrary notwithstanding.

27. Magistrates paying licence duty, and being owners of land abutting on rivers or lakes in any district, may act and vote as *ex officio* members of any board of conservators elected for any such district.

28. On the first *Monday* in the month of *October* in the year one thousand eight hundred and sixty-four all existing boards of conservators shall cease; and new boards shall be elected.

29. No person shall be eligible for the office of conservator in any electoral division in which he does not reside or possess real property.

30. Where a turbine or similar hydraulic machine, which may be injurious to salmon or the young of salmon in their descent to the sea, is supplied from a river frequented by salmon, the person owning or using such machine shall, during the time in which such descent to the sea takes place, provide grating or other efficient means to prevent such salmon or young of salmon from passing into such machine, and in case such means be not provided such person shall forfeit a sum not exceeding fifty pounds, and also a sum not exceeding five pounds for each day during which such injury to the fry continues.

31. All salmon passes and fish ladders shall be at all times open to the inspection of the commissioners and the conservators of the district, and of any person duly authorized by them or any of them.

[Appointment and Powers of Commissioners.

32. Her Majesty may by warrant under the royal

sign manual appoint any number of persons not exceeding three, of whom one shall be an officer in the naval service of her Majesty, and another a barrister of not less than seven years standing at the Bar, to be commissioners under this Act during her Majesty's pleasure, and upon every vacancy in the office of any commissioner by death, resignation, or incapacity to act may appoint some other fit person to fill the vacancy: provided always, that in the case of a vacancy by the death, resignation, or incapacity of any commissioner being such officer or barrister, the person so to be appointed shall be of the same profession as the officer or barrister in whose place he shall be appointed.

33. The commissioners appointed under this Act shall be styled "The Special Commissioners for *Irish Fisheries*;" they shall cause to be made for their commission such seal or seals as they may require; and any summons, order, warrant, or other instrument, or copy thereof, purporting to be sealed with the seal of the commissioners, and to be signed as herein after mentioned, shall be received in evidence without any further proof.

34. No commissioner shall during his continuance in office be capable of being elected or of sitting as a member of the House of Commons.

35. All warrants for the removal of any illegal net or illegal weir shall be signed by two at least of the commissioners, and all cases relating to the removal of such nets or weirs shall be heard by all the commissioners, but the opinions of two of them shall, in case of difference, decide any question; any other acts authorized to be done by the commissioners may be done by any one of them, and any summons under the seal of the commissioners, and signed by any person delegated by them, shall be deemed to be sufficiently executed.

36. The commissioners of her Majesty's treasury may from time to time fix such salaries as they may think fit for the commissioners hereby appointed, and also appoint such additional officers, clerks, and servants, at such salaries as the said commissioners of the treasury may think proper and necessary, and from time to time dismiss such officers, clerks, and servants, and appoint others in their place.

37. The offices of the said commissioners, and all powers, rights, and privileges pertaining thereto, shall continue in force for two years only, and from thenceforth until the end of the next session of Parliament.

38. The commissioners may examine any witnesses on oath; and with respect to the following matters, that is to say,

- (1.) Enforcing the attendance of witnesses, and the production of deeds, books, papers, and documents;
- (2.) The enforcing any order whatever made by them under any of the powers or authorities of this Act or the Salmon Fisheries Acts,

shall, in addition to any other powers conferred on them by this Act, have all such powers, rights, and privileges as the judges of her Majesty's Court of Queen's Bench in *Ireland* have for such or the like purposes.

39. Every person who upon examination before

the commissioners, or any one of them, wilfully gives false evidence and every person who wilfully swears, affirms, or declares falsely in any affidavit relating to any matter within the cognizance of the commissioners, shall be liable to the pains and penalties of perjury.

40. The commissioners shall not be subject to be restrained in the execution of their powers under this Act, nor shall any person be restrained from making an application under this Act to the commissioners, by order of any court of justice or by any other legal process, nor shall the commissioners be required by writ of mandamus or any writ of a like nature to do any act or take any proceeding under this Act, nor shall proceedings before them be removable by certiorari or other writ of a like nature.

41. Proceedings before the commissioners shall not abate or be suspended by any death or transmission or change of interest; but in any such case of death or transmission or change of interest it shall be lawful for the commissioners, when they see fit, to require notices to be given to persons becoming interested, or to make any orders for continuing, suspending, or carrying on the proceedings, or otherwise in relation thereto, which to the commissioners appears just.

42. On the determination of the office of the special commissioners, all powers and duties transferred to, vested in, or imposed on them by this Act shall be transferred to and vested in two permanent inspectors of fisheries, to be appointed by and to be subject to the control of the Lord Lieutenant of *Ireland*.

Penalties, Saving Clause, &c.

43. It shall be lawful for the Court before which any indictment or information for any offence against this Act, or for any nuisance in tidal or inland waters, shall have been preferred, heard, or tried and determined, to order that the costs, charges, and expenses of and incident to such indictment or information, and the proceedings therein, and the preferring, hearing, or trial and determination thereof, shall follow the event of the same respectively, and be borne and paid by the party against whom the same shall have been determined, and that such costs, charges, and expenses, shall be estimated either as between party and party or as between attorney and client, at the discretion of such court.

44. This Act, so far as is consistent with the tenor thereof, shall be construed with the Acts relating to salmon fisheries in *Ireland*, and herein referred to as "The Salmon Fisheries Acts," and the definitions of words and expressions now in force in the said Salmon Fisheries Acts shall apply to the same words and expressions when used in this Act, but so as to include "a head weir" under the expression "fixed net," and that "fishing milldam" shall mean a dam used or intended to be used partly for the purpose of catching or facilitating the catching of fish, and partly for the purpose of supplying water for milling or other purposes.

45. All penalties imposed by this Act shall be recovered and applied in manner in which penalties under the said Salmon Fisheries Acts are recoverable and applicable.

46. Nothing in this Act contained shall render legal or be deemed to recognize as legal, or to confer, any title on any person in respect of any fixed net or fishing weir that is in contravention of any Act of Parliament, or of the common law in force in *Ireland*.

47. Provided always, that nothing herein-before contained shall prevent any person having any fixed engine now in use, and in respect of which licence duty has been paid, from being allowed to continue to use the same during the remainder of the present season.

CAP. CXV.

An Act to explain the Act for the Amendment of the Law relative to gratuitous Trustees in *Scotland*.
[28th July, 1863.]

CAP. CXVI.

An Act to provide for the Appointment of Navy Prize Agents, and respecting their Duties and Remuneration.
[28th July, 1863.]

Sect. 1. *Short title.*

2. *Commencement of Act.*

3. *Interpretation of terms.*

4. *Appointment of agent.*

5. *Agent to be appointed after passing of Act.*

6. *As to filling up vacancy of agent.*

7. *Agent to be nominated by captain.*

8. *Power to remove agent.*

9. *Agent to act until power revoked.*

10. *No person holding office under the Crown to act as agent.*

11. *Agent before acting to register power of appointment in Court of Admiralty.*

12. *Agent to take all proceedings.*

13. *Expenses to be paid out of proceeds of sale.*

14. *As to costs and charges of sale.*

15. *Allowance to agent of 2½ per cent.*

16. *Admiralty to distribute prize money, &c.*

17. *As to investment of prize money when any delay in distribution.*

18. *Officers not entitled to prize until granted by authority. Powers given to agents as to condemnation of prizes to be subject to control of her Majesty, &c.*

19. *Act not to extend to seizures made by officers of customs.*

‘WHEREAS it is desirable that provisions should be made for the appointment of navy prize agents, and respecting their duties and remuneration:’ be it therefore enacted by the Queen’s most excellent Majesty, by and with the advice and consent of the lords spiritual and temporal, and commons, in this present Parliament assembled, and by the authority of the same, as follows:

1. This Act may be cited for all purposes as “The Navy Prize Agents Act, 1863.”

2. This Act shall come into operation on the first day of October one thousand eight hundred and sixty-three.

3. In the construction of this Act, unless the contrary is expressed or is to be inferred from the context,

“Her Majesty” shall include her Majesty, her heirs and successors:

“Lords of the admiralty” shall mean and include the lord high admiral, and also the commissioners for executing the office of lord high admiral of the United Kingdom of *Great Britain* and *Ireland* for the time being:

“Court of Admiralty” shall mean and include the High Court of Admiralty of *England*, and any admiralty, vice-admiralty, or other court within her Majesty’s dominions, which shall be duly authorized to take cognizance of, and judicially to proceed in matters of prize:

“Government accountant” shall mean and include any officer in charge of public money, whether belonging to the commissariat, customs, or any other department, who may have been or may be appointed by the lords of the treasury or admiralty, or by one of her Majesty’s principal secretaries of state:

“Her Majesty’s ships and vessels of war” shall mean and include all ships and vessels belonging to her Majesty:

“Officers and crew” shall mean and include all flag and other officers, engineers, seamen, marines, soldiers, and others on board any of her Majesty’s ships and vessels of war:

“Captain or commanding officer” shall mean the captain or other officer for the time being in command of any of her Majesty’s ships and vessels of war.

4. Each of her Majesty’s ships and vessels of war shall at all times after the commencement of this Act have an agent, to be appointed as herein-after provided, who shall at all times have an office or place of business within five miles of the General Post Office, *London*, and who shall represent and act for such ship or vessel and the officers and crew thereof as herein-after mentioned.

5. The several agents for her Majesty’s ships and vessels of war which shall be in commission at the time this Act shall come into operation shall be appointed forthwith after that date, and the agents for all ships and vessels of war of her Majesty which shall hereafter be placed in commission shall be appointed as soon as conveniently as may be after the same shall respectively be so placed in commission.

6. Whenever a vacancy shall occur in the office of agent to any such ship or vessel of war by reason of death or retirement of the agent, or from any other cause, such vacancy shall forthwith be filled up by the appointment of some other person as agent to such ship or vessel.

7. The agent for each ship or vessel of war shall be nominated and appointed by the captain or commanding officer thereof, and every such appointment shall be made by a power of attorney, duly stamped, executed by such captain or commanding officer under his hand and seal, and attested by one witness at the least.

8. The captain or commanding officer of any ship or vessel of war may at any time remove the agent for the time being of such ship or vessel from his office, and may appoint some other person as agent in his stead, and such revocation and new appointment shall in like

manner be made by deed under seal, duly stamped, executed, and attested as aforesaid: provided always, that until the power of attorney or deed appointing such new agent shall have been registered in the High Court of Admiralty in *England*, as herein-after mentioned, and also until notice of such new appointment shall have been given to the accountant-general of the navy, as herein-after provided, the former agent shall not be deemed to have been removed from his office and may and shall continue to act as agent for such ship or vessel.

9. The duly appointed agent of any ship or vessel of war shall continue to be and act as such, notwithstanding any change of the captain or commanding officer of such ship or vessel, unless such new captain or commanding officer shall remove him from his office as agent and appoint another in his stead under the provisions herein-before contained.

10. No person holding any office, appointment, or employment in any of her Majesty's services, or under the Crown, shall be appointed or be capable of acting as agent to any ship or vessel of war as aforesaid, and if any person being at the time agent to any such ship or vessel shall accept any such office, appointment, or employment in any of her Majesty's services, or under the Crown, his office as agent shall immediately and *ipso facto* become vacant.

11. Every agent shall, before acting in any respect under the provisions of this Act exhibit the power of attorney by which he shall have been appointed, and cause the same to be registered in the High Court of Admiralty, and shall also give notice of his appointment to the accountant general of the navy.

12. Such agent shall, by himself or by a proper sub-agent appointed and remunerated by him, take all steps and proceedings that may be necessary or proper to be taken on behalf and in the name of such ship or vessel of war and the officers and crew thereof for or towards procuring the condemnation of any prize and the realization of the proceeds thereof, and for prosecuting and enforcing the claims of such ship or vessel to such prize or the proceeds thereof, or to any bounty or other monies: provided that nothing herein shall deprive any captain or commanding officer of the right of taking such proceedings in case of the absence or default of any such agent or sub-agent.

13. When the proceeds of any ships or goods upon any sale, or any bounty or other monies, shall have been paid in to the account of her Majesty's paymaster general, or into the hands of some Government accountant, the Court of Admiralty which may have condemned such prize, or awarded such bounty or other monies, shall direct the payment thereof of all costs, charges, and expenses which may be chargeable against the same, or which may have been incurred by the captors or by the agent under this Act, after such costs, charges, and expenses shall have been taxed or allowed by the registrar of such court or his deputy.

14. Such costs, charges, and expenses shall include the reasonable and proper charges and expenses of and incident to any such sale as aforesaid, but shall not include any charge or allowance whatsoever in respect of any services of the agent of the ship or vessel entitled to such prize or bounty or other monies, and

such agent shall be remunerated for all labour and services in connexion with any such claim solely by the per-centage or allowance herein-after provided for.

15. Upon the total balance of the net proceeds of any such prize or of any bounty or other monies remaining after payment of such costs, charges, and expenses as are by law payable thereout, an allowance or per-centage of two pounds ten shillings *per centum* of the amount of such balances shall be payable to the agent of the ship or vessel of war entitled to such prize or bounty or other monies as and by way of remuneration for his service as such agent, and such allowance or per-centage shall be paid to him accordingly immediately after the time for appealing shall have expired; and where more than one of her Majesty's ships and vessels of war shall be entitled to participate in such proceeds or bounty or other monies, then the total amount of the allowance or per-centage at the rate aforesaid shall be divided among the several agents of such ships and vessels in the same proportions as the ships and vessels which they respectively represent are entitled to participate in such proceeds or other monies, and shall be paid to them respectively accordingly.

16. After payment to the agent or agents of such allowance or per-centage, the residue of such proceeds or bounty or other monies shall, as soon as may be, be distributed by the lords of the admiralty to and among the persons entitled thereto according to their rights and interests, after the same shall be duly notified in the *London Gazette*.

17. Whenever the proceeds of any prize or the amount of any bounty or other monies have been paid into the account of her Majesty's paymaster general or into the hands of some Government accountant as aforesaid, but the same are not immediately distributable, either because an appeal is pending in respect thereof, or because such distribution is not to be made until after the time for appealing has expired, the Court of Admiralty by which such prize was condemned or such bounty or other monies decreed or awarded (as the case may be) may, on the conjoint application of the claimant or his agent, with the agent of the ship or vessel of war claiming to be entitled thereto, until the time of appeal has expired, or after the expiration of such time without appeal, or after final condemnation, on the application of the agent of the ship or vessel of war claiming to be entitled thereto, direct such proceeds or other amount as aforesaid or any part thereof to be invested in the public funds or stocks of *Great Britain and Ireland*, or upon such other securities and in such other manner as such court may from time to time direct, until such time as the same shall become payable to the claimant or distributable, and any interest accruing thereon shall from time to time be added to the principal monies and shall form part of the amount to be afterwards paid or distributed.

18. Nothing in this Act shall be deemed or construed to entitle the officers or crew of any ship of war to any prize which shall not have been granted to them by her Majesty, her heirs or successors, or by the authority of Parliament; and all the powers herein-before given to the agent of any ship or vessel of war, to take any steps or proceedings for or

towards the condemnation of any prize, and the realisation of the proceeds thereof, or for prosecuting and enforcing the claims of such ship or vessel to such prize, or the proceeds thereof, or for making or conducting the sales of any ships or goods claimed as prize after condemnation thereof, pending any appeal, or before the expiration of the time allowed for appealing against such condemnation, shall be subject to such and the same control and authority of her Majesty and her successors in all respects as has been heretofore possessed or exercised by her Majesty or any of her royal predecessors in cases of prize depending in the High Court of Admiralty.

19. Nothing in this Act contained shall extend or be construed to extend to any seizure of ships, vessels, goods, or merchandise made by any officer or officers of customs or of inland revenue or excise, for any breach of the laws or regulations relating to the customs, inland revenue, or excise, or to trade and navigation.

CAP. CXVII.

An Act to amend the Nuisances Removal Act for England, 1855, with respect to the Seizure of diseased and unwholesome Meat.

[28th July, 1863.]

CAP. CXVIII.

An Act for consolidating in one Act certain provisions frequently inserted in Acts relating to the constitution and management of companies incorporated for carrying on undertakings of a public nature.

[28th July, 1863.]

8 & 9 Vic. ca. 16 & 17.

- Sec. 1. *Short title.*
 2. *Division of Act into parts.*
 3. *Application of part I.*
 4. *Power to company to cancel forfeited shares.*
 5. *Evidence for cancellation of forfeited shares.*
 6. *Payment of calls in arrear notwithstanding cancellation.*
 7. *Value of forfeited shares to be deducted from amount due in respect thereof.*
 8. *Company may cancel forfeited shares with consent of holders.*
 9. *As to surrender of shares.*
 10. *No money to be paid for cancellation or surrender.*
 11. *Power to create shares in lieu of cancelled, forfeited, &c. shares.*
 12. *Regulations as to creation and issue of ordinary shares or new ordinary stock.*
 13. *Regulations as to creation and issue of new preference shares or new preference stock. Saving rights of preference shareholders.*
 14. *Preference shares to be entitled to dividends only out of the profits of each year.*
 15. *Terms, &c. to be stated on certificates.*
 16. *Unissued shares and stock may be cancelled.*
 17. *If ordinary stock or shares at a premium new shares or stock to be offered to existing ordinary shareholders.*
 18. *Offer to be made by letter.*
 19. *New shares or stock to vest on acceptance.*
 20. *As to disposal of new shares or stock to*

others. Power to enlarge time for accepting new shares or stock.

21. *General power to dispose of unappropriated new shares and stock.*
22. *Regulations as to creation and issue of debenture stock.*
23. *Debenture stock to be a prior charge.*
24. *Interest on debenture stock to be a primary charge.*
25. *Payment of arrears may be enforced by appointment of receiver or judicial factor.*
26. *Mode of appointing receiver or judicial factor.*
27. *Arrears may be recovered by action or suit.*
28. *Debenture stock to be registered.*
29. *Company to deliver certificate to holders of debenture stock.*
30. *Mortgages not affected by this Act.*
31. *Holders of debenture stock not to vote.*
32. *Application of money raised.*
33. *Separate accounts of debenture stock.*
34. *Borrowing powers extinguished to extent of debenture stock.*
35. *Application of part III. to mortgage preference stock and funded debt.*
36. *Continuance of powers.*
37. *Actions, &c. not to abate.*
38. *General saving of right.*
39. *Contracts, &c. preserved.*

‘WHEREAS the Companies Clauses Consolidation Act, 1845, and the Companies Clauses Consolidation (Scotland) Act, 1845, respectively, were passed in order to comprise in one general Act such provisions relating to the constitution and management of joint stock companies incorporated for the purpose of carrying on undertakings of a public nature in England or Ireland, or in Scotland, respectively, as were at the times of the passing of those Acts usually introduced into Acts of Parliament relating to such companies:

And whereas sundry provisions of the like nature, but not comprised in the said General Acts respectively, are now frequently introduced into Acts of Parliament relating to such companies, and it is expedient to comprise such last mentioned provisions also in one General Act, such Act to be applicable to England or Ireland, or to Scotland, as the case may require, and that as well for the purpose of avoiding the necessity of repeating such provisions in the Acts relating to such undertakings as for ensuring greater uniformity in the provisions themselves:’

Be it therefore enacted by the Queen’s most excellent Majesty, by and with the advice and consent of the lords spiritual and temporal, and commons, in this present Parliament assembled, and by the authority of the same, as follows:

1. This Act may be cited as The Companies Clauses Act, 1863.

2. This Act shall be deemed to be divided into four parts, as follows:

- Part. I. relating to cancellation and surrender of shares;
- Part II. relating to additional capital;
- Part III. relating to debenture stock;
- Part IV. relating to change of name.

PART I.

CANCELLATION AND SURRENDER OF SHARES.

3. This part of this Act shall apply to every company incorporated either before or after the passing of this Act which obtains a Special Act incorporating this part of this Act.

4. Where any share of the capital of the company is after the passing of this Act declared forfeited under and in pursuance of the provisions with respect to the forfeiture of shares for nonpayment of calls contained in The Companies Clauses Consolidation Act, 1845, and The Companies Clauses Consolidation (*Scotland*) Act, 1845, respectively, and the forfeiture is confirmed by a meeting in accordance with the same provisions respectively, and notice of the forfeiture has been given,—then and in every such case, if the directors of the company are unable to sell the share for a sum equal to the arrears of calls and interest and expenses due in respect thereof, the company at any general meeting held not less than two months after such notice is given may, in case payment of the arrears of calls, interest, and expenses due in respect thereof is not made by the registered holder of the share before the meeting is held, resolve that the share instead of being sold shall be cancelled, and the share shall thereupon be cancelled accordingly.

5. A declaration in writing made by some credible person in *England* or *Ireland* before a justice, and in *Scotland* before any sheriff or justice, stating that a sum of money sufficient to pay the arrears of calls, interest, and expenses due in respect of the share could not at the time of the cancellation of the share be obtained for the same upon the Stock Exchange prescribed in the Special Act, and if no Stock Exchange is prescribed then upon the Stock Exchange, as to *England*, of the city of *London*, and as to *Scotland* of the city of *Edinburgh*, and as to *Ireland* of the city of *Dublin*, shall be sufficient evidence of the fact so declared.

6. Where it is so resolved that any share shall be cancelled, the holder thereof shall from and after the passing of the resolution be precluded from all right and interest therein and in respect thereof; but the cancellation shall not affect the liability of the last registered holder of the share to pay to the company all arrears of calls, interest, and expenses due in respect of the share at the time of the cancellation, or the power of the company to enforce payment thereof by action or otherwise.

7. Provided always, that if the company enforces the payment of the arrears of calls, interest, and expenses under the last preceding provision, the value of the share at the time of the cancellation thereof shall be deducted from the amount so then due; provided also, that if payment of all arrears of calls, interest, and expenses is made before such meeting as aforesaid is held, the share shall revert to the person to whom it belonged at the time of forfeiture, and shall be re entered on the company's register accordingly.

8. Where any share is declared forfeited, or where any sum payable on any share remains unpaid, the company, with the consent in writing of the registered holder of the share, and with the sanction of a general meeting, may resolve that the share shall be

cancelled, and immediately thereupon the share shall be cancelled, and all liabilities and rights with respect to the share shall thereupon be absolutely extinguished.

9. The company may from time to time accept, on such terms as they think fit, surrenders of any shares which have not been fully paid up.

10. The company shall not pay or refund to any shareholder any sum of money for or in respect of the cancellation or surrender of any share.

11. The company may from time to time, in lieu of any shares that have been cancelled or surrendered, issue new shares of such amounts as will allow the same to be conveniently apportioned or disposed of according to the resolution of any ordinary or extraordinary meeting of the company, and may from time to time fix the amounts and times of payments of the calls on any such new shares, and dispose thereof on such terms and conditions as may be so resolved upon: Provided, that the aggregate nominal amount of the new shares shall not exceed the aggregate nominal amount of the shares in lieu of which the new shares are issued, after deducting the amount actually paid up in respect of the shares cancelled or surrendered.

PART II.

ADDITIONAL CAPITAL.

New Ordinary Shares or Stock.

12. Where any company, incorporated either before or after the passing of this Act for the purpose of carrying on any undertaking, is authorized by any Special Act hereafter passed, and incorporating this part of this Act, to raise any additional sum or sums by the issue of new ordinary shares, or by the issue of new ordinary stock, or (at the option of the company) by either of those modes,—then and in every such case the company, with the sanction of such proportion of the votes of the shareholders and stockholders entitled to vote in that behalf at meetings of the company, present (personally or by proxy) at a meeting of the company specially convened for the purpose, as is prescribed in the Special Act, and if no proportion is prescribed, then of three-fifths of such votes, may, for the purpose of raising the additional sum or sums, from time to time create and issue (according as the authority given by the Special Act extends to shares only, or to stock only, or to both) such new ordinary shares, of such nominal amount, and subject to the payment of calls of such amounts and at such times as the company thinks fit, or such new ordinary stock as the company thinks fit.

Preference Shares or Stock.

13. Where any such company is authorized by any Special Act hereafter passed and incorporating this part of this Act to raise any additional sum or sums by the issue of new preference shares, or by the issue of new preference stock, or (at the option of the company) by either of those modes,—then and in every such case the company, with the like sanction as aforesaid, may for the purpose of raising such additional sum or sums, from time to time create and issue (according as the authority given by the Special Act extends to shares only, or to stock only, or to both) such new shares or new stock, either ordinary or preference

rence, and either of one class and with like privileges, or of several classes and with different privileges, and of the same or different amounts, and respectively with any fixed, fluctuating, contingent, preferential, perpetual, terminable, deferred, or other dividend or interest not exceeding the rate prescribed in the Special Act, and if no rate is prescribed then not exceeding the rate of five pounds *per centum per annum*, and subject (as to any such new shares) to the payment of calls of such amounts and at such times as the company from time to time thinks fit:

Provided always, that any preference assigned to any shares or stock so issued under the Special Act shall not affect any guarantee, or any preference or priority in the payment of dividend or interest, on any shares or stock, that may have been granted by the company under or confirmed by any previous Act, or that may be otherwise lawfully subsisting.

14. The preference shares, or preference stock so issued shall be entitled to the preferential dividend or interest assigned thereto, out of the profits of each year, in priority to the ordinary shares and ordinary stock of the company: but if in any year ending on the day prescribed in the Special Act, and if no day is prescribed, then on the thirty-first day of *December*, there are no profits available for the payment of the full amount of preferential dividend or interest for that year, no part of the deficiency shall be made good out of the profits of any subsequent year, or out of any other funds of the company.

15. The terms and conditions to which any preference share or preference stock is subject shall be clearly stated on the certificate of that preference share or portion of preference stock.

General Provisions as to new Shares or Stock.

16. If, after having created new shares or new stock, the company determines not to issue the whole of the new shares or new stock, they may cancel the unissued new shares or new stock.

17. If, at the time of the issue of new shares or new stock, the ordinary shares or ordinary stock of the company are or is at a premium, then, unless the company before the issue of the new shares or new stock otherwise determines, the new shares or new stock then issued shall be of such amount as will conveniently allow the same to be apportioned among the then holders of the ordinary stock and ordinary shares respectively, in proportion, as nearly as conveniently may be, to the ordinary shares and ordinary stock held by them respectively, and shall be offered to them at par in that proportion: Provided, that it shall not be obligatory on the company so to apportion or offer any new shares or new stock unless the amount of every new share or portion of new stock to be so offered would if so apportioned be at least the sum prescribed in the Special Act, and if no sum is prescribed then at least ten pounds.

18. The offer of new shares or new stock shall be made by letter under the hand of the treasurer or secretary of the company given to every such shareholder or stockholder as aforesaid, or sent by post addressed to him according to his address in the shareholders or stockholders address book, or left for him at his usual or then last known place of abode in *England*,

Scotland, or *Ireland* (as the case may require); and every such offer made by letter sent by post shall be considered as made on the day on which the letter in due course of delivery ought to be delivered at the place to which it is addressed.

19. The new shares or portions of new stock so offered shall vest in and belong to the shareholders or stockholders who accept the same or their nominees.

20. If any shareholder or stockholder fails for the time prescribed in the Special Act, and if no time is prescribed then for one month, after the offer to him of new shares or new stock, to signify his acceptance of the same or any part thereof, then and in every such case at the expiration of that period he shall be deemed to have declined the offer of such new shares or new stock, or such part thereof as aforesaid, and the same may be disposed of by the company as hereinafter provided:

Provided, that where a shareholder or stockholder, from absence abroad or other cause satisfactory to the directors of the company, omits to signify within the time aforesaid his acceptance of the new shares or new stock offered to him, the directors, if they think proper, may permit him to accept the same, notwithstanding that such time has elapsed.

21. Subject to the foregoing provisions, the company may from time to time dispose of new shares and new stock, at such times, to such persons, on such terms and conditions, and in such manner, as the directors think advantageous to the company, but so that not less than the full nominal amount of any share or portion of stock be payable or paid in respect thereof.

PART III.

DEBENTURE STOCK.

22. Where any company, incorporated either before or after the passing of this Act for the purpose of carrying on any undertaking, is authorized by any Special Act hereafter passed, and incorporating this part of this Act, to create and issue debenture stock, —then and in every such case the company, with the sanction of such proportion of the votes of the shareholders and stockholders entitled to vote in that behalf at meetings of the company, present (personally or by proxy) at a meeting of the company specially convened for the purpose, as is prescribed in the Special Act, and if no proportion is prescribed, then of three-fifths of such votes, may from time to time raise all or any part of the money which for the time being they have raised, or are authorized to raise, on mortgage or bond, by the creation and issue at such times, in such amounts and manner, on such terms, subject to such conditions, and with such rights and privileges, as the company thinks fit, of stock to be called debenture stock, instead of and to the same amount as the whole or any part of the money which may for the time being be owing by the company on mortgage or bond, or which they may from time to time have power to raise on mortgage or bond, and may attach to the stock so created such fixed and perpetual preferential interest, not exceeding the rate prescribed in the Special Act, and if no rate is prescribed, then not exceeding the rate of four pounds *per centum per annum*, payable half-yearly or otherwise, and com-

mening at once, or at any future time or times, when and as the debenture stock is issued, or otherwise, as the company thinks fit.

23. Debenture stock, with the interest thereon, shall be a charge upon the undertaking of the company, prior to all shares or stock of the company, and shall be transmissible and transferable in the same manner and according to the same regulations and provisions as other stock of the company, and shall in all other respects have the incidents of personal estate.

24. The interest on debenture stock shall have priority of payment over all dividends or interest on any shares or stock of the company, whether ordinary or preference or guaranteed, and shall rank next to the interest payable on the mortgages or bonds for the time being of the company legally granted before the creation of such stock; but the holders of debenture stock shall not, as among themselves, be entitled to any preference or priority.

25. If within thirty days after the interest on any such debenture stock is payable the same is not paid, any one or more of the holders of the debenture stock holding individually or collectively, the sum in nominal amount thereof prescribed in the Special Act, and if no sum is prescribed, then a sum equal to one tenth of the aggregate amount which the company is for the time being authorized to raise by mortgage, by bond, and by debenture stock, or the sum of ten thousand pounds, whichever of the two last-mentioned sums is the smaller sum, may (without prejudice to the right to sue in any court of competent jurisdiction for the interest in arrear) require the appointment in *England or Ireland* of a receiver, and in *Scotland* of a judicial factor.

26. Every such application for a receiver shall be made to two justices, and every such application for a judicial factor shall be made to the court of session; and on any such application the justices or court (as the case may be), by order in writing, after hearing the parties, may appoint some person to receive the whole or a competent part of the tolls or sums liable to the payment of the interest, until all the arrears of interest then due on the debenture stock, with all costs, including the charges of receiving the tolls or sums, are fully paid; and upon such appointment being made all such tolls or sums shall be paid to and received by the person so appointed; and all money so received shall be deemed so much money received by or to the use of the several persons interested in the same, according to their several priorities.

The receiver or judicial factor shall distribute rateably and without priority, among all the proprietors of debenture stock to whom interest is in arrear, the money which so comes to his hands, after applying a sufficient part thereof in or towards satisfaction of the interest on the mortgages and bonds of the company.

As soon as the full amount of interest and costs has been so received, the power of the receiver or judicial factor shall cease, and he shall be bound to account to the company for his acts or intrusions or the sums received by him, and to pay over to the company any balance that may be in his hands.

27. If the interest on debenture stock is in arrear for thirty days next after any of the respective days whereon the same is payable, the holder for the time

being thereof may (without prejudice to his power to apply for the appointment of a receiver or judicial factor) recover the arrears with costs by action or suit against the company in any court of competent jurisdiction.

28. The company shall cause entries of the debenture stock from time to time created to be made in a register to be kept for that purpose, wherein they shall enter the names and addresses of the several persons and corporations from time to time entitled to the debenture stock, with the respective amounts of the stock to which they are respectively entitled; and the register shall be accessible for inspection and perusal at all reasonable times to every mortgagee, bondholder, debenture stock holder, shareholder, and stockholder of the company, without the payment of any fee or charge.

29. The company shall deliver to every holder of debenture stock a certificate stating the amount of debenture stock held by him; and all regulations or provisions for the time being applicable to certificates of shares in the capital of the company shall apply, *mutatis mutandis*, to certificates of debenture stock.

30. Nothing herein or in the Special Act authorizing the issue of debenture stock contained shall in any way affect any mortgage or bond at any time legally granted by the company before the creation of such stock, or any power of the company to raise money on mortgage or bond, but the holders of all such mortgages and bonds shall, during the continuance thereof respectively, be entitled to the same priorities, rights and privileges in all respects as they would have been entitled to if the Special Act authorizing the issue of debenture stock had not been passed.

31. Debenture stock shall not entitle the holders thereof to be present or vote at any meeting of the company, or confer any qualification, but shall, in all respects not otherwise by or under this Act or the Special Act provided for, be considered as entitling the holders to the rights and powers of mortgagees of the undertaking other than the right to require repayment of the principal money paid up in respect of the debenture stock.

32. Money raised by debenture stock shall be applied exclusively either in paying off money due by the company on mortgage or bond, or else for the purposes to which the same money would be applicable if it were raised on mortgage or bond instead of on debenture stock.

33. Separate and distinct accounts shall be kept by the company, showing how much money has been received for or on account of debenture stock, and how much money borrowed or owing on mortgage or bond, or which they have power so to borrow, has been paid off by debenture stock, or raised thereby, instead of being borrowed on mortgage or bond.

34. The powers of borrowing and re-borrowing by the company shall, to the extent of the money raised by the issue of debenture stock, be extinguished.

35. The provisions of this part of this Act shall be deemed to apply to mortgage preference stock, and to funded debt, as the case may require, in all respects as if mortgage preference stock or funded debt were mentioned throughout this part of this Act wherever debenture stock is mentioned therein.

PART IV.
CHANGE OF NAME.

36. Where by any Special Act hereafter passed and incorporating this part of this Act the name of any company incorporated either before or after the passing of this Act for the purpose of carrying on any undertaking is changed,—then and in every such case from the passing of the Special Act the company by their new name shall have and may exercise the powers then vested in the company by their original name; and all Acts relating to the company by their original name shall be read and interpreted as if throughout those Acts, wherever the original name of the company or any reference to the company by their original name occurs, the new name of the company or reference to the company by their new name were substituted.

37. No action, suit, bill, process, writ, indictment, information, or other proceeding, whether civil or criminal, which at or immediately before the passing of the Special Act is commenced and is then pending,—either at the suit or instance of the company by their original name against any other corporation or any person, or at the suit or instance of any other corporation or any person against the company, by their original name,—shall abate, determine, or be otherwise impeached or affected for or by reason of the change of the name of the company; nor shall any notice, tender, requisition, warrant, summons, pleading, civil or criminal writ or other process, record, deed, contract, agreement, writing, or instrument then or thereafter to be made, issued, written, or commenced, be deemed to be vacated, discharged, invalidated, prejudiced, or affected by reason of the company or their undertaking being therein respectively called by the original name of the company or undertaking; and it shall not be necessary in any bill, suit, indictment, information, proceeding, notice, tender, requisition, warrant, summons, pleading, civil or criminal writ, or other process, or in any record, deed, contract, agreement, writing, or other instrument or matter, to aver that the company had been called or known for any period by the original name of the company, or that their undertaking had been called or known within that period by the original name of the undertaking, and that by the Special Act effecting the change the names of the company and their undertaking were changed, and that after the passing of that Special Act the company had been called or known by their new name, and their undertaking by its new name; but it shall be deemed true, lawful, and sufficient therein to aver the style and describe the company by their new name, and their undertaking by its new name, in the same manner as if the company had been originally incorporated, called, or known by their new name, and as if their undertaking had been originally called or known by its new name.

38. Notwithstanding the change of the name of the company, everything before the passing of the Special Act effecting the change done, suffered, or confirmed under or by virtue of any other Act shall be as valid as if the Special Act effecting the change were not passed; and the change of name and last-mentioned Special Act respectively shall accordingly be subject and without prejudice to everything so done, suffered, or confirmed before the passing of the last-mentioned

Special Act, and to all rights, liabilities, claims, and demands, then present or future, which, if the change of name had not happened and such last mentioned Special Act had not been passed, would be incident to or consequent on anything so done, suffered, or confirmed.

39. Notwithstanding the change of the name of the company, all deeds, instruments, purchases, sales, securities, and contracts before the passing of the Special Act effecting the change made under any other Act, or with reference to the purposes thereof, shall be as effectual to all intents in favour of, against, and with respect to the company as if the name of the company had remained unchanged.

CAP. CXIX.

An Act to prevent false representations as to grants of medals or certificates made by the Commissioners for the Exhibitions of 1851 and 1862.

[28th July, 1863.]

- Sec. 1. *Penalty on false representations. As to having obtained medals.*
 2. *Provisions as to proceedings under this Act.*
 3. *Definition of terms.*
 4. *Recovery of penalties.*
 5. *Conviction not to affect any right or civil remedy.*
 6. *Short title.*

• WHEREAS it is expedient to prevent false representations with respect to grants of medals and certificates by the Commissioners for the Exhibition of 1851 and the Commissioners for the Exhibition of 1862: Be it enacted by the Queen's most excellent Majesty, by and with the advice and consent of the lords spiritual and temporal, and commons, in this present Parliament assembled, and by the authority of the same, as follows:

1. If any trader commits any of the offences following; that is to say,
 1. Falsely represents that he has obtained a medal or certificate from the Exhibition Commissioners in respect of any articles or process for which a medal or certificate has been awarded by the commissioners:
 2. Falsely represents (knowing such representation to be false) that any other trader has obtained a medal or certificate from the Exhibition Commissioners:
 3. Falsely represents (knowing such representation to be false) that any article sold or exposed for sale has been made by, or by any process invented by, a person who has obtained in respect of such article or process a medal or certificate from the Exhibition Commissioners:
 He shall incur the following penalties; that is to say,
 1. For the first offence he shall forfeit to her Majesty a sum not exceeding five pounds.
 3. For any subsequent offence he shall forfeit to her Majesty a sum not exceeding twenty pounds, or be imprisoned for a period not exceeding six months.
2. In proceedings under this Act it shall not be necessary to prove that any person has sustained damage by the false representations of the defendant. It shall not be necessary in any proceedings under

his Act to set out any copy or fac-simile of any medal or certificate.

3. For the purpose of this Act "The Exhibition Commissioners" shall mean the Commissioners for the Exhibition of 1851 and the Commissioners for the Exhibition of 1862, or either of such bodies of commissioners.

The term "defendant" shall mean any person against whom proceedings may be taken under this Act.

4. Offences under this Act may be prosecuted summarily in *England* and *Ireland* before two justices; as to *England*, in manner directed by an Act passed in the session holden in the eleventh and twelfth years of the reign of her Majesty, Queen Victoria, chapter forty-three, intituled *An Act to facilitate the performance of the Duties of Justices of the Peace out of Sessions within England and Wales with respect to summary Convictions and Orders*, or any Act amending the same; as to *Ireland*, in manner directed by the Act passed in the session holden in the fourteenth and fifteenth years of the reign of her Majesty Queen Victoria, intituled *An Act to consolidate and amend the Acts regulating the Proceedings in Petty Sessions, and the Duties of Justices of the Peace out of Quarter Sessions in Ireland*, or any Act amending the same.

In *Scotland*, an offence against this Act may be prosecuted summarily at the instance of the procurator fiscal before any sheriff or sheriff substitute, or before any two justices of the county, or before the magistrates or any police magistrate of the burgh in which the offence was committed.

5. No provision of this Act shall take away, diminish, or prejudicially affect any suit, process, proceeding, right, or remedy which any person may be entitled to at law, in equity or otherwise; nor exempt or excuse any person from answering or making discovery upon examination as a witness, or upon interrogatories or otherwise, in any suit or other civil proceeding: Provided always, that no evidence, statement, or discovery which any person shall be compelled to give or make shall be admissible in evidence against such person in support of any indictment for a misdemeanour at common law or otherwise, or of any proceeding under the provisions of this Act.

6. This Act may be cited for all purposes as "The Exhibition Medals Act, 1863."

CAP. CXX.

An Act for the augmentation of certain benefices, the right of presentation to which is vested in the Lord Chancellor. [28th July, 1863.]

CAP. CXXI.

An Act to establish the Validity of Acts performed in Her Majesty's Possessions abroad by certain Clergymen ordained in Foreign Parts, and to extend the Powers of Colonial Legislatures with respect to such Clergymen. [28th July, 1863.]

26 G. 3, c. 84. 19 & 20 Vict., c. 20 (*Barbadoes*).

Sec. 1. Colonial Legislatures may authorize exercise of clerical functions by persons ordained by bishops consecrated under 26 G. 3., c. 84.

2. Acts heretofore performed by such persons to be valid.

'WHEREAS by the third section of an Act passed in the twenty-sixth year of his late Majesty King George the Third, chapter eighty-four, intituled *An Act to empower the Archbishop of Canterbury or the Archbishop of York for the Time being to consecrate to the Office of a Bishop Persons being Subjects or Citizens of Countries out of His Majesty's Dominions*, it was enacted that no person or persons admitted to the order of priest or deacon by any bishop or bishops so consecrated, or by the successor or successors of any bishop or bishops so consecrated, should be thereby enabled to exercise his or their respective office or offices within his Majesty's dominions; And whereas by an Act passed by the Legislature of *Barbadoes* in the nineteenth and twentieth year of her Majesty Queen Victoria, chapter twenty, intituled *An Act to enable the Reverend Joseph Shepherd Mayers to exercise his Office as a Clergyman within this Island*, it was enacted, that it should be lawful for the said Reverend Joseph Shepherd Mayers to exercise the office of priest, and the said Reverend Joseph Shepherd Mayers hath from that time exercised the said office in the island of *Barbadoes*: and whereas it is apprehended that divers persons having been ordained by such bishop or bishops as aforesaid or their successors have at times exercised their respective offices in *British* colonies: and whereas doubts are entertained respecting the validity of the aforesaid Act passed by the Legislature of *Barbadoes*, and of the marriages solemnized and other acts performed by the said Reverend Joseph Shepherd Mayers under authority of the said Act, or by other persons so ordained as aforesaid, and it is advisable to remove such doubts, and to define the power of Colonial Legislatures in this respect: Be it therefore enacted by the Queen's most excellent Majesty, by and with the advice and consent of the lords spiritual and temporal, and commons, in this present Parliament assembled, and by the authority of the same, as follows:

1. It shall be lawful for the Legislature of any of her Majesty's possessions abroad, by any law or laws to be by them passed, to authorize any persons admitted to the order of priest or deacon by any of such bishops as are mentioned in the first-recited Act to exercise their respective offices in such possession, anything in the aforesaid Act of Parliament to the contrary notwithstanding, and all laws heretofore passed by any such Legislature for that purpose shall be and the same are hereby declared to be valid and effectual to all intents and purposes.

2. All acts heretofore performed in any *British* colony by any person having been admitted to the office of priest or deacon by any of such bishops as aforesaid or of their successors shall be as valid and effectual at law for all purposes whatever as if such person had been so admitted by a bishop or bishops of the United Church of *Great Britain* and *Ireland*.

CAP. CXXII.

An Act to enable her Majesty in Council to make Alterations in the Circuits of the Judges. [28th July, 1863.]

CAP. CXXIII.

An Act to amend the Law relating to District Parochial Churches in Ireland. [28th July, 1863.]

Sec. 1. *Power to churchwardens of district parochial churches erected under provisions of 14 & 15 Vict., c. 17, to levy pew rents. As to situation of free sittings.*

2. *Application of pew rents.*

‘WHEREAS it is expedient to amend the law respecting district parochial churches and chapels erected in Ireland by funds provided by way of endowment:’ Be it therefore enacted by the Queen’s most excellent Majesty, by and with the advice and consent of the lords spiritual and temporal, and commons, in this present Parliament assembled, and by the authority of the same, as follows:

1. That whenever a district parochial church or chapel shall be erected within the boundaries of any city or corporate town in Ireland, or within the distance of three miles from the boundaries of such city or corporate town, under the provisions of the statute passed in the fourteenth and fifteenth years of her Majesty, intituled *An Act to consolidate and amend the Laws relating to the Erection and Endowment of Churches and Chapels and Perpetual Curacies* in Ireland, it shall be lawful for the churchwardens of such district parish, when duly chosen and appointed according to law, to contract for, collect, and levy and recover by all proper means and proceedings an annual rent or rents for the use of any pews or sittings in such church or chapel from such persons as shall be willing to take and occupy the same, so that no such proceeding shall abate by reason of the death, removal, or going out of office of any such churchwardens, but may be commenced, prosecuted, and continued in the official names of the churchwardens of such district church: provided always, that in every such church or chapel erected, appropriated, or endowed under the provisions of the said Act of Parliament, one third at least of the sittings shall be set apart as free sittings for ever; and that such free sittings shall, with respect to position and convenience, be as advantageously situated in the church or chapel as the pews or sittings for which a rent or rents may be fixed or taken.

2. It shall and may be lawful for the churchwardens of any such district parish church or chapel so erected within any city or town corporate in Ireland, or within the distance of three miles from the boundaries thereof, to apply the pew rents so collected or recovered, to the insurance against fire of the said church or chapel, and to increasing the stipend, salary, or endowment of the incumbent or perpetual curate of such district parish church or chapel, or in defraying such other incidental charges as may from time to time be approved of by vestry meetings of such district parish duly assembled according to law.

CAP. CXXIV.

An Act for the more effectual condensation of muriatic acid gas in alkali works. [28th July, 1863.]

Sec. 1. *Short title.*

2. *Commencement of Act.*

3. *Interpretation of terms.*

4. *As to the conduct of Alkali works.*

5. *Owner to be liable for offences in the first instance, unless he prove that the offence was committed by some agent, &c. without his knowledge, in which case such agent, &c. to be liable.*

6. *As to the registration of Alkali works.*

7. *Appointment of inspectors.*

8. *What persons disqualified from acting as inspector.*

9. *Duties and powers of inspector.*

10. *Salaries of inspectors and sub-inspectors.*

11. *General penalties on violation of Act.*

12. *Inspector to report to Parliament.*

13. *Power to owners of works to make special rules.*

14. *As to recovery of penalties in England for other than offences against a special rule.*

15. *As to recovery of general penalties in Scotland.*

16. *As to recovery of general penalties in Ireland.*

17. *Application of penalties.*

18. *As to recovery of penalties for offences against special rule.*

19. *Term of Act.*

‘WHEREAS it is expedient to provide for the better condensation of the muriatic acid gas evolved in alkali works:’ Be it enacted by the Queen’s most excellent Majesty, by and with the advice and consent of the lords spiritual and temporal, and commons, in this present parliament assembled, and by the authority of the same, as follows:

Preliminary.

1. This Act may be cited as the “Alkali Act, 1863.”

2. This Act shall come into operation on the first day of January, one thousand eight hundred and sixty-four.

3. The term “alkali work,” as hereinafter used, shall mean every work for the manufacture of alkali, sulphate of soda, or sulphate of potash in which muriatic acid gas is evolved:

The term “owner,” as hereinafter used, shall mean the lessee or occupier or any other person carrying on any alkali work:

The term “the inspector” shall mean the inspector to be appointed under this Act.

Alkali Works.

4. Every alkali work shall be carried on in such manner as to secure the condensation to the satisfaction of the inspector, derived from his own examination or from that of a sub-inspector, of not less than ninety-five per centum of the muriatic acid gas evolved therein: Provided always, that nothing herein contained shall entitle the inspector to direct any alteration to be made in the process of manufacture or the apparatus used therein.

If any alkali work is carried on in contravention of this section, the owner of that work shall on its being made to appear to the court before which any proceedings for recovery of a penalty may be instituted that ninety-five per centum at least of the muriatic acid gas evolved in such work has not been condensed, be deemed to be guilty of an offence against this Act, and be subject in respect of the first conviction to a

penalty not exceeding fifty pounds, and in respect of every offence after a previous conviction to a penalty not exceeding one hundred pounds: Provided always, that no such owner shall be convicted of more than one such offence in respect of any one day: Provided also, that no such penalty shall be inflicted unless the inspector shall produce before the court having cognizance of the matter a statement in writing of the facts on which he founds his opinion that ninety-five per centum of the muriatic acid gas evolved in the alkali work is not condensed therein, and serve a copy thereof with the process commencing the proceedings.

5. The owner of any alkali work in which any offence against this Act has been proved to have been committed, and for which a pecuniary penalty may be imposed, shall in every case be deemed to have committed the offence, and shall be liable to pay the penalty, unless he shall prove to the satisfaction of the court before which any action shall be brought for the recovery of such penalty that he has used due diligence to comply with and to enforce the execution of this Act, and that the offence in question was committed by some agent, servant, or workman, whom he shall charge by name as the actual offender, without his knowledge, consent, or connivance, in which case such agent, servant, or workman shall be liable to and may be sued for the payment of the penalty, and of the costs of all proceedings which may be taken for the recovery thereof, either against himself or against the owner under this Act; provided that it shall be lawful for the inspector to proceed in the first instance against the person whom he shall believe to be the actual offender, without first proceeding against the owner, in any case in which it shall be made to appear to the satisfaction of such inspector that the owner has used all due diligence to comply with and to enforce the execution of this Act, and that the offence has been committed by the person whom he may charge therewith without the knowledge, consent, or connivance of the owner, and in contravention of his orders.

6. No alkali work shall at any time after the expiration of three months after the appointment of the inspector be carried on or prosecuted until such work has been registered by the owner with the inspector. In every register hereby required to be made there shall be inserted the name in full of the owner, and of the parish or township in which the work is situate, and within one month after change of ownership in any such work the register of such work shall be amended by inserting the name of the new owner; and if any alkali work is carried on in contravention of this section, the owner thereof shall, on conviction, be deemed to be guilty of an offence against this Act, and shall be subject to a penalty not exceeding five pounds for every day during which such work shall have been so carried on.

Inspectors.

7. For the purpose of carrying into effect the provisions of this Act, the Board of Trade may from time to time appoint any fit and proper person to be inspector of alkali works under this Act, and may from time to time remove any inspector so appointed, and appoint another person in his place. The Board of Trade may also, on application of the inspector, from time to time appoint and remove such sub-inspector

or sub-inspectors as the said Board may deem necessary for the purpose of carrying this Act into effect. Notice of the appointment of such inspector and sub-inspectors shall be published in the *London Gazette*, and a copy of the gazette shall be evidence of the appointment made.

8. No person either directly or indirectly acting or practising as a land agent, or directly or indirectly engaged in any manufacture, or interested in any patent in or according to which the decomposition of salt or the condensation of muriatic acid gas may be effected, shall act as an inspector or sub-inspector under this Act.

9. It shall be the duty of every inspector under this Act to ascertain from time to time that all the alkali works are carried on in conformity with the provisions of this Act, and to enforce the said provisions, and to cause notice to be given to every owner whose work shall be carried on in contravention of this Act of the commission of such offence as soon as conveniently may be after the commission thereof: and with a view to the performance of that duty he or any sub-inspector may at all reasonable times, by day and by night, without giving previous notice, but so as not to interrupt the process of the manufacture, enter upon and inspect any alkali work, and examine into the efficiency of the condensing apparatus, and the quantity of muriatic acid gas condensed, and generally into all matters and works tending to show compliance or non-compliance with the provisions of this Act. And the owner of such works, upon demand of the inspector, shall within a reasonable time furnish him with a plan, to be kept secret by such inspector, of those parts of such works in which the decomposition of salt or other process causing the evolution of muriatic acid gas or the condensation thereof is carried on.

It shall be lawful for the inspector or any sub-inspector under his direction, but so as not to interfere with the process of the manufacture, to apply any tests or make any experiments he may think proper for the purpose of ascertaining the efficiency of the condensing apparatus, or the quantity of gas condensed; and the owner or agent of the works shall be deemed to be guilty of an offence against this Act unless he renders to the said inspector or sub-inspector all necessary facilities for their entry, examination, and testing.

10. Every inspector and sub-inspector appointed under this Act shall be paid such salary as may be determined by the Board of Trade, with the consent of the Commissioners of her Majesty's Treasury.

11. Every person who wilfully obstructs any inspector or sub-inspector in the execution of this Act, and every owner of any alkali work who refuses or neglects to afford to the inspector or sub-inspector the facilities necessary for making any entry inspection, examination, or testing under this Act, or who neglects or wilfully violates any provision of this Act, for the neglect or violation of which no other penalty is by this Act imposed, shall be guilty of an offence within the meaning of this Act, and shall for every such offence incur a penalty not exceeding ten pounds.

12. The inspector shall, on or before the first day of March in every year, make a report in writing to the Board of Trade of his proceedings during the pre-

ceding year, and a copy of such report shall be laid before both Houses of Parliament.

Special Rules.

13. The owner of any alkali work may, with the sanction of the Board of Trade, make, alter, or repeal special rules for the guidance of such of his workmen as are employed in any process causing the evolution of muriatic acid gas or whose duty it is to attend to the apparatus used in the condensation of that gas, and may annex penalties to any violation of such rules, so that no penalty exceeds two pounds for any one offence.

A printed copy of the special rules in force in any alkali work shall be given by the owner of the work to every person working or employed in or about that work affected thereby.

Penalties.

14. The following regulations shall be enacted with respect to the recovery in *England* of penalties for offences other than offences against a special rule:

Every such penalty shall be recovered by action in the county court having jurisdiction in the district in which the alkali works are situate in respect of which the penalty arises:

The action shall be brought, with the sanction of the board of trade, by the inspector appointed under this Act, within three months after the commission of the offence, and for the purposes of such action the penalty shall be deemed to be a debt due to such inspector:

The plaintiff in any action for a penalty under this Act shall be presumed to be the inspector appointed under this Act, until the contrary is proved by the defendant:

The court may, upon the application of either party, appoint a person to take down in writing the evidence of the witnesses, and may award to that person such compensation as the court thinks just:

The amount of compensation awarded by the judge shall be deemed to be costs in the cause:

If either party in any action for a penalty under this Act feels aggrieved by the decision of the court in point of law, or on the merits, or in respect of the admission or rejection of any evidence, he may appeal from that decision to any of the superior courts of common law at *Westminster*:

The appeal shall be in the form of a special case to be agreed upon by both parties or their attorneys, and if they cannot agree, to be settled by the judge of the county court upon the application of the parties or their attorneys:

The court of appeal may draw any inferences from the facts stated in the case that a jury might draw from the facts stated by witnesses:

Subject to the provisions of this section, all the enactments, rules, and orders relating to proceedings in actions in county courts, and to enforcing judgments in county courts, and appeals from decisions of the county court judges, and to the conditions of such appeals, and to the power of the superior courts on such appeals, shall apply to an action for a penalty under this Act, and to an appeal from such action, in the same manner as if such action and appeal related to a matter within the ordinary jurisdiction of the court:

Within the city of *London* and the liberties thereof the Sheriffs Court, established by a local Act passed in the eleventh year of the reign of her present Majesty, chapter seventy-one, intituled *An Act for the more easy Recovery of Small Debts and Demands within the City of London and the Liberties thereof*, shall be deemed to be the county court having jurisdiction in the case.

15. In *Scotland* any offence under this Act, with the exception of offences against a special rule, shall be prosecuted at the instance of the inspector, with the sanction of the board of trade, before the sheriff or sheriff substitute of the county in which the offence has been committed, and the sheriff or sheriff substitute having cognisance of such offence may award costs to either party, and may sentence the offender to imprisonment for any period not exceeding six months, unless the penalty and costs be previously paid; and any decision or sentence of such sheriff or sheriff substitute shall be subject to review and appeal according to law.

16. In *Ireland* all penalties incurred under this Act, with the exception of penalties against a special rule, may be recovered by civil bill at the instance of the inspector, with the sanction of the board of trade, in the manner and with the appeal directed by an Act passed in the fourteenth and fifteenth years of her Majesty, chapter fifty-seven, or any Act or Acts amending the law relating to civil bills.

17. All penalties recovered under this Act, except in respect of offences against a special rule, shall be paid into the receipt of her Majesty's Exchequer in such manner as the commissioners of the treasury may determine.

18. All penalties incurred under this Act in respect of any offence against a special rule may be recovered summarily in *England* and *Ireland* before two or more justices: as to *England*, in manner directed by an Act passed in the session holden in the eleventh and twelfth years of the reign of her Majesty Queen *Victoria*, chapter forty-three, intituled *An Act to facilitate the performance of the Duties of Justices of the Peace out of Sessions within England and Wales, with respect to summary Convictions and Orders*, or any Act amending the same; as to *Ireland*, in manner directed by the Act passed in the session holden in the fourteenth and fifteenth years of the reign of her Majesty Queen *Victoria*, chapter ninety-three, intituled *An Act to consolidate and amend the Acts regulating the Proceedings of Petty Sessions, and the Duties of Justices of the Peace out of Quarter Sessions*, in *Ireland*, or any Act amending the same; and in *Scotland*, before the sheriff or two justices, in manner directed by "The Railways Clauses Consolidation, *Scotland*, Act, 1845," with respect to penalties imposed by that Act, the recovery of which is not otherwise provided for.

19. This Act shall continue in force to the first day of *July* one thousand eight hundred and sixty-eight, and no longer.

CAP. CXXV.

An Act for promoting the revision of the statute law by repealing certain enactments which have ceased to be in force or have become unnecessary.

[28th July, 1863.]

A TABLE OF THE PUBLIC GENERAL STATUTES

PASSED IN THE

FIFTH SESSION OF THE EIGHTEENTH PARLIAMENT OF THE UNITED KINGDOM OF GREAT BRITAIN AND IRELAND.

26 & 27 VICTORIA.

Chap.	Relating to	Chap.	Relating to
I—an act to enable her Majesty to provide for the establishment of his Royal Highness the Prince of Wales and her Royal Highness the Princess Alexandra of Denmark, and to settle certain annuities on her Royal Highness	U K	XXII—an act to grant certain duties of customs and inland revenue	U K
II—an act to make provision concerning bills of exchange and promissory notes payable in the metropolis on the day appointed for the passage through the metropolis of her Royal Highness the Princess Alexandra of Denmark	E	XXIII—an act to alter the boundaries of New Zealand	U K
III—an act to extend the credit for payment of a portion of the excise duty on malt	U K	XXIV—an act to facilitate the appointment of vice-admirals and of officers in vice-admiralty courts in her Majesty's possessions abroad, and to confirm the past proceedings, to extend the jurisdiction, and to amend the practice of those courts	U K
IV—an act to extend for a further period the provisions of the union relief aid act of the last session	E	XXV—an act to make further provision for the investment of the monies received by the commissioners for the reduction of the national debt from the trustees of savings banks established under the enactments of the act ninth George the Fourth, chapter ninety-two	E & I
V—an act to amend the law relating to the royal naval coast volunteers	U K	XXVI—an act to facilitate the drainage of land in Ireland	I
VI—an act to apply the sum of ten millions out of the consolidated fund to the service of the year one thousand eight hundred and sixty-three	U K	XXVII—an act to amend the law relating to marriages in Ireland	I
VII—an act for altering the duties on tobacco, and permitting the manufacture of cavendish and negrohead in bond	U K	XXVIII—an act to give further facilities to the holders of the public stocks	G B & I
VIII—an act for punishing mutiny and desertion, and for the better payment of the army and their quarters	U K	XXIX—an act to amend and continue the law relating to corrupt practices at elections of members of Parliament	G B & I
IX—an act for the regulation of her Majesty's royal marine forces while on shore	U K	XXX—an act to authorize further harbour regulations for the protection of her Majesty's ships, dockyards, and naval stations	U K
X—an act for prohibiting the exportation of salmon at certain times	G B & I	XXXI—an act for the government of the Cayman Islands	U K
XI—an act for the registration of births and deaths in Ireland	I	XXXII—an act to confirm certain provisional orders under the Local Government Act (1858) relating to the districts of <i>Basford, Teignmouth, Kingston-upon-Hull, Nottingham, Bradford, Ryde, Bedford, Croydon, Bailey, Berwick-upon-Tweed, Skeerness, and Bromsgrove</i>	E
XII—an act to abolish the office of secretary at war, and to transfer the duties of that office to one of her Majesty's principal secretaries of state	U K	XXXIII—an act for granting to her Majesty certain duties of inland revenue; and to amend the laws relating to the inland revenue	U K
XIII—an act for the protection of certain garden or ornamental grounds in cities and boroughs	E	XXXIV—an act to carry into effect an additional article to the treaty of the seventh day of April one thousand eight hundred and sixty-two, between her Majesty and the United States of America, for the suppression of the African slave trade	U K
XIV—an act to amend the law relating to post office savings banks	G B & I	XXXV—an act for the prevention and punishment of offences committed by her Majesty's subjects in South Africa	U K
XV—an act to apply the sum of twenty millions out of the consolidated fund to the service of the year one thousand eight hundred and sixty-three	U K	XXXVI—an act for carrying into effect the report of the commissioners appointed to inquire into the state of the dioceses of <i>Canterbury, London, Winchester, and Rochester</i> ; and for other purposes	E
XVI—an act for raising the sum of one million pounds by exchequer bonds for the service of the year one thousand eight hundred and sixty-three	U K	XXXVII—an act to defray the charge of the pay, clothing, and contingent and other expenses of the disembodied militia in Great Britain and Ireland; to grant allowances in certain cases to subaltern officers, adjutants, paymasters, quartermasters, surgeons, assistant surgeons, and surgeons mates of the militia; and to authorize the employment of the non-commissioned officers	G B & I
XVII—an act for amending the local government Act (1858)	E	XXXVIII—an act to amend the act for placing	
XVIII—an act to authorize the inclosure of certain lands in pursuance of a report of the inclosure commissioners for England and Wales	E		
XIX—an act to amend the law relative to the sale of hares in Ireland	I		
XX—an act to further limit and define the time for proceeding to election during the recess	U K		
XXI—an act to amend the law enabling boards of guardians to recover costs of maintenance of illegitimate children in certain cases in Ireland	I		

Chap.	Relating to	Chap.	Relating to
the employment of women, young persons, and children in bleaching works and dyeing works under the regulations of the Factories Act	G B & I	LIX—an act for confirming a scheme of the charity commissioners for the management of the charities in the borough of <i>Buthin</i> in the county of <i>Denbigh</i> , comprising the Hospital of <i>Christ</i> and its subsidiary endowments, the grammar school, <i>Edward Lloyd's</i> foundation, and Bishop <i>Goodman's</i> charity	E
XXXIX—an act to authorize the inclosure of certain lands in pursuance of a special report of the inclosure commissioners	E	LX—an act to confirm a certain provisional order under the General Police and Improvement (<i>Scotland</i>) Act, 1862, relating to the burgh of <i>Leith</i>	S
XL—an act for the regulation of bakehouses	G B & I	LXI—an act to prevent waywardens contracting for works within their own district	E
XLI—an act to amend the law respecting the liability of innkeepers, and to prevent certain frauds upon them	G B & I	LXII—an act to amend the law relating to the seizure of growing crops in <i>Ireland</i>	I
XLII—an act to amend the act of the twentieth and twenty-first years of <i>Victoria</i> , authorizing the sale of mill sites and water powers by the commissioners of public works in <i>Ireland</i>	I	LXIII—an act to confirm certain provisional orders under the Land Drainage Act, 1861	E
XLIII—an act to enable her Majesty's postmaster general to sell and otherwise dispose of land	U K	LXIV—an act to confirm certain provisional orders under the Local Government Act (1858), relating to the districts of <i>Plymouth</i> , <i>Holwell</i> , <i>Llanelly</i> , <i>West Ham</i> , <i>Worthing</i> , <i>Aberavon</i> , and <i>Wallasey</i>	E
XLIV—an act for the further security of the persons of her Majesty's subjects from personal violence	E & I	LXV—an act to consolidate and amend the acts relating to the volunteer force in <i>Great Britain</i>	G B
XLV—an act for making a new street from <i>Blackfriars</i> to the <i>Mansion House</i> in the city of <i>London</i> in connexion with the embankment of the River <i>Thames</i> on the Northern side of that river, and for other purposes	E	LXVI—an act to amend the law relating to prisons in <i>Ireland</i>	I
XLVI—an act for further continuing and appropriating the <i>London</i> coal and wine duties	E	LXVII—an act to enable provision to be made out of the funds of <i>Greenwich Hospital</i> for the widows of seamen and marines slain, killed, or drowned in the sea service of the Crown	U K
XLVII—an act for removing doubts as to the powers of the courts of the Church of <i>Scotland</i> , and extending the powers of the said courts	S	LXVIII—an act to extend the powers of the act relating to the main drainage of the metropolis	E
XLVIII—an act to repeal the act of the twentieth and twenty-first years of her Majesty, chapter sixty-six, for punishing mutiny and desertion of officers and soldiers in the service of the <i>East India</i> Company, and for regulating in such service the payment of regimental debts and the distribution of the effects of officers and soldiers dying in the service	U K	LXIX—an act to establish officers of the royal naval reserve	U K
XLIX—an act giving power to sell and dispose of lands, parcel of the possessions of the duchy of <i>Cornwall</i> , and to purchase other lands to be annexed thereto, and to regulate future grants of leases of the possessions of the said duchy; and for other purposes	E	LXX—an act to facilitate the execution of public works in certain manufacturing districts; to authorize for that purpose advances of public money to a limited amount upon security of local rates; and to shorten the period for the adoption of the Local Government Act, 1858, in certain cases	E
L—an act to continue the powers of the commissioners under the Salmon Fisheries (<i>Scotland</i>) Act until the first day of <i>January</i> one thousand eight hundred and sixty-five, and to amend the said Act	S	LXXI—an act for the preservation and improvement of <i>Harwich Harbour</i>	E
LI—an act to amend the Passengers Act, 1855	U K	LXXII—an act for the further improvement of the harbour of <i>Hewth</i>	I
LII—an act to further extend and make compulsory the practice of vaccination in <i>Ireland</i>	I	LXXIII—an act to give further facilities to the holders of <i>India</i> stock	U K
LIII—an act to suspend the making of lists and the ballots for the militia of the United Kingdom	G B & I	LXXIV—an act to enable her Majesty to declare gold coins to be issued from her Majesty's branch mint at <i>Sydney</i> , <i>New South Wales</i> , a legal tender for payments; and for other purposes relating thereto	U K
LIV—an act for vesting in her Majesty's principal secretary of state for the war department certain lands and hereditaments at <i>Walmor</i> in the County of <i>Kent</i>	E	LXXV—an act for embankment of part of the River <i>Thames</i> , on the South side thereof, in the parish of <i>Saint Mary Lambeth</i> , and for other purposes	E
LV—an act to continue the poor law board for a limited period	E	LXXVI—an act to determine the time at which letters patent shall take effect in the Colonies	U K
LVI—an act to make perpetual an Act to amend the laws relating to loan societies	E	LXXVII—an act to amend the law relating to the jurisdiction of justices residing or being out of the county for which they are justices	E
LVII—an act to consolidate and amend the acts relating to the payment of regimental debts, and the distribution of the effects of officers and soldiers in case of death, and to make like provision for the cases of desertion and insanity, and other cases	U K	LXXVIII—an act to amend the acts relating to the turnpike roads in the neighbourhood of the metropolis north of the River <i>Thames</i>	E
LVIII—an act for confirming a scheme of the charity commissioners for the management of the charity of <i>Sir Robert Hicham</i> , knight, king's serjeant, for the benefit of <i>Framlingham</i> , <i>Debenham</i> , and <i>Levington</i> , in the county of <i>Suffolk</i> , and of <i>Coygeshall</i> in the county of <i>Essex</i>	E	LXXIX—an act for the amendment of the law relating to the religious instruction of prisoners in county and borough prisons in <i>England</i> and <i>Scotland</i>	E & S
		LXXX—an act for providing a further sum towards defraying the expenses of constructing fortifications for the protection of the royal arsenals and dockyards and the ports of <i>Dover</i> and <i>Portland</i> , and of erecting a central arsenal	G B & I

Chap.	Relating to	Chap.	Relating to
LXXXI—an act to amend, so far as regards advances for the purposes of "The Harbours and Passing Tolls, &c. Act, 1861," certain of the acts authorizing the advance of money out of the Consolidated Fund for carrying on public works and fisheries and employment of the poor	G B	CIII—an act to amend the law in certain cases of misappropriation by servants of the property of their masters	E
LXXXII—an act to empower the bishops of <i>Welsh</i> Dioceses to facilitate the making provision for <i>English</i> services in certain parishes in <i>Wales</i>	W	CIV—an act for confirming certain provisional orders made by the board of trade under the general pier and harbour Act, 1861, relating to <i>Blackpool, Deal, and Walmer, Exmouth, Rose-harty, Ilfracombe, Instow, Bangor, Chatham, Bray, Dartmouth, and Nairn</i>	G B & I
LXXXIII—an act to define the boundaries of the Colony of <i>British Columbia</i> , and to continue an act to provide for the Government of the said colony	U K	CV—an act to remove certain restrictions on the negotiation of promissory notes and bills of exchange under a limited sum	E
LXXXIV—an act to confirm certain acts of colonial Legislatures	U K	CVI—an act to further amend the law relating to the conveyance of land for charitable uses	U K
LXXXV—an act to give relief to persons who may refuse or be unwilling, from alleged conscientious motives, to be sworn in criminal proceedings in <i>Scotland</i>	S	CVII—an act to indemnify such persons in the United Kingdom as have omitted to qualify themselves for offices and employments, and to extend the time limited for those purposes respectively	G B & I
LXXXVI—an act to authorize the taking of harbour dues at <i>Port Erie</i> in the <i>Isle of Man</i> , in order to provide a fund for the improvement of the harbour, and for other purposes	E	CVIII—an act to extend and make compulsory the practice of vaccination in <i>Scotland</i>	S
LXXXVII—an act to consolidate and amend the laws relating to savings banks	G B & I	CIX—an act for remedying certain defects in the law relating to the removal of prisoners in <i>Scotland</i>	S
LXXXVIII—an act to enable landed proprietors to construct works for the drainage and improvement of land in <i>Ireland</i>	I	CX—an act to amend the lunacy acts in relation to the building of asylums for pauper lunatics	E
LXXXIX—an act for the further amendment of the law relating to the removal of poor persons, natives of <i>Ireland</i> , from <i>England</i>	E & I	CXI—an act to amend the naval medical supplemental fund society winding-up act, 1861	U K
XC—an act to provide for the registration of marriages in <i>Ireland</i>	I	CXII—an act to regulate the exercise of powers under special acts for the construction and maintenance of telegraphs	U K
XCI—an act to extend for a further period the provisions of the union relief aid acts	E	CXIII—an act to prohibit the sale and use of poisoned grain or seed	G B & I
XCII—an act for consolidating in one act certain provisions frequently inserted in acts relating to railways	G B & I	CXIV—an act to amend the laws relating to fisheries in <i>Ireland</i>	I
XCIII—an act for consolidating in one act certain provisions frequently inserted in acts relating to waterworks	G B & I	CXV—an act to explain the act for the amendment of the law relative to gratuitous trustees in <i>Scotland</i>	S
XCIV—an act to amend the law relating to the repair of turnpike roads in <i>England</i> , and to continue certain turnpike acts in <i>Great Britain</i>	G B	CXVI—an act to provide for the appointment of navy prize agents, and respecting their duties and remuneration	U K
XCV—an act for continuing various expiring acts	G B & I	CXVII—an act to amend the nuisances removal act for <i>England</i> , 1855, with respect to the seizure of diseased and unwholesome meat	E
XCVI—an act to amend the petty sessions (<i>Ireland</i>) Act (1851), and the petty sessions clerks (<i>Ireland</i>) Act (1858)	I	CXVIII—an act for consolidating in one act certain provisions frequently inserted in acts relating to the constitution and management of companies incorporated for carrying on undertakings of a public nature	G B & I
XCVII—an act to enable cities, towns, and boroughs of twenty-five thousand inhabitants and upwards to appoint stipendiary magistrates	E	CXIX—an act to prevent false representations as to grants of medals or certificates made by the commissioners for the exhibition of 1851 and 1862	U K
XCVIII—an act to confirm certain provisional orders made under an Act of the fifteenth year of her present Majesty, to facilitate arrangements for the relief of turnpike trusts	E	CXX—an act for the augmentation of certain benefices, the right of presentation to which is vested in the lord chancellor	E
XCIX—an act to apply a sum out of the consolidated fund and the surplus of ways and means to the service of the year one thousand eight hundred and sixty three, and to appropriate the supplies granted in this session of parliament	U K	CXXI—an act to establish the validity of acts performed in her Majesty's possessions abroad by certain clergymen ordained in foreign parts, and to extend the powers of colonial legislatures with respect to such clergymen	U K
C—an act to render owners of dogs in <i>Scotland</i> liable in certain cases for injuries done by their dogs to sheep and cattle	S	CXXII—an act to enable her Majesty in council to make alterations in the circuits of the judges	E
CI—an act to appoint additional commissioners for executing the acts for granting a land tax and other rates and taxes	G B	CXXIII—an act to amend the law relating to district parochial churches in <i>Ireland</i>	I
CII—an act to reduce the duty on rum in certain cases	U K	CXXIV—an act for the more effectual condensation of muriatic acid gas in alkali works	G B & I
		CXXV—an act for promoting the revision of the statute law by repealing certain enactments which have ceased to be in force or have become unnecessary	U K

Law and Equity Index

TO

THE IRISH JURIST,

INCLUDING

A DIGEST OF THE CASES DECIDED IN THE COURTS OF COMMON LAW AND EQUITY IN IRELAND, AS REPORTED IN THE FIFTEENTH VOLUME OF THE IRISH JURIST (THE EIGHTH OF THE NEW SERIES,)

AND IN THE

THIRTEENTH VOLUME OF THE IRISH COMMON LAW AND CHANCERY REPORTS.

* * The letters at the conclusion of each paragraph indicate the titles of the Reports digested, and the names of the respective Courts, thus:—*Ir. Jur. Irish Jurist*—*Ir. C. L. R. Irish Common Law Reports*—*Ir. Ch. R. Irish Chancery Reports*—*C. Chancery*—*R. Rolls*—*Q. B. Queen's Bench*—*C. P. Common Pleas*—*Exch. Exchequer*—*Cir. Cas. Circuit Cases*—*Ex. Cham. Exchequer Chamber*—*Reg. C. Registry Cases*—*Crim. Ap. Court of Criminal Appeal*—*L. E. C. Landed Estates Court*—*Adm. Admiralty Court*—*M. O. Master's Office*—*Consol. Cham. Consolidated Chamber*—*P. C. Judicial Committee of the Privy Council*—*Bank. Bankrupt Court*—*H. L. House of Lords*.

ACCOUNT, ACTION OF.

By one tenant in common against another.] The Common Law Procedure Act (*Ir.*) 1853, s. 3, repealed the 6 Anne, c. 10 (*Ir.*) s. 23, only so far as to destroy the form of action thereby created, but left the right of action unimpaired. *Kearney v. Kearney*, 13 *Ir. C. L. Rep.* 814, Q.B.

An action of account under 6 Anne, c. 10 (*Ireland*), sec. 23, being brought by one tenant in common against another, Held, upon demurrer, that the Common Law Procedure Act, in repealing that statute, abolished the form of proceeding only and not the right of action. *Kearney v. Kearney*, 6 *Ir. Jur.*, N.S., 127, followed. *Garnett v. Cullen*, 8 *Ir. Jur.*, N.S., 154, *Exch.*

ADMINISTRATION SUIT.

A. being liable under a covenant to B. and C. by his will bequeathed legacies and appointed B. and C. his executors, who both proved the will. B. died, leaving C. surviving him. C. died, having bequeathed legacies, and appointed E. executor. A suit was instituted against E., and a final decree made for the administration of the assets of C., no claim being made in that suit on foot of the covenant. A suit against E. alone for an account of the assets of A. by the parties claiming the money secured by the covenant was dismissed, without prejudice to their proceeding against the legatees of C. *Clarke v. Pope*, 18 *Ir. Ch. Rep.* 91, R.

ADMINISTRATION BOND, *see* PROBATE (COURT OF).

ADMINISTRATION, LETTERS OF, *see* PROBATE (COURT OF).

ADMIRALTY

Collision.] A steam-ship which does not keep at her proper side of the channel, when coming down or going up a river, and which starboards her helm when she should have ported, will, under ordinary circumstances, be held liable in a suit for collision to pay both damages and costs. *The Arbutus*, 8 *Ir. Jur.*, N.S., 273, *Adm.*

Where a vessel has come into collision with another vessel, owing to the gross negligence of those in charge of her, her owners will not be liable in a suit of collision to pay damages to the owners of the injured vessel if it appears that the vessel causing the damage was in charge of a duly licensed pilot at the time, and that the pilotage was by statute compulsory. *Id.*

In a suit of collision, where the impugnants plead that it was caused by want of proper lights on board the promovent vessel, and this plea is positively denied, the Court will carefully examine the entire of the evidence and decide the question upon the general accuracy and trustworthiness of the respective witnesses. *The Semaphore*, 8 *Ir. Jur.*, N.S., 319, *Adm.*

Where there is the risk of a collision, if two vessels continue on their respective courses when first seen, both vessels are bound to port helm under the provisions of "The Merchant Shipping Act," 17 & 18 *Vict.*, c. 104, s. 236, and if one of them ports in proper time and the other neglects to do so, and a collision takes place, she will be held liable to make good all the damages caused by her default and pay the costs of the suit. *Id.*

The absence of a good look out in hazy weather on board the impugnant vessel will go far to induce the Court to hold her liable in a suit of collision. *Id.*

Salvage.] In this case, where the property saved was admittedly worth 115,000*l.*, the Court awarded the sum on 5,750*l.*, "one-twentieth," or "five per cent.," upon both ship and cargo to the salvors together with their costs of suit. *The Mary Stenhouse*, 8 Ir. Jur., N.S., Adm.

Upon an appeal to the Court of Delegates, the salvage awarded by the Court of Admiralty was reduced from 5,750*l.* to a sum of 3,000*l.*, each party to bear their own costs of the appeal. *Ib.*

In fixing a proportion of the value for salvage reward the Court of Admiralty is in the habit of giving a smaller proportion where the property is large, and a higher proportion where the property is small, and for the obvious reason, that where the property is of small value a small proportion would not hold out a sufficient encouragement, whereas in cases of considerable value a small proportion would afford an adequate remuneration. *Ib.*

In this case, which was a suit for sale, where the property saved was admittedly worth 12,500*l.*, the Court awarded a sum of 400*l.*, amounting to nearly "one-thirtieth," or "three per cent.," on the total value to the salvors, together with their costs, overruling a tender of 150*l.*; and upon an appeal to the Court of Delegates the judgment of the Court of Admiralty was affirmed, each party to bear their own costs of the appeal. *The Nimroud*, 8 Ir. Jur., N.S., 99, Adm.

Suit for wages and materials] Where seamen sign ship's articles for a specified service, and before the voyage has concluded, the captain agrees to give one or more of them increased wages, the Court will not bind the owners by such an agreement, and will only make its decree for the wages properly payable under the ship's articles. *The Patriotto*, 8 Ir. Jur., N.S., 317, Adm.

The Court will award kettle-money and costs to petitioners claiming for wages, and substantiating their claims, but will not give conduct money in the case of a British registered ship. *Ib.*

A decree for materials will be made on funds in Court realized by the sale of the ship, but the payment must be *puisse* to the claims of the seamen for wages. *Ib.*

Bottomry; Deficient fund.] Where freight has been *bona fide* advanced anterior to the period when a bottomry bond was executed the bond does not attach on that freight, and the Court will order it to be refunded; but the costs of exchange and insurance on such an advance cannot be charged against the consignee. In making such an order the court will give the petitioners their costs out of the funds if it appear that all parties have acted properly. *The Fortuna*, 8 Ir. Jur., N.S., 399, Adm.

Sale under Court.] If a party purchase a ship at a sale directed under a decree of the Court of Admiralty, he will not be held to his purchase if it appear that he was misled by the advertisements or conditions of sale to buy a vessel unsuited for his purposes; but if, on investigation of all the facts, the Court should be satisfied that he had full information from another reliable quarter prior to the confirmation of the sale, it will hold him bound to complete his purchase. *The Duna*, 8 Ir. Jur., N.S., 400, Adm.

AFTER-ACQUIRED PROPERTY.

Settlement of.] A., the heir presumptive of a person found an idiot, conveyed, by marriage settlement executed in 1794, lands of which he was seized for a remainder in tail, together with all other lands of which he then was or might thereafter be possessed, to uses in strict settlement. In 1819 a judgment was recovered against A.; and in 1839, the idiot having died, A. became entitled to certain lands as his heir-at-law. A. died in 1859. Held that the trusts of the deed of 1794 attached on the descended lands in priority to the judgment recovered against A. *In re Stack*, 13 Ir. Ch. Rep. 215, Ch. App.

AGENT.

Disallowance of land-agent's fees.] A land-agent misconducting himself in the management of property, although receiving and accounting for the rents, may be disallowed his fees on the sum received by him. *Palmer v. Goodwin*, 18 Ir. Ch. Rep. 171, C.

see PRINCIPAL AND AGENT.

ALIEN, see PROBATE (COURT OF).

ANCIENT MEADOW.

Meadow land which has not been broken up during the twenty years which immediately preceded the execution of a lease is, as between lessor and lessee, *ancient meadow*, the breaking up of which during the term amounts to a breach of the lessee's covenant not to commit waste. So held by the Court of Exchequer Chamber, reversing the judgment of the Court of Queen's Bench. Lefroy, C.J. and O'Brien, J. (Hayes, J., *dissentiens*, Fitzgerald, J., *absente*.) Q. B. and Ex. Cham. *Murphy v. Daly* (13 Ir. C. L. R. 239).

APPURTENANCES.

Meaning of word and what passes by.] A demised to B. lands then in the possession of B., as tenant to A., *habendum*, "with the rights, members, and appurtenances therunto belonging or in anywise appertaining" to B. and his representatives. Before the date of this lease B. had been accustomed to cut turf for the use of his family on a bog which belonged to A., and adjoined the demised lands. Held that the lease continued to B. and his representatives the right of cutting turf for domestic use. *Dobbins v. Somers*, 13 Ir. C. L. Rep. 293, Q.B.

Held that the term "appurtenances," when used in a lease is flexible, and must be interpreted so as to carry out the intention of the parties. *Ib.*

ARREST.

Discharge from on ground of suppression when fiat obtained.] Where important facts have been suppressed in the affidavit to ground a fiat for the arrest of a defendant he will be discharged, notwithstanding *laches* on his part in applying for his discharge. *M'Mahon v. M'Mahon*, 8 Ir. Jur., N.S., 118, Cons. Ch.

Effect of discharge from arrest.] A debtor arrested on a judgment and discharged, cannot be arrested again upon foot of that judgment or any portion thereof, notwithstanding that he may have obtained his discharge upon an undertaking to pay the amount of the judgment-debt by instalments, and that that undertaking is embodied in an order of a Master of the Court of Chancery, which, while directing his discharge, declared that the judgment should stand as a security for the instalments. The violation of such an undertaking amounts to deception only but not to fraud, so as to render the discharge void. *Seymour v. Clarke*, 18 Ir. C. L. R. 537, Exch.

The proper modes of effectuating such an undertaking. *Ib.* Plea to a writ of *revivor* praying execution generally, that the plaintiff, after the recovery of the judgment mentioned in the writ, had issued a *ca. sa.* on foot of it, upon which the defendant had been arrested and detained in custody until discharged under an order from the plaintiff. Held, upon authority of *Burns v. O'Leary*, 8 Ir. Com. Law Rep. 1, that this plea disclosed no answer to plaintiff's writ. *Doonan v. Doonan*, 18 Ir. C. L. Rep. 27, Exch.

*Arrest for sum under 10*l.**] A obtained a civil-bill decree against B. for £31 8s. 6d., which was afterwards reduced by payment by instalments to £7 8s. 6d. A. then arrested B. for the balance then remaining due. B. afterwards sued A. for a wrongful arrest in respect of an amount not exceeding £10. Held—that the 11 & 12 Vict., c. 28, s. 1, did not apply where the writ of execution originally issued for an amount exclusive of costs exceeding £10, though the amount to be actually enforced was subsequently reduced by payment below that sum; and that accordingly the present action was not maintainable. *English v. Dunne*, 13 Ir. C. L. R., 562, C.P.; s.c. 8 Ir. Jur. N.S., 31.

Held, also, that a civil-bill decree was in the nature of a writ of execution, as well as of a judgment. *Ib.*

Shuldham v. Boles, 2 Ir. C. L. R., 140, distinguished. *Ib.*

ARTICLES.

Revocation of trusts in.] By ante-nuptial articles, husband and wife covenanted that a sum of 2000*l.* should be assigned to A. and B. in trust for the younger children of the marriage, as the husband and wife should jointly, or as the survivor should by deed appoint; and in default of appointment, in trust for all the younger children, sons at twenty-one and daughters at twenty-one or marriage; and if no child should attain a vested interest, in trust for the survivor of the husband and wife, and that the settlement to be made in pursuance of the articles should contain a power to the hus-

band and wife to revoke all or any of the trusts, powers, &c., in such settlement contained, of all or any part of the trust fund; and by the same or any other deed or deeds to declare other trusts of the trust premises, the trusts of which should be so revoked. No settlement was executed. The husband and wife, by deed reciting the power of revocation in the articles, revoked the trusts as to the 2000*l.*, and declared that it should be held in trust, to be forthwith assigned to C. and D., whose receipt should be a discharge for that sum. Held, that the trusts of the marriage or titles were revoked, and that the 2000*l.* became the property of the wife. *In re Charleville, minors*, 13 Ir. Ch. Rep., 6, R.

ASSURANCE.

Payment of policy to trustee. When a policy of assurance is assigned to a trustee who either by express terms or by fair construction has a power to give receipts, the Company ought not to refuse payment to the trustee. *Curtin v. Jellico*, 13 Ir. Ch. R. 180, C.

ATTACHMENT.

If the tenancy of lands over which a receiver has been appointed, is disputed, the Court will not issue an attachment for non-payment of rent. *Herbert v. Ras* 13 Ir. Ch. R. 25. R.

ATTORNEY AND SOLICITOR.

Licence to be paid by attorney residing in the country, but transacting his ordinary business in Dublin. Where an application was made on behalf of the plaintiff to stay the taxation of defendant's costs, in an action tried in Dublin in 1868, on the ground that G. F. M., defendant's attorney, had taken out a certificate to enable him to practise as a country attorney for 1868, for which he paid the sum of 6*l.*, same being the amount required to be paid by a country practitioner, not ordinarily carrying on his business in the city of Dublin for more than forty days in the year, and where it appeared that though G. F. M. lived altogether in the country in said year, yet that his entire business was carried on in the Superior Courts, and attended to by a town agent in the city of Dublin, it was Held, that an attorney living in the country, whose ordinary business was transacted in Dublin, should pay a city licence. *Keegan v. Mowlds*, 8 Ir. Jur. N.S. 416. Ex. Held, also, that a party who employs an uncertificated attorney is entitled merely to his costs out of pocket. *Id.*

ATTORNEY AND CLIENT.

Responsibility of client for act of attorney. In the course of the trial of an ejectment brought to recover a tract of land of very trifling value, it was proposed by the plaintiff's counsel and acceded to by the defendant's counsel, that the issue between the parties should be tested by the ascertainment of a particular matter of fact deposed to by the plaintiff, and it was further agreed that the written reply to a written interrogatory, addressed to the official of a bank in a neighbouring town should be conclusive of the question between them. The clerk of the plaintiff's solicitor, who had been conducting the trial throughout on the part of his master's client, became the bearer of this missive, and brought back an answer in writing which was of ambiguous import; but the writer, by a verbal communication made contemporaneously with the delivery of the answer, explained to the clerk that its meaning was what would in fact have proved unfavourable to the plaintiff. The clerk made no mention of this communication, and the jury found a verdict for the plaintiff, subsequently to which the defendant discovered the fact of the verbal explanation. At a still later period it was ascertained by the plaintiff's attorney that the verbal explanation by the bank official was itself a mistake, and that the merits, so far as they could be tested by the proposed method, were entirely with his client. Held, that a conditional order for a new trial on the grounds of surprise, newly discovered evidence and suppression of evidence, should be discharged (*Monahan, C. J. dissentiente*), *Carey v. Walsh*, 8 Ir. Jur. N.S. 86, C.P.

And, per Christian J., that the conduct of the attorney in not submitting the oral communication for the consideration of the court, was blameworthy. *Id.*

And, per Ball and Keogh, JJ., that to make absolute the order for a new trial would be punishing one person for the fault of another. *Id.*

And, per Keogh J., that there was no duty in the attorney or his clerk to communicate the explanation. *Id.*

And, per Monahan, C. J., that the clerk, under such circumstances, could not be separated from the attorney, nor the attorney from his client; that it was the imperative duty of the attorney to have submitted the explanation for the consideration of the court, and that, irrespectively of any merits, a verdict tainted by such a *suppressio veri* ought not to be allowed to stand. *Id.*

See EVIDENCE.

AWARD.

Amendment of]. The Common Law Procedure Act (Ireland) 1856, s. 11, gives the Court jurisdiction to remit at any time an award to the arbitrator, in order that he may correct a superficial error. *Coleman v. The Cork and Youghal Railway Company*, 13 Ir. C.L.R., 368. Q.B.

This jurisdiction cannot be ousted by inserting a prohibitory clause in the consent. *Id.*

Semble—that the court will, in every case, limit a time within which the amendment must be made. *Id.*

BANKER.

A summons and plaint alleged that A., the plaintiff, drew a cheque upon a Banking Company, requiring them to pay to S. and K., or their order, 190*l.* 17*s.* 7*d.*, the bank having at the time funds of A. to meet same; that P. L. forged the signature of S. and K. as an endorsement on the back of said cheque, and presented same for payment at the bank; that the said forged document was manifestly not in the handwriting of S. and K., or either of them, and was manifestly in the handwriting of P. L.; and that the respective handwritings of S. and K. and P. L. were well known to the servants and agents of the bank at their office when the same was presented for payment by P. L.; that the bank wrongfully cashed the cheque, and paid money of the plaintiff, to the amount of 190*l.* 17*s.* 7*d.* to P. L., and said money was paid to P. L. by the gross negligence of the bank, &c., &c. Held (*Christian, J. dissentiente*) that the allegations in the plaint shewed that the instrument in question was a draft for money payable to order, within the 16 and 17 Vict., c. 59, s. 19, and that it purported to have been endorsed by S. and K., and accordingly the bank was protected by statute, and the action was not maintainable. *Hare v. Copland*, 13 Ir. C.L.R., 426. C.P.

BANKRUPTCY.

Reducing proof.] A bank or creditors upon a bankrupt's estate for a considerable amount, and hold the acceptances of the bankrupt for the entire debt, which entitles them to prove for the full amount. Those bills were drawn by J. P., and accepted by the bankrupt, who, as collateral security, gave J. P. a mortgage on certain leasehold property. J. P., joined by the bankrupt, assigned this mortgage to J. G., who discounted the bills in question for J. P., who subsequently gets the bills discounted by the Provincial Bank. J. G. makes the mortgage available to the extent of 387*l.* Held, that this sum must be deducted from the proof made by the bank; or that if they insist on their right to retain the entire amount of their proof, then that they should allow the assignees to proceed in their name against J. P., on foot of the bills in question. *Re Wilson*, 8 Ir. Jur. N.S. 57. Bank.

Interest proveable by trustees of marriage settlement.] A wife's fortune upon her marriage is advanced to the husband upon his bond with interest at six per cent; the bond is put in settlement, and vested in trustees for the benefit of the wife. The conditions of the settlement with regard to the payment of interest are, that it shall not be payable except in the event of death, bankruptcy, or insolvency, or a reasonable apprehension of insolvency. Bankruptcy takes place. Interest is proveable by the trustees of such settlement from the advance of the money to the husband up to the date of his bankruptcy. *Re O'Brien*, 8 Ir. Jur. N.S. 217. Bank.

Adjournment of examination sine die—Directing prosecution.] Although a bankrupt may make a full and true disclosure and discovery of his estate and effects, still if he be guilty of reckless trading, forgery, and fraud upon his general creditors the court is not bound to pass the final examination, for if that were done the bankrupt would, at the end of three years, at most, be entitled, under the 143rd section, to his certificate, no matter what crimes he may have committed. The Court has perfect

jurisdiction, under any state of facts, to adjourn the examination *sine die* under the 140th section. *Re M'Iroy*, 8 Ir. Jur., N.S., 218, Bank.

Where the only evidence of a bankrupt having committed crimes that would subject him to a public prosecution, has been obtained by his own admissions when under examination, the Court will not order a prosecution against him. *Id.*

Certificate—Case sent back from Court of Appeal.] Where the examination of a bankrupt is adjourned *sine die* with a view to prevent him from getting into trade again, and on the ground that there are several patent errors in his schedule calculated to lead to the inference that he has not made a true disclosure, and he appeals from that decision; and upon the hearing of that appeal the fact of the errors in the schedule is not brought before the Court, and they decide the case upon the ground that, notwithstanding his misconduct as a trader, if he fully disclosed everything, the Court below was bound to pass his examination, and the trader entitled to get his certificate at the end of three years, and the case is sent back to the Bankrupt Court—the judge in bankruptcy will allow the schedule to be amended, and pass the examination, but will adjourn the certificate for three years. *Re Bourke*, 8 Ir. Jur., N.S., 199, Bank.

Quare, no matter what the fraud and misconduct of a trader may be if he fully and truly states everything, is he entitled to have his examination passed, and to get his certificate at the end of three years? *Id.*

Suspension of certificate.] Where a bankrupt has traded recklessly, made false representations as to the state of his affairs, and made false or fictitious entries, or introduced fictitious figures into his books, for the purpose of bringing out a balance in his favour; but it appears upon a full investigation of his case by the assignee that there has been no suppression or concealment; the examination will be passed, but the certificate will be suspended for three years. Cases may occur of so fraudulent a character that, although the bankrupt may make a full disclosure, still the Court will not be bound to pass the examination. *Re Digan and Hird*, 8 Ir. Jur., N.S., 138, Bank.

Rendering account of assets.] Where the account given by a bankrupt and his friend, who had the alleged custody of a large sum of money, the property of creditors, is so highly improbable, and out of the range of the ordinary transactions of life, as to make it impossible for the Court to believe that the account is true, and where such account leads to the general inference that there is deliberate falsehood, the Court, although it will adjourn the examination *sine die* will not direct a prosecution. *Re McCarthy*, 8 Ir. Jur., N.S., 178, Bank.

Accounts irregularly kept and fabricated.] Where the business of a partnership was prosperous up to the time of dissolution, when one partner went out upon an arrangement that he was to be secured an annuity, no portion of which was ever paid, although the outgoing partner was obliged to file a bill to raise the amount; and where regular books were discontinued, and accounts kept on slips of paper, the inference is that it was done for a fraudulent purpose. If a trader submits fabricated accounts for the purpose of obtaining forbearance and fresh credit, and is guilty of criminal acts, the Court is not bound to pass the examination, although he may fully account; but where regular books are not kept, and the entire accounts are not satisfactory, it is evidence that a true disclosure has not been made, and the examination will be adjourned *sine die*. *Re Charles Lyster*, 8 Ir. Jur., N.S., 176, Bank.

Removal of property.] Where property has been removed, although it has been sworn that it has all been brought back, and the creditors are unable to trace any other property, or give evidence of its removal, still where a deficiency is unaccounted for, the presumption is that all the property concealed has not been restored. Where the evidence of the bankrupt is contradicted, and his only explanation is that he does not recollect, the Court cannot believe that he has made a full disclosure. In such case the examination will be adjourned *sine die*, but liberty will be reserved to re-open it when the bankrupt can make a better case, and satisfy the creditors that all the property has been restored. *Re Hennessy*, 8 Ir. Jur., N.S., 139, Bank.

Vexatious litigation.] Where an action is brought for the recovery of a debt and false pleas are put in, and then a cross-action is brought, and both are referred to arbitration, when the plaintiff recovers a less sum than the action is brought

for, the ground of vexatious defence fails. Although bringing an unfounded action will always receive the censure of the Court, yet where both actions are made the subject of one verdict, the insolvent will only be remanded on a final hearing within the limits of the discretionary clause. *Re McCarthy*, 8 Ir. Jur., N.S., 187, Bank.

Fraudulent preference.] Although a preference to a creditor be not the voluntary act of a trader, but given by the contrivance and at the suggestion of another, for the purpose of getting a security for his own debt, and he, for this purpose, induces the trader to mortgage certain property for the debt due to such creditor, and that the mortgagee will besides indorse certain bills to secure the debt of the party having recourse to this contrivance, such a dealing will be deemed a fraud upon the bankrupt laws, and done for the purpose of defeating their operation; and such deed will be inoperative against the assignees; and the party thus induced to indorse the bills will have a good defence to any action brought for the recovery of them. *Re William McKean*, 8 Ir. Jur., N.S., 16, Bank.

A trader indorsed to a bank certain bills of exchange drawn by him in fictitious names. Afterwards, seeing that the stoppage of the firm of which he was a partner was inevitable, and fearing that he might be prosecuted for forgery, if the circumstances connected with these bills were allowed to transpire in proceedings in the Court of Bankruptcy, he withdrew the bills from the bank before they had arrived at maturity. Held, that this payment was a fraudulent preference within the meaning of the bankrupt laws, and void as such. *Re Read*, 8 Ir. Jur., N.S., 41, Bank.

Order and disposition.] Where a testator bequeaths to trustees certain jewellery which he should die possessed of, upon trust that they or the trustees for the time being should permit his widow to enjoy the same for her life, and that after her decease the same shall form a portion of the residue of his personal estate, and the widow of the testator, shortly after her husband's death, lends the ornaments to her daughter on the occasion of her marriage, and they remain in her possession until shortly before her death, when they are pledged by her, and are then in the possession of the husband, who becomes insolvent after he releases them, they do not pass to his assignees either as the absolute property of his wife, and consequently his own property, or as being in his order and disposition with the consent of the trustees, who are the legal owners. *Re Robertson*, 8 Ir. Jur., N.S., 418, Bank.

Reputed ownership.] Where a trader is for some years the lessee of a furnished hotel, the furniture of which belongs to the lessor, and where he carries on his business, and at the end of that period he fails in his circumstances, and enters into a composition with his creditors of seven and six pence in the pound, which he pays, but after that he still continues to deal with the same creditors, and with a new class of creditors, who know how he is circumstanced, and is then made bankrupt, the assignees claim the furniture of the hotel as being in the reputed ownership of the bankrupt at the time of his bankruptcy; but it appearing that he had the same furniture in his possession at the time he entered into the composition with his creditors, and that it was of sufficient value to pay double what he owed at the time, it might safely be presumed that he obtained no fresh credit on account of the possession of the property, and that the reputed ownership clause did not apply. *Re Shaw*, 8 Ir. Jur., N.S., 96, Bank.

Partners.] Where partners in a concern take little or no part in the business, and know nothing of the accounts, although their examination will be passed, their certificates will be suspended. *Re McCarthy*, 8 Ir. Jur., N.S., 178, Bank.

Partnership allowance to partners in proportion to dividend on joint estate.] Where a dividend is paid on the joint estate of partners, entitling them to an allowance in proportion to the dividend paid, such allowance will be double, or as much as each as if paid on a separate estate, upholding the decision in the case of *Gibbs v. Howard* (Montague's Reports, 105). *Re Scott*, 8 Ir. Jur., N.S., 160, Bank.

Quare, if only the one per-centage was given to be divided between the bankrupts, would they have the right of appeal? *Id.*

Creation of partnership.] Where H who carried on an extensive wholesale wollen trade in Dublin, wholly on his own account, had agreed with M. to become the manager and partner in a separate and larger concern which had been conducted by and le-

hanging to M. in Huddersfield; and a portion of the agreement was that M. should come to Dublin, and there superintend the separate trade which was carried on in the name of H., though on no definite or conclusive agreement, but with a view to test its capacity and determine was such separate trade worth being carried on. Held—That although the Dublin house was not carried on as an adjunct to or part of the co-partnership constituted in the Huddersfield concern, and although he did not intend to commit M. to a partnership with him in the Dublin trade, yet that M., by thus superintending, became in fact a partner in such trade; and that a claim made by the executors of M. to be admitted as creditors on the estate of H. for goods sold and cash supplied by the Huddersfield concern to the Dublin concern should be disallowed, but without prejudice to any claim the executors might have under any special agreement with H. *Re Hall*, 8 Ir. Jur., N.S., 356, Bank.

Right to proceeds of bills.] B., a customer of the bankrupt, gave him a bill for two hundred pounds in the ordinary course of business, which bill was sent into the bank where the bankrupt did business, but, by mistake, it was not entered on the docket with other bills sent in at the same time, and was supposed to be lost, and B. gave another bill in lieu of it, which was also sent to the bank, and put to the bankrupt's credit. B. was compelled to pay both bills. B. gave another bill to the bankrupt, the acceptance of a third party, which was lodged as a guarantee for his solvency and for safe custody. B. also gave the bankrupt two bills as renewals for a previous bill partly accepted for the bankrupt's accommodation, but upon which some advances had been made. The proceeds of all the bills became part of the bankrupt's estate. Held, that the proceeds of the two first bills did not pass to the assignees, and that B. was entitled to be repaid the amount out of the bankrupt's estate of the two first bills, but that the same rule did not apply to the claim on foot of the third bill. *Re Hall*, 8 Ir. Jur. N.S., 257, Bank.

Right of mortgagee.] Although a deed of assignment by way of mortgage may be executed by a trader in insolvent circumstances, and upon the eve of bankruptcy, yet when it was executed in pursuance of a previous arrangement to do so, and that at the time of such agreement or arrangement the party advancing the money acted bona fide, and that on the day the deed was actually executed, the mortgagee had no knowledge of any circumstances existing to render the conveyance anything but a simple fulfilment of the previous agreement, such assignment will not be deemed an act of bankruptcy, but will be valid against the assignees. *Re Wm. McKean*, 8 Ir. Jur. N.S., 16, Bank.

Right of lien.] Where a bank discounts the drafts of a trader upon a consignee to whom he consigns goods to be sold on commission before the bills are accepted by the consignee, who ultimately refuses to accept them at all, although the goods have been subsequently sold, the bank that discounted the bills has no lien on the goods or claim on the produce of them when sold, either by way of lien, or by virtue of any right existing in respect of the course of dealing which previously existed. *Re William McKean*, 8 Ir. Jur. N.S. 16, Bank.

What is a debt within the 291st section of Bankruptcy and Insolvency Act.] The liability on a bill of exchange is a debt within the meaning of the 291st section of the Irish Bankruptcy and Insolvency Act, 20 & 21 Vict., c. 60, and an indorsement to the purchaser of such bill of exchange is not necessary in order to enable him to sue upon it. *Fynn v. Jennings*, 8 Ir. Jur. N.S., 269, C.P.

BENEFICE.

Effect of judgment on.] See JUDGMENT.

BILL OF EXCHANGE.

Evidence of authority to accept.] The plaintiff sued the official manager of the Tipperary Joint Stock Bank upon a bill of exchange accepted "per pro the Tipperary Joint Stock Bank, William Kelly, manager." One of the defences being a traverse of the acceptance, William Kelly was asked at the trial by the counsel for the plaintiff, if it was part of his business as manager to accept bills of exchange for the said bank. Held, upon exceptions, that the question was admissible. *Eyre v. McDowell*, 8 Ir. Jur. N.S., 383, C.P.

A book which was produced at the trial was deposed to by William Kelly as being one of the books of the bank, and contained amongst others the following entry:—"1853. I

beg to inform you that Mr. William Kelly has been appointed manager here, and has been empowered to sign all documents and endorse all bills on account of this bank. I enclose specimen of his signature." Service of a notice upon the defendant's attorney to produce the original of a circular letter, of which this entry was a copy, was admitted, and the entry tendered in evidence by the plaintiff's counsel. The judge admitted the entry. Held, that the entry was inadmissible. *Id.*

The plaintiff having proved the fact of the acceptance of the bill, and having given in evidence the entry and a letter authorising William Kelly to accept the bill from James Sadlier, who was deposed to by William Kelly as being the sole acting director of the bank; and William Kelly having deposed that he was himself at the time of accepting said bill manager of the bank, and that it was part of his business as such manager to accept bills for the bank; and that he considered he had authority to accept bills, and that he did accept bills; and the deed of incorporation, by one of whose clauses the power to authorise the acceptance of bills was reserved to the court of directors, while by another of them it was provided that three directors should be necessary to constitute a court, not being in evidence at this stage of the trial, Held that the judge was right in refusing, at the close of the plaintiff's case to direct a verdict for the defendant. *Id.*

The defendant's counsel proposed to ask the manager of the Provincial Bank whether this bill of exchange was, in the ordinary course of business, a bill that a bank, according to banking usages, would accept for an inland customer. The judge rejected the evidence. Held that the question was admissible. *Id.*

The defendant's counsel proposed to ask the same witness would a bill accepted in the way this bill was accepted, according to the course of trade and bankers, put a party upon inquiry as to the authority for acceptance. The judge rejected the evidence. Held that the question was admissible. *Id.*

The defendant's counsel proposed to ask the same witness whether authority to indorse was authority to accept. The judge rejected the evidence. Held that the question was inadmissible. *Id.*

The judge told the jury that if they believed that William Kelly, as the manager of the bank, signed the bill by direction of James Sadlier, and that James Sadlier was at the time director of the bank, they should find for the plaintiff. Held, that this was a misdirection. *Id.*

Held, that the words "per pro" upon the face of the bill of exchange imposed upon the plaintiff the onus of inquiry into the authority by which it was accepted. *Id.*

Held, that knowledge of fraud attending the acceptance of the bill upon the part of the plaintiff's attorneys, who, in this particular transaction, did not act as his attorneys, would be no evidence to support a plea that the bill was accepted through fraud, and that the plaintiff had notice of the fraud when the bill was indorsed to himself. *Id.*

Indorsee for value without notice.] Where a bill of exchange is given by a third party to a creditor to induce him to forbear opposing E. an insolvent, and the creditor indorses it for valuable consideration to the plaintiffs, who have no notice whatever of the insolvency of E., who is no party to the bill, and who are bona fide holders, still they cannot recover against the acceptor, the bill being void, *ab initio*, but must look to the party from whom they received the bill. *Dowd & others v. O'Brien*, 8 Ir. Jur. N.S., 140. C.P.

Practice under Summary Procedure on Bills of Exchange Act, 25 & 26 Vict., c. 43. Motion for security for costs in action under.] In an action under the Summary Bills of Exchange (Ireland) Act, the defendant may apply to the Court to compel the plaintiff to give security for costs, without having previously obtained leave from a judge to appear and defend. *Jackson v. Barton*, 8 Ir. Jur., N.S., 94, Cons. Ch.

In the Court of Queen's Bench such a motion may be grounded on the ordinary affidavit of merits required by the 52nd section of the Common Law Procedure Act, 1853. *Id.*

Martin v. Wilson, 7 Ir. Jur., N.S., 335, not followed. *Id.*

A defendant in an action brought under the Summary Procedure on Bills of Exchange Act must have obtained liberty to appear and defend before applying for security for costs. *Jackson v. Barton* 8 Ir. Jur. N.S., 131. Q.B.

Martin v. Wilson, 7 Ir. Jur., N.S., 335, followed. *Id.*

Costs in actions under the Bills of Exchange Act.] Actions brought under the Summary Bills of Exchange Act (24 & 25 Vict. c. 43) are subject to the provisions of the 97th section of the Common Law Procedure Act of 1856; and if the sum recovered be less than 20*l*., and both parties reside within the same civil bill jurisdiction, the plaintiff will not be entitled to costs. *Copland v. Armstrong*, 13 Ir. C. L. Rep., App. lxxvi., G. P.

CIVIL BILL PRACTICE.

Where the copy of the civil bill served did not contain the name of the attorney, or mention any place where the civil bill was to be heard, the process was not dismissed, but nilled. *Bannatyne v. O'Loughlin*, 8 Ir. Jur. N.S. 124.

A renewal refused where the amount of the decree which had been taken against the body of the defendant had been reduced by payments below 10*l*.. *Meara v. O'Brien*, 8 Ir. Jur. N.S. 124.

Appeal in interpleader process.] No appeal lies from the decision of the chairman upon an interpleader process, under the Civil Bill Act, 14 & 15 Vict. c. 57, s. 150. *Lundy, Appellant; Holden, Respondent*, 8 Ir. Jur., N.S. 120, Assizes.

COMMISSION TO EXAMINE WITNESSES.

It is no answer to an application for a commission to examine witnesses in London that an action with the same object is pending in England. *Bartlett v. Lewis*, 13 Ir. C. L. Rep., App. xxxix., Exch.

The granting of a commission to examine witnesses is a matter *ex debito iustitie*. *Id.*

CONDITION.

Forfeiture for condition broken. Release.] An indenture of assignment of certain premises in the vicinity of Dublin contained a covenant by the assignee to expend within a certain number of years a certain sum of money in the erection of dwelling-houses on the premises conveyed, the sum to be expended within each year being also fixed, and a clause of re-entry for breach of the covenant. An indenture of subsequent date between the same parties, and endorsed upon the back of the former, after reciting that the assignee had built one house, and was desirous to let the portion of the premises not built on, contained the following covenant by the assignor: "that in case any penalty or forfeiture shall be incurred under and pursuant to, and for non-performance of the clauses, covenants, and agreements within reserved, that in such case such penalty or forfeiture shall not in any manner affect the interest of the persons who may be tenants to said within demised premises so as in any manner to deprive such persons of the full benefit of their respective holdings; and it is covenanted, &c., that in case of any such penalty, &c., and that proceedings be taken on account thereof, then he, the said assignor, instead of the said assignee, shall be entitled to recover and receive the rents payable by such persons; and that such persons shall not become liable to pay any greater sum." Upon an ejectment brought upon a forfeiture incurred by breach of the former covenant or condition, and a motion to turn the verdict for the defendant into one for the plaintiff, Held (per Monahan, C.J., and Ball, J., Christian, J., giving no opinion, and Keogh, J., having been absent during the argument) that the second indenture did not operate as a release of the condition in the first. *Coleville v. Hall*, 8 Ir. Jur. N.S. 803, C. P.

Held, also, a portion of the premises being set, and a portion unset, that the appointment of a receiver upon foot of a judgment for rent due obtained by the assignor against the assignee, was not such a legal eviction as would excuse the assignee from performing the condition in the original indenture. *Id.*

Held, also, that the receipt by the receiver from an under-tenant of rent accruing due out of the premises subsequently to the bringing of the ejectment did not operate as a waiver of the forfeiture. *Id.*

Held, that a termor who assigns upon condition may re-enter for condition broken. *Id.*

CONTRACT.

To an action by indorsee against acceptor of a bill of exchange, the defendant pleaded thirdly, that before the obtaining or acceptance of said bill, the plaintiff agreed to sell an

estate to J. S., the drawer of said bill, and that a portion of the purchase-money of said estate should be secured by a bill to be accepted by the T. Bank (whose official manager the defendant was), and the balance by a mortgage on part of the estate; that the plaintiff, at the expense of J. S., should do all necessary acts, and execute all proper transfer deeds, &c. That subsequently it was agreed between the plaintiff and J. S. that the amount for which the bill was to be drawn should be increased, so as to include a further sum alleged to be due by J. S. to the plaintiff; and accordingly J. S. delivered to the plaintiff a bill of exchange, drawn by him upon and accepted by the bank for 17,000*l*., payable the 1st of December, 1855, which the bank accepted for the accommodation of J. S., and never received any consideration for the acceptance or payment of the same; which bill was afterwards received by the bank by the bill now sued on, for which they had never received any value or consideration, nor, except as aforesaid, there never was any value or consideration for the indorsement of said bill to the plaintiff; and that after the bill became due, and before the commencement of the suit, the plaintiff repudiated the said agreement, and refused to convey the estate and to perform the agreement. The fourth defence averred, in addition, that J. S., after making the said agreement, conveyed his interest to trustees; that the plaintiff afterwards filed a bill in the Court of Chancery in England against the present defendant, amongst others, as representing the bank, praying that the said agreement should be cancelled as fraudulent, &c.; that the defendant appeared on the part of the bank, and disclaimed any interest in the subject-matter of the suit; and that he was thereby induced, as such official manager, to change, and did change, the position of the banking company, whereby the plaintiff was estopped from setting up the validity of the agreement, or to recover the amount of said bill. The plaintiff replied to the fourth defence, that the bill in Chancery was afterwards dismissed by side-bar order. The plaintiff likewise demurred to both pleas, and the defendant demurred to the replication. Held, that the third defence was no answer to the action, inasmuch as the making of the contract, and not its performance, was the consideration for the bill. *Eyre v. McDowell*, 13 Ir. C. L. R. 458, C. P.

Held, also, that the fourth plea was likewise no answer to the action, inasmuch as it did not follow that the defendant was necessarily induced by the plaintiff's suit in equity to disclaim the benefit of the agreement, and thereby to alter his position. *Id.*

Held, also, that even assuming this to have been the case, the replication, by shewing that the suit had been dismissed for want of prosecution, was a sufficient answer to the defence. *Id.*

Construction of terms of.] A cargo of Indian corn was shipped at New York, on a vessel named "The Surf," bound for Sligo. A written contract was made between the plaintiff and the defendants for the sale and purchase of the cargo; and one of the terms was, that if "The Surf" did not "arrive" on or before the 20th of June, the contract should be void. "The Surf" arrived prior to the 20th of June at a place called "Oyster Island," about four miles from Sligo, and within the natural port and harbour of Sligo. It appeared that vessels anchoring at Oyster Island report themselves to the custom-house of Sligo, and become liable to port and harbour dues. The "Surf" did not arrive at the quay of Sligo until after the 20th. The defendant having at the trial relied upon the breach of condition, the Lord Chief Justice ruled that the term "arrive," in the condition, meant "at the quay of Sligo," and he accordingly directed a verdict for the defendants. The facts having been stated in special case for the opinion of the Court—Held (per Keogh and Christian, JJ., Monahan, C.J., dissentente,) that the question of arrival was one of fact, and should have gone to the jury. *Montgomery v. Middleton*, 13 Ir. C. L. Rep., 173, C. P.

Held, per Monahan, C.J., that the question entirely turned up on the meaning of the word "arrive" in the contract, and was one of law, to be determined by the Court. *Id.*

A contract for the sale of a cargo of mixed maize, then on its way from New York to Sligo, contained a condition that, should the vessel which carried it not arrive at Sligo on or before the 20th of June, 1861, the contract should be void. Held (affirming the judgment of two of the judges of the Court of Common Pleas), that in trying an action brought by the plaintiff for non-acceptance to which the defendants

pleaded that the condition was not performed, the judge should have left to the jury the question whether on or before the 20th June, 1861, the vessel had arrived at Sligo within the intent and meaning of the contract (Hayes, J., *dissentiens*). *Montgomery v. Middleton*, 8 Ir. Jur., N.S., 280, Exch. Ch.

Pleading in action on. To an action for the price of barley sold and delivered, the defendant pleaded that the barley delivered was inferior to the sample, and that the defendant used a small portion in making malt, which turned out bad and useless, whereupon defendant requested plaintiff to take back the barley, which he refused. He further pleaded that the barley was warranted to be fit for malting, that the barley delivered was unfit for that purpose, and that he used a small portion of the barley in making malt, and that the malt made therefrom was of no value, alleging a refusal by the plaintiff to take back the remainder of the barley, which, with the malt so made, remained still on the defendant's premises, and was of no use. Held, that the pleas were bad, for not showing that the defendant made the trial of quality within a reasonable time after delivery, and that he used only so much of the barley as was sufficient for the trial. *Coventry v. M'Enery*, 18 Ir. C. Rep. 160, C. P.

Specific performance—Uncertainty. The respondent who was the proprietor of baths, wrote to the petitioner, who was in the constabulary, that if he would take the management of the baths, she would engage to give him 50*l.* a year, with coals, and light, and washing; and also a per centage on the profits, and would also guarantee him a sum for life, equivalent to his present pay and future pension, in case the baths failed or she disposed of them. The petitioner accepted the offer, whereupon the respondent wrote to him, "When you come up to town, I will have a deed got ready for you, securing you for life the same pension you would get after service in the police; and any property I leave will be liable for this charge. I tell you this, that none of your friends may be uneasy, though I know you would not be uneasy yourself, but feel sure that my word would be as good as a bond; still to prevent any loss to you from an accident, you shall have a bond to secure you. As to your salary, you will have the whole of the payments to make weekly to all the people as well as to yourself; so there is no occasion to make any mention of that in the deed of pension." Held, that if the petitioner voluntarily left the respondent's service, he would not be entitled to a specific performance of the agreement. *Gillis v. M'Ghee*, 13 Ir. Ch. Rep., 48, R.

Held also, that the contract being for hiring and service, the Court would not decree a specific performance of it. *Id.*

Semble. the agreement is too uncertain to justify a decree for specific performance. *Id.*

T. the owner of lands, on the 26th of July 1854, wrote to F. his tenant, requesting him to send a proposal to take a farm at the rent of 170*l.* for one life. F. on the 8th of August sent a proposal for the farm at that rent for one life, or twenty-one years. T. on the 13th wrote that he would get the "lease filled up in Dublin." Held, that there was not any finally concluded contract between T. and F. *Finucane v. Turner*, 13 Ir. Ch. Rep., 488, C.

Specific performance—Part performance where one of parties contracting is a corporation. A proposal was made by J. D. to a corporation, to take out a lease of part of their lands, at a certain rent. The proposal was accepted, and the acceptance entered on the corporation-books. This was immediately communicated to J. D., who, soon after, took possession, and paid the first year's rent, when due. He then refused to complete his contract, by taking out the lease. Held, in a suit for specific performance, that there was here sufficient acts of part performance to take the case out of the general rule, by which corporations can contract only under their common seal. *The Governors of St. Stephen's Hospital v. Dyas*, 8 Ir. Jur. N.S., 411, R.

Specific performance—As to covenants to be inserted in lease. Agreement for a lease with a covenant that the lessee should build a wall round the land. A lease was executed by the lessor, but not by the lessee, which did not contain the covenant to build. Held, after the death of the lessee, that a suit could not be maintained against his administrator having assets, for the specific performance of the original agreement. *Bloss v. Prendergast*, 13 Ir. Ch. Rep., 373, R.

Semble. the suit should have been to reform the lease by adding the covenant to build the wall. *Id.*

COSTS.—I. IN EQUITY.

Costs of affidavit violating 8th G. O. of May 1857.] Where an affidavit violates the eighth order of May 1857, directing that the facts deposed to as being within the deponent's own knowledge are to be distinguished from those believed by reason of information derived from other sources. **Semble.**—That the costs of such portions only as are not in conformity with that order are to be disallowed on taxation. *Cranford v. Pilson*, 8 Ir. Jur. N.S., 4, R.

Costs of counsel.] The practice is on taxation between party and party, to allow the costs of two counsel only on the hearing of a cause petition. *Cloran v. Lord Clancarty*, 13 Ir. Ch. Rep. 1, R.

Under special circumstances, the Court ordered the Master to allow the costs of a third counsel. *Id.*

In taxation between party and party, no fee to counsel is allowed for settling the draft affidavit of the petitioner, in reply to the respondent's affidavit in answer. *Id.*

II. AT LAW.

Costs of motion to set aside defence as embarrassing.] Where, upon a motion to amend or set aside defences, the Court directs some of the defences to be amended upon grounds different from those laid in the notice of the plaintiff's motion, this circumstance will go to the costs of the motion. *Lyngait v. Lee*, 8 Ir. Jur. N.S. 112, C. P.

Certificate for costs.] An action was brought for the breaking of a dam, and thereby causing an unusual quantity of water to flow to the plaintiff's mill, so as to obstruct the working. The second count charged the defendant with having deepened the channel of a certain stream, and having caused same to flow in an unusual direction, so as to damage the plaintiff's premises. The defendant pleaded to both counts, by way both of denial and justification. The case was referred at the trial to arbitrators, whose award was to be entered as the verdict of a jury, and they ultimately found for defendant on the first count, and for plaintiff on the second count. Held, upon a motion for a certificate, under the 97th section of the Common Law Procedure Amendment Act, 1859, that the case was fit to be tried in one of the superior courts, notwithstanding that the parties resided within the same jurisdiction, that in consequence of the reference, the Court had jurisdiction to grant the certificate at this stage of the cause, and that it was a proper case for so doing. *Bennett v. Scott*, 13 Ir. C. L. Rep. 467, C. P.

In an action of contract, both parties to which resided within the same civil bill jurisdiction, and which was brought to recover five and one-half years' arrears of salary, the plaintiff obtained 8*l.* by verdict, besides 45*l.* which the defendant lodged in Court under a plea of tender before action commenced, but did not apply to the judge who tried the case for a certificate that it was a case fit to be tried in a superior court. The taxing master, accordingly, refused to tax the plaintiff's costs upon the higher scale. Upon appeal, that ruling was reversed by the Court (Fitzgerald, J., dissenting). *O'Rourke v. M'Donnell*, 13 Ir. C. L. Rep. App. viii., Q. B.

As to allowing full or half costs.] The plaintiff in the first count of his summons and plaint complained that, being possessed of a mill, and in virtue of the mill, of a dam, the defendant removed the dam and caused the water of the adjoining stream to flow against the mill. The second count of the same summons and plaint complained that the plaintiff being possessed of a close and water-mill, the water of a certain stream had flowed and ought to flow in a smooth manner into the mill, and from thence in its usual channel; and that the defendant widened, deepened, and enlarged the bed of the river, and kept it widened, and thereby prevented the water from running in its smooth manner into and past the plaintiff's premises, and that thereby the water flowed in a different direction, and with violence against the plaintiff's premises; and quantities of it were collected against the wheel of his mill. The defendant pleaded (with other pleas) to the first of these counts that the dam was a wrongful obstruction; and that to allow the water to flow, as of right it ought, past the defendant's lands, he removed it, doing no unnecessary damage. To the second count he pleaded that to allow the water to flow, as of right it ought, past certain lands of the defendant, he removed a certain dam, weeds and stones, and other wrongful obstructions, and thereby necessarily somewhat widened, deepened, and enlarged the bed of the river, but not beyond what had previously been, and still of right

ought to be, the width and depth thereof. The cause having been referred by consent, after the jury were sworn, to three arbitrators, to whom no power to certify for costs was reserved; and the arbitrators, several months after the reference, having found for the defendant upon the first, and for the plaintiff upon the second of these defences, with 50s. damages, and the Court having, upon an application by the plaintiff under the 97th section of the Common Law Procedure Act, 1856, determined that they were bound to follow the decision of a court of co-ordinate jurisdiction on the point, and to hold that there had been no trial within the meaning of the 97th s.; and the plaintiff now applying that the taxation of his costs might be reviewed, and full costs allowed to him under the 243rd section of the Common Law Procedure Act, 1853. Held, (Christian, J., *dissentiente*) that the two sections in the two Common Law Procedure Acts being *in pari materia*, the Court was obliged, in consistency with their former decision, to hold that there had been no trial within the meaning of the 103rd General Order made under the 243rd section. *Bennett v. Scott*, 8 Ir. Jur., N.S., 206, C.P.

Held also, (Christian, J., *dissentiente*) that under the above circumstances the 243rd section must be taken to intend some mode by which the plaintiff's right to full costs should be ascertained. *Id.*

Held also, (Christian, J., *dissentiente*) that there was nothing on the record to connect the grievances in the two counts, and therefore that the findings of the arbitrators were not inconsistent; and there being a *prima facie* case of a right in issue more extensive than the sum sued for, that the case should be remitted to the taxing officer, whose duty it was to decide, in the first instance, whether there was or not. *Id.*

Held, (per Christian, J.) that the award of the arbitrators was tantamount to a trial within the meaning of the 103rd General Order. *Id.*

That the inability of the judge to give the certificate directed by the General Order, supposing it to exist, is no reason for withdrawing the case from the operation of the order, and that the plaintiff is remediless. *Id.*

That the 3 & 4 Vict., c. 24, s. 2, is, for the purposes of this question, identical with the 243rd section expanded by the 103rd General Order. *Id.*

That, supposing the 103rd Order out of the way, the grievance complained of in the first count was the same as that complained of in the second count, and that the taxing officer was right in allowing the plaintiff only half costs. *Id.*

That a judge who concurs in holding obligatory on a court the decision of a court of co-ordinate jurisdiction, which he believes to be erroneous, is not committed to the subordinate propositions embodied in such decision. *Id.*

Security for costs.] A motion for security for costs is too late after defence filed, although the preliminary notice was served before the time for pleading has expired. *Jacob v. Bernal*, 8 Ir. Jur., N.S., 46, Q.B.

A defendant does not save his right to security for costs by serving notice of motion for that purpose, if pending the motion he files a defence, and omits to serve with it a notice that it is filed without prejudice to the pending motion. *Beassey v. Condon*, 13 Ir. C. L. Rep. App. xxxvii, Ex.

It will make no exception to the general rule, which requires a plaintiff residing out of the jurisdiction of the court to give security for costs, that he is possessed of considerable property within the jurisdiction. *Hickman v. Forde*, 8 Ir. Jur., N.S., 188, C.P.

The practice of the Court of Common Pleas differs from that of the Court of Exchequer in respect to the affidavit necessary to ground a motion to compel the plaintiff in an action to give security for costs, the former court being satisfied with a general affidavit of merits. *Id.*

In an action for rent by an absentee landlord against his tenant, an affidavit by the defendant's attorney, which contained the following, was held sufficient for the above purpose: "This deponent, saith the said defendant, has a just and legal defence upon the merits, as deponent believes, to the said action of the plaintiff, and deponent saith he makes this affidavit in consequence of the defendant having been obliged to go to England on business, where he is at present, as deponent has been informed." *Id.*

A plaintiff resident in Ireland at the time that an action is commenced will not be compelled to give security for costs; but he will not get the costs of a motion to compel him to do

so, if he has mis-stated his residence in the summons and plaint. *Tom v. Nagle*, 13 Ir. C. L. Rep., app. xxxviii, Exch.

Costs in Court of Probate.] see PROBATE (COURT OF).

Costs in cases of habeas corpus.] see HABEAS CORPUS.

Costs in actions under summary procedure on bills of Exchange Act.] see BILL OF EXCHANGE. See also PAYMENT.

COURT OF APPEAL.

Jurisdiction of.] G. was a joint and several simple contract creditor of H. and W. A suit was instituted to administer the real and personal estate of H. and W., in which suit G. proved his demand. In January, 1857, a report was made in this suit, by which the Master found that, the parties interested so desiring, he had not taken an account of the personal estate of H., and he inserted G.'s claim only in the schedule of the debts of W. In February, 1857, the cause was heard and the report confirmed, and a decree made accordingly. In January, 1862, G. filed a petition in the nature of a bill of review, to vary this decree. Held, that the Court of Appeal had jurisdiction to entertain this petition: that G., not being a party to the original suit, but having come in merely to prove his debt, was not bound by the consent of the parties interested, and that he had not lost the right to vary this decree by his delay. *Waleh v. Waleh*, 13 Ir. Ch. R. 496, Ch. App.

COVENANT.

Construction of covenant for title.] Indenture of 1st March, 1862, reciting that under indenture of conveyance of 17th July, 1841, between the defendant and C.D., the defendant was seized and possessed of the premises thereafter mentioned; and reciting that the defendant had agreed with the plaintiff for the sale of all the defendant's estate and interest under the conveyance of the 17th July, 1841, to the plaintiff, witnessed that the defendant did grant, bargain, sell, and assign unto the plaintiff, his heirs, executors, administrators, and assigns, a certain dwelling-house and premises, to hold the same unto the plaintiff, his heirs, executors, administrators, and assigns for ever. Covenant—That the defendant then had in himself good right, full power, and lawful authority to make that conveyance of his estate and interest under the conveyance of the 17th July, 1841, to the plaintiff, his heirs, executors, administrators, and assigns. Held—That this was not a covenant that the party had power to convey a freehold estate, but a covenant that he had power to convey such estate, as he took under the indenture of the 17th July, 1841. *Dehnor v. McCabe*, 8 Ir. Jur., N.S., 236, C.P.

CRIMINAL INFORMATION.

Plea of justification to criminal information for words spoken.] The Court refused to set aside on motion a plea of justification pleaded to counts of a criminal information for words spoken of and to a person acting magisterially, leaving the party to demur if he thought fit. *The Queen v. Rea*, 8 Ir. Jur., N.S., 382, Q.B.

CRIMINAL LAW.

Indecent exposure.] An indictment for indecent exposure charging the offence to have been committed on a highway, is not sustained by evidence that the offence was committed in a place near the highway, though in full view of it. *The Queen v. Farrell*, 8 Ir. Jur., N.S., 6, Cr. Ap.

An indecent exposure seen by one person only, and capable of being seen by one person only, is not an offence at common law. *Secus*, if there are other persons in such a situation as that they may be witnesses of the exposure. *Id.*

Cruelty to animals.] To cause one cock to fight another is an offence punishable under the 2nd section of the 12 & 13 Vict., c. 92. *Bates v. McCormick*, 8 Ir. Jur., N.S., 239, C.P. A cock is an "animal" within the meaning of the 2nd section. *Id.*

Coyne v. Brady, (7 Ir. Jur., N.S., 66) distinguished. *Id.* The 2nd section of 12 & 13 Vict., c. 92, deals with offenders who, if the offence were a felony, would be principals in the first degree; the 3rd with those who would be accessories before the fact or principals in the second degree (per Christian, J.) *Id.*

Evidence in criminal cases.] see EVIDENCE.

CROSS-REMAINDERS.

See WILL (CONSTRUCTION).

DAMAGES.

Whether too remote.] In an action by a principal against his agent in a particular branch for abandoning his agency, the jury having given damages for losses sustained by the principal in collateral branches of his business by reason of the injury done to his credit by the defendant's abandonment of his agency, the Court refused to interfere with the verdict, or to consider the damages too remote. *Boyd v. Pitt*, 8 Ir. Jur., N.S., 50. Exch.

DECREE IN EQUITY.

Effect of in answer to action at law.] To a summons and plaint containing counts in trespass and trover for cutting turf upon a bog granted to the defendants by a deed which reserved the "turbary" to the plaintiffs, an equitable defence was pleaded, to this effect: that the very questions raised in this action had been the subject of a bill and cross-bill filed by the ancestors of the parties to this action; the former to establish an exclusive right to turbary in the ancestor of the plaintiff under an instrument in writing of the year 1791, the latter praying the execution of a conveyance to the ancestors of the defendants in the terms of the above-mentioned instrument; that the ancestor of the plaintiff having brought an action of ejectment for the bog in question pursuant to decretal order of the Court of Chancery, a verdict was found for the ancestors of the defendants, which, the Court, sitting in banco, refused to set aside; that in a second action brought by the ancestor of the plaintiff for preventing him from cutting turf on the bog, he was nonsuited; that the cross-suits having come to a hearing a decree was pronounced, which remains in minutes "as the parties thereto agreed, and did act on the minutes, and submitted thereto;" that by that decree the bill of the ancestor of the plaintiff was dismissed, with costs, and the ancestors of the defendants were declared entitled to the possession of the bog in question (*inter alia*); that the deed upon the construction of which the present action was brought was made in pursuance of that decree, and in the exact terms of the deed of 1791; that the judgments and decrees in the former action and suits were still in force, and that by them the very questions raised by the first paragraph of the summons and plaint had been decided. *Demurrer thereto allowed* upon the ground that the dismissal of a bill seeking equitable relief in respect of an instrument on which a party can sue at law is no bar to an action at law upon the same instrument, although the decrees do not state the dismissal to have been without prejudice. *Beere v. Fleming*, 13 Ir. C. L. R. 506. Exch.

Effect of decree of dismissal for want of appearance.] A former decree dismissing a bill on the hearing for want of the plaintiff's appearance is not a bar to another suit for the same demand. *Phibbs v. O'Donell*, 8 Ir. Jur., N.S., 238. C.

DEED (CONSTRUCTION).

The *habendum* of a deed, although void, may be looked at, together with the other parts of the deed, to qualify the estate granted by the premises. *Hagarty v. Nally*, 13 Ir. C. L. R. 532. Exch.

Uncertainty.] Demise of a farm of land in the townland of C, "together with half an acre of bog, during the continuance of the demise," with a covenant by the lessor for quiet enjoyment of the demised premises with the appurtenances. The lessee having been disturbed in the enjoyment of the bog allotted to him brought an action on the covenant. Held per O'Brien, J., and Fitzgerald, J., that whether the clause in the lease relating to the half acre of bog amounted to an actual demise of the soil or to a grant of turbary, it was in either case too vague and uncertain to sustain an action. *McKenna v. Murray*, 8 Ir. Jur., N.S., 263. Q.B.

Per Hayes, J., that the covenant for quiet enjoyment extended to the farm only, and therefore that no action on that covenant could be brought for a disturbance of the enjoyment of the half acre of bog. *Id.*

DEVISE.

A devise of a "house, garden, out-offices, lawn, to monks named 'Christian Brothers.'" Held void for uncertainty. *Boyes v. Byrne*, 13 Ir. C. L. R. 166. C.P.

A devise to an illegitimate child and his heirs gives an estate in fee-simple. *Daly v. Aldworth*, 8 Ir. Jur., N.S., 141. Ch.

Satisfaction of.] A devise to a child of a legal rentcharge will not be satisfied by a subsequent gift by deed by way of advancement of a rentcharge equal in amount. *Preston v. Lord Gormanstown*, 13 Ir. Ch. Rep. 323. Ch.

DOWER.

Bar of, by marriage articles.] Marriage articles recited that the father of the lady, who had attained age, had agreed to give her a portion, and that the gentleman had agreed to settle certain properties to secure a jointure and for that purpose to convey them if the sale of them was confirmed, or otherwise to assign the purchase-money of the properties then lodged in court to trustees in order to secure the said jointure for the lady; and further recited that the gentleman had become the purchaser of the said lands under a decree, and had lodged the purchase-money, and that title was in process of being made out. And the gentleman covenanted with the trustees in consideration of the marriage and marriage portion, that he and his heirs would convey the lands (when the title thereto should be perfected, and the same conveyed to him and his heirs) to the trustees, to hold to his use for life, and after his decease to the use that the lady should during her life receive a jointure, and subject to such jointure and to a term to secure the payment of such jointure to the use of the gentleman and his heirs; and in case the sale should not be completed, and the sum lodged in court should become payable to him, it was covenanted that it should be received and taken by the trustees upon trust to invest it in the funds or in lands in trust as to the interest of rents, for him for life, and after his decease to secure a jointure for the lady, and subject to such jointure for the gentleman and his executors. And he covenanted with the trustees that in case the lands or the purchase-money should not by the interest thereof produce the amount of the jointure, all his other property, and all the property thereafter to be acquired by him, should be charged with the payment of the deficiency. Held that the lady was barred of her dower by the articles. *In re Dwyer, minor*, 13 Ir. Ch. Rep. 481. R.

ECCLESIASTICAL LAW.

Right to Pews.] The churchwardens alone have the regulation of the pews in a parish church, even if it also be a cathedral, subject to the control of the ordinary. Every parishioner has a right to be seated, but not to a pew. Persons not parishioners have no right to a pew or a sitting. Rights to pews annexed to messuages by prescription cannot be severed from the occupancy of the messuage. In a cathedral, not being a parish church, *semble*, there can be no allocation of seats unless by the bishop. *In re the Pews of St. Columb* 8 Ir. Jur., N.S., 115, Cons. Derry.

Alms collected in proprietary chapel.] The alms collected; whether at the offertory or during divine service, in a proprietary chapel not having a district assigned to it belong as of right to the rector of the parish in which the chapel is situated, to be disposed of as he and the churchwarden shall direct, and that notwithstanding Napier's Act, 14 & 15 Vic. c. 72. The office promoted by the *Rev. Laurence Dowdall v. Rev. James Hewitt*, 8 Ir. Jur., N.S., 553, Cons. Dublin.

EJECTMENT.

Effect of proceedings in prior ejectment.] Where a party who had been served with an ejectment was put out of possession, and again let into possession under that ejectment, Held that he could not, in a second ejectment against him, dispute the sufficiency of the proceedings in the first to get rid of a lease alleged to have been thereby evicted, and that the facts so proved in the second ejectment were sufficient to warrant the jury in finding a verdict for the plaintiff. *Ford v. Byrne*, 8 Ir. Jur., N.S., 65. Q.B.

New trial in.] A deed-poll executed by the Commissioners of the Incumbered Estates Court, conveyed to the plaintiff "the townland of C, containing 659A. 8a. 27r., more or less, and which are more particularly set forth in the schedule hereto annexed, and as delineated and describe in the map attached hereto. The schedule annexed contained several headings, of which the first was, "No. on Map," the second, "Denomination of the Townland," and the fourth,

"Statute Measure." Under the first of these appeared "No. 60," and opposite to it in the second column, the words "Road and waste land," and under the words "Statute Measure," "1A. Or. 10r." Upon the trial of an ejectment brought to recover the sites of certain cottages and gardens, it was proved that the ground on which they stood was within the limits of No. 60, as marked upon the map, and evidence was given on the other hand that the road and waste, exclusive of the defendant's holdings, contained what was set opposite to "No. 60" in the fourth column. The jury having found a verdict for the defendants, a rule for a new trial on the grounds that such verdict was against evidence, and the weight of evidence was made absolute. *Rowley v. Rieley*, 8 Ir. Jur. N. S. 69, C.P.

The maxim that there is a difference between new trial motions in ejectment, and other new trial motions, on the ground that a new ejectment may be brought by the plaintiff, if he likes, applies to cases in which there is a *bona fide* question, as, for instance, whether there be a life in being or not. *Id.*

FLECTION.

H., by his marriage settlement, conveyed certain real and personal property therein specified, and all the real and personal property of which he was then, or might die seised or possessed, to trustees on trust, in case the petitioner, his intended wife, should survive him, to raise 400*l.* for the petitioner. H., by his will bequeathed a considerable portion of the real and personal property, specifically mentioned in his settlement, to his wife for life, with remainder over. He directed other portions of his property to be sold, and the proceeds to be invested for the benefit of his wife for life, with remainder over; and he constituted F. his residuary legatee. H. having died, leaving the petitioner surviving, Held, that she was bound to elect between the 400*l.* provided by her settlement, and the benefits conferred by the will. *Heasle v. Fitzmaurice*, 13 Ir. Ch. R. 481, C.

EQUITY.

A. who held Greenacre by lease, with *toties quoties* covenant of renewal, from B, who held by similar lease Greenacre, with other lands from C, who held from Trinity College, settled his estate by registered deed. R., tenant of another portion of B's land, subsequently obtained possession of a portion of Greenacre. R. purchased C's interest in the name of a trustee. There were large arrears of rent and renewal fines due from B. to C. R.'s trustee served notice on B. and his undertenants to pay up the rent and fines, and they having failed to comply, and the lease to B. having expired, notices to quit were served, and B. and his undertenants, including R., were evicted, R. having obtained possession of the lands from his trustee. Held, that the persons claiming under A.'s settlement, were entitled to enforce against R. the interests under that settlement. *Lombard v. Hickson*, 13 Ir. Ch. R., 533, Ch. App.

ESTOPPEL.

A., being entitled by settlement to life interest in a charge of 800*l.* with interest, at the rate of 50*l.* per annum, in accordance with the provisions of the settlement, entered into possession of the lands of O., for the purpose of carrying out the trusts of the settlement. It appeared, however, that at the same time he also took possession for the same purposes of the lands of T., other lands of the settlor, which were not mentioned in the deed of settlement, but which from the earliest times, always went together with the lands of O. The rents and profits of O. and T. together amounted to about 50*l.* per annum, and no claim for any balance of interest was ever made by A. A. having continued in occupation of the lands for more than twenty years, in a suit instituted by the representative of the settlor for redemption of the lands of O and T. Held that A. was estopped from contending that the lands of T. were not comprised in the settlement, and from relying on the Statute of Limitations as a bar to the redemption of the lands of T. *Phibbs v. O'Donnell*, 8 Ir. Jur. N.S. 226, C.

By settlement executed in 1787, on the marriage of E. lands held for lives renewable, were settled to the use of E. for life, with remainder to the use of issue of marriage as E. should appoint; in default of appointment, to them share and share alike; in failure of issue to E. absolutely. There were

issue of the marriage two children, F. and the petitioner M. On the marriage of F. in 1816, a settlement, to which E. was party, was executed, which recited the limitation contained in the settlement of 1787, and also recited that F. was entitled to one moiety of the lands in that settlement, subject to the life estate of E., and proceeded to put that moiety in strict settlement. E., by this deed, did not exercise his power of appointment, nor convey the settled land at all. In 1817, the petitioner M. married, and a settlement was executed on her marriage, in which E. joined, using words sufficiently large to convey all his interest in the lands comprised in the deed of 1787. Held, that whatever might be the true construction of the deed of 1787, the petitioner claiming under E. would not be allowed to disappoint the provisions of the deed of 1816. *Nunn v. Donovan*, 13 Ir. Ch. R. 184, C.

EVIDENCE.

Semble—A stamped copy of a lost unstamped document, requiring a stamp, is admissible in evidence. *Cannor v. Cronin* 7 Ir. C. L. R. 480, doubted. *Herbert v. Ras*, 13 Ir. Ch. R. 25, R.

Extracts from books of distribution] Extracts from the books of distribution are admissible in evidence, in questions arising upon the quantities and descriptions of land granted by patents made under the acts of settlement and explanation. *Spaight v. Twiss*, 13 Ir. C. L. R. 516. Ex.

Know v. The Earl of Mayo, 7 Ir. Ch. R. 563, affirmed. *Id.* *Old copy of lost deed*] A document purporting to be an old copy of a lost deed, whereby certain charges on land were created, coming from the custody of the owner of one of these charges is not admissible in evidence against the owner of the land without being proved. *In re Coome*, 8 Ir. Jur. N.S. 124, Ch. App.

Evidence of ancient possession of fishery.] M. brought an action against O. for breaking his several fishery in a public navigable river. At the trial M., who was tenant of the corporation of L., gave in evidence a reconveyance by P. to the corporation of the fishery in question, dated 1684, and in order to show there had been previously a pending suit between P. and the Corporation, each claiming under conflicting grants from the Crown, M. gave in evidence a bill filed by P. in the Court of Chancery, against the corporation, with their answer, dated 1674. On exception to this evidence, Held (reversing the judgment of the Irish Exchequer Chamber), that such evidence was admissible as part of the history of the adverse claim of P., which ended in P.'s recovery to the Corporation. *Malcomson v. O'Dea*, 8 Ir. Jur. N.S. 258, H. of L.

At the trial, in order to prove the ancient possession of the fishery, M. gave in evidence an assembly book of the corporation, containing entries showing that the fishery was then let for certain rents to a tenant. On exception to this evidence, Held (reversing the judgment of the Irish Exchequer Chamber), that such book was admissible in evidence, for the rule is, that ancient documents, coming out of the proper custody, and purporting upon the face of them to exercise ownership, such as a lease or a licence, may be given in evidence without proof of possession or payment of rent under them, as being, in themselves, acts of ownership and proof of possession. *Id.*

Though Magna Charta made illegal all grants by the Crown, of a several fishery in a navigable river, which had not been in existence in the reign of Henry II., yet if evidence now be given of long enjoyment of a fishery there, to the exclusion of others, of such a character as to establish that it has been dealt with as of right as a distinct and separate property, and there is nothing to show that its origin was modern, the reasonable presumption is that it became such in due course of law, and therefore must have been created before legal memory. *Id.*

Evidence of title to public office.] Evidence of acting in a public office is evidence to go the jury of a title to that office as against a wrong-doer, though the title be put in issue by the pleadings and the appointment is required to be under seal. And such evidence of acting carries with it the presumption that all formalities necessary to authorise such acting have been complied with. *Hayes v. Denton*, 13 Ir. C. L. Rep. 22. Exch. Ch.

Privilege of client writing to solicitor.] Confidential letters written before the commencement of a suit by one of the par-

ties to his solicitor in reference to the subject matter in dispute are privileged, and cannot be given in evidence at the hearing by the opposite party. *Phibbs v. O'Donel*, 8 Ir. Jur., N.S., 226. Ch.

Statement by prisoner after arrest.] Counsel not to state in his address to jury statement made by prisoner after his arrest. *Regina v. Bodkin*, 8 Ir. Jur., N.S., 340. Assizes.

Answer by a prisoner, after his arrest, to a question asked by police constable inadmissible. *Ib.*

Evidence of handwriting in criminal cases.] Police officers and constables not admissible as experts. *Regina v. Wilbain & Ryan*, 8 Ir. Jur., N.S., 340. Assizes.

See GUARDIAN AND WARD.

EXCEPTION.

Effect of on covenant to keep in repair.] Where a lease contained a covenant on the tenant's part to keep the demised premises, and all improvements thereon, in repair, and also an exception by the landlord of all timber trees growing on the premises, and a reservation of a right of ingress on the premises, and the tenant suffered the timber to be cut down. Held, that the landlord could not recover damages against the tenant for the cutting down of the timber in an action on the covenant to keep the premises in repair. *Allen v. Carver*, 8 Ir. Jur., N.S., 149. Q. B.

EXCEPTIONS, BILL OF.

Where there is a bill of exceptions tendered by a party on the trial of a cause he cannot move for a new trial on a point of law included among the grounds of exception or which might have been included unless the bill of exceptions be first abandoned. *Bloomfield v. Johnston*, 8 Ir. Jur., N.S., 185. C.P. S. C., 13 Ir. C. L. Rep., app. lvii.

Where a conditional order for a new trial has been improvidently granted by the court, the proper course for the opposite party to pursue is not to show cause against its being made absolute, but to apply to have it set aside. *Ib.*

Where both parties take exceptions at the trial they should be incorporated into one record; and it is advisable that the one party should insert into his bill of exceptions the evidence on the judge's notes, and the other party prepare a short bill of exceptions referring to his opponents, and adding his own. *Ib.*

Semble, there is nothing in the circumstance that one party tenders exceptions to prevent the other from having recourse to a new trial motion. *Ib.*

EXECUTOR AND ADMINISTRATOR.

With what executor chargeable.] Two persons carried on business in partnership. One died, having bequeathed his stock-in-trade. **Semble**, that his executor was chargeable with a moiety of the value of the stock-in-trade at the time of his death. *Creagh v. Creagh*, 8 Ir. Jur., N.S., 28. R.

Liability of executor for interest on over-paid legacy duty.] Executors in passing their residuary account, erroneously stated the degrees of relationship of the legatees to the testator, in consequence of which a large sum was paid to the Crown for legacy duty in excess of that properly chargeable. The liability for the principal being admitted, held that the executors were also chargeable with interest. *Shaw v. Turbett*, 13 Ir. Ch. Rep. 568. C.

The executors by their answers submitted that they were not liable for interest, and the decree at the first hearing was silent upon the subject. Held, that the charge for interest could properly be made on further directions. *Ib.*

An executor having paid a large excess of legacy duty out of the assets of the testator in consequence of an erroneous but bona fide representation made by him to the Government official. Held (*dissentiente*, O'Brien, J.), that on refunding the money so overpaid to the person entitled to it, he was properly charged with interest also. And held (*per curiam*), that in a suit against the executor for an account, the question of his liability to pay this interest could be discussed and determined on further directions. *Shaw v. Turbett*, (8 Ir. Jur., N.S., 1. Ch. Ap.

Sale of arrears of rent by.] A testator who was tenant for life of his real estate, bequeathed to a trustee the residue of his real and personal estate, and all rent and arrears of rent which might be due to him at the time of his decease, and all timber or other trees he might be entitled to, upon

trust, to sell and convert into money, get in, and recover so much thereof as should not consist of ready money, and declared certain trusts of the proceeds. He then authorized the executors of his will, of whom the trustee was one, to compromise and compound, or submit to arbitration and settle, all debts owing to or from him, and generally to act in relation to the premises as they should think expedient, without being liable to any loss which might be occasioned thereby. Held that this will did not authorise the trustees or executors to sell the arrears of rent to the remainderman. *In re Alexanders, minors*, 13 Ir. Ch. Rep. 137. Ch. Ap.

The executors, one of whom became agent to the remainderman, sold the arrears, which amounted to 49,000*l.*, to the remainderman for 20,000*l.* Almost the whole amount of arrears was collected by the remainderman. Held, that the executors were to be charged with the entire amount of the arrears which had been received. *Ib.*

The difficulty of collecting arrears of rent does not excuse executors for not collecting them without some evidence that in fact they could not have been received. *Ib.*

Liability of.] Executors not relieved from consequences of a breach of trust by presenting a petition under the 11th section of the Court of Chancery (Ireland) Regulation Act, 1850. *In re Guinness's Trusts*, 8 Ir. Jur., N.S., 24. R.

Rights of administrator in respect of acts done by him before obtaining administration.] A person who improperly disposes of the money of an intestate and afterwards takes out administration, may maintain an action for money had and received to recover it. *Lynght v. Benison*, 8 Ir. Jur., N.S., 368. C. P.

Executor de son tort, evidence of payment by.] In an action of trover by an administratrix against A. who had made himself executor *de son tort*, evidence was received, in mitigation of the damages against A., of payments made by him, which would have been allowed in a due course of administration by a rightful executor. Held, that such evidence was properly received. *McCarthy v. Donovan*, 13 Ir. C. L. Rep. 195. C. P.

EXPORT, PLACE OF.

An inland town, from the market of which butter is sent direct to a foreign market, is not a "place of export from whence butter is commonly shipped for exportation," within the meaning of the 52 G. 3, c. 134, and 7 & 8 G. 4, c. 61. *Hayes v. Dexter*, 18 Ir. C. L. Rep., 22. Exch. Ch.

FALSE REPRESENTATION.

Action for.] An action for a false representation, in a summons and plaint, of the residence of a party to an action, by which the taxing officer is induced to allow to the successful party half the costs of the action, is unsustainable while the judgment remains in full force and effect. *McKenna v. Sexton*, 8 Ir. Jur., N.S., 216. C. P.

FRANCHISE (MUNICIPAL).

Rating—Successive occupancy.] Previous to May, 1862, A. occupied a tenement in Belfast, valued at 114*l.*, for which he was rated as occupier under the rate made on the 25th June, 1861. On the 1st May, 1862, he left part of the tenement, retaining the other part, which, in fact, was a separate tenement. On the 25th April, 1862, the valuation within the union was finally revised; and by the revised valuation the original valuation of A's old tenement was altered and divided into two, the value of one being 90*l.*, and that of the other, the part retained by A. after May, 1862, being 30*l.* A. served a notice on the guardians claiming to be put on the rate of 1861, in respect of the new tenement. This the guardians refused to do. On the 25th June, 1862, another rate was struck in which A. was duly rated as occupier of the new tenement. Held, that A. was not entitled to appear on the list of burgesses for the year following the 31st August, 1862, either under a 30 or a 33 of the Municipal Corporations Act, st. 3 & 4 Vict. c. 108. *The Queen v. The Mayor of Belfast*, 8 Ir. Jur. N.S. 27, Q. B.

Freedom by grandbirth in the city of Dublin.] Held, that a person is entitled to be admitted to the Freeman's Franchise in the city of Dublin, in right of his grandfather, either paternal or maternal, pursuant to the custom established in the Corporation by prescription. *In re Smyly*, 8 Ir. Jur. N.S. 367, Lord Mayor's Court.

FRAUD.

A. being entitled to certain leasehold and also a certain fee-simple estates, devises the latter to trustees, on trust for his grandson B., in case he should attain twenty-three, and to his sons in tail male, and if B. should not attain twenty-three, then to whichever of his other grandsons should do so first, with remainders over. He also bequeaths to C., one of his grandsons, one-seventh of his residuary estate, which included his leasehold estate. B. attained twenty-three, and died without issue on May 8, 1849. By deed dated March 29, 1834, C. conveyed to E. all that and those the seventh share of C. of and in the residuary estate of A., and in particular his share in the seventh part of the residuary property, "and all the estate and interest of him the said C. therein, or in any other lands which were part of the residuary estate" of A. to have and to hold the said leaseholds, "and all other the share which the said C. is at present entitled to, of any lands or tenements, or any other property part of the residuary estate of A." This deed was prepared by the present owner, who was a solicitor. E. subsequently, on the 25th of June, 1835, made a conveyance to the owner in similar terms. C. died in 1848, having first disposed by a codicil of his shares in the fee-simple estate to which he was to become entitled on the death of B., and having charged his share with 1,000*l.* for X., the present claimant. X. was then a minor, and though he took no steps until the present proceedings to enforce his demand, he was paid annually 120*l.* by the owner, up to the filing of the petition in this matter. Held, first, that this payment, though it could not bind owner's creditors, rebuts charges of lack against X. *Re Rorke's Estate*, 18 Ir. Ch. Rep., 365, L. K. C.

Second, that the fee-simple lands did not pass in equity, by the deed of March 29, 1834, to E., owing to fraud, either in the preparation of the deed, or in the making of a claim to the lands. *Id.*

Third, that mortgagees without notice of the fraud, could not avail themselves in this case of that defence, since there were circumstances of a nature to put them on suspicion, patent on the face of the title. *Id.*

Sembla, if the intent of the deed was clear, and that part of the consideration was paid for the reversionary interest in the fee-simple estate, it would have been competent to the parties to convey their rights (in equity at least) by any part of the deed. *Id.*

GRAND JURY LAWS.

Order of justices to road contractor to enter lands. An order of justices, authorising a road contractor to enter the lands of a third party, and take stones under the 162nd section of 6 & 7 Wm. 4, c. 116, was in the following terms— "Under the provisions of the Grand Jury Acts, 6 & 7 W. 4, c. 116, s. 162, I hereby authorise and empower M. O'B., road contractor, to enter on the lands of S in the possession of E. F., for the purpose of quarrying and carrying away materials for the repair and maintenance of 400 perches of the road from Nenagh to Limerick, between the barony bounds at T., and the barony bounds at D., in the barony of Upper Ormond and County of Tipperary; and we name J. Q., M. O'B., and M. S., arbitrators as to damages. Given under my hand, at Nenagh Petty Sessions, this 14th day of July, 1860. R. G., W. O., Justices of the Peace, County Tipperary." Held, this order was bad, no jurisdiction of the justices to make it appearing on the face of the order, *Fitzpatrick v. Pine*, 13 Ir. C. L. Rep. 32, Exch.

Compensation for malicious injury. Form of certificate to be made by the judge of assize, where compensation has been presented for malicious injury, committed near the boundary of a county. *In re presentment to Mr. James Shea*, 8 Ir. Jur. N.S. 120, Assizes.

The posting of notices of intention to apply for compensation for a malicious injury, under the provisions of the Grand Jury Act, st. 5 & 6 Wm. 4, c. 116, is a condition precedent to obtaining the compensation; and the provisions of the Grand Jury Act in this respect are incorporated with the Cork Improvement Act, st. 15 & 16 Vict., c. cxliii. (local and personal). *In the matter of the Commissioners of Public Works in Ireland, trustees of the Queen's College, Cork*, 8 Ir. Jur. N.S. 123, Q. B.

Observations upon the policy of the Legislature in requiring the service and posting of notices in cases of malicious injury; *Id.*

Mode of laying sums payable to road-contractor. When the grand jury have presented for the repair of a mail-coach road for a period of years, under the provisions of 6 & 7 W. 4, c. 116, s. 52, all sums payable to the contractor must be levied half off the barony, and half off the county at large, though before the expiration of the contract the road has ceased to be a mail-coach road. *In the matter of a Mail-coach road through the Barony of Costello*, 8 Ir. Jur. N.S. 122, Assizes.

Salaries. Where the chairman of the county certified for a sum of 15*l.* for the expense of the town clerk of the county of the town of D., under 13 & 14 Vict., c. 69, s. 52, which sum the presentment session reduced to 10*l.* On application to the judge to direct the grand jury to present for the amount certified by the chairman, it was held that the grand jury could not present a larger sum than that presented at presentment sessions. *In the matter of the Town Clerk of the County of the Town of Drogheda*, 8 Ir. Jur. N.S. 121, Assizes.

Where the grand jury has, under st. 24 & 25 Vict. c. 63, s. 4, passed a resolution increasing the salary of the county surveyor, and the presentment sessions have approved of the resolution, with modification, and fixed a lower salary than that given by the resolution, the grand jury can only present the sum approved of by the presentment sessions, and not that given by the resolution. *In the matter of a presentment for the salary of the Surveyor of the County Tipperary, South Riding*, 8 Ir. Jur. N.S. 121, Assizes.

Presentment. Grand Jury presentment to build a wall to fence a road, and enclose a fair-green, not authorised by the 6 & 7 Wm. 4, c. 116, s. 56. *In re Kinsella*, 8 Ir. Jur. N.S. 119, Assizes.

Quare, for the affirmation of a presentment by the Grand Jury, must the majority consist of twelve at least? *In re the Gorey Presentment*, 8 Ir. Jur. N.S., 120, Assizes.

Representation of arrears. When the arrears could not be levied off the Barony of M. in due time, and the collectors had, out of their own monies, lodged same to the credit of the treasurer of the county, it was held, that the Grand Jury were bound to represent the arrears in order to reimburse the collectors. *Ex parte the ass collectors of Mohill*, 8 Ir. Jur. N.S. 122, Assizes.

GUARDIAN AND WARD.

Fiduciary position of guardian. A held lands from M., under an agreement for a lease, at the yearly rent of 54*l.* 7*s.* 8*d.* A receiver was appointed over M.'s interest, and in the Chancery proceedings the rent was abated to 33*l.* 12*s.* A died, and, by his will, appointed B. executor, and one of the guardians of his infant children. B. went into possession as guardian. In the course of proceedings to sell M.'s estate in the Incumbered Estates Court, the notice to tenants was served on B., and this notice stated the rent to be 33*l.* 12*s.* The rental followed the statement in the notice. B. purchased at the sale, and M.'s interest was conveyed to him by the Commissioners, subject to the tenancies in the schedule in the deed. The schedule of tenancies contained a column for tenure and for rent. The statement as to these lands in the tenure column was, "Proposals accepted by" dated the 26th of December, 1837, for 900 years. In the rent column the rent was stated to be 33*l.* 12*s.* B. after his purchase, obtained from C., his co-guardian, a surrender of the interest which was held not to bind the minors. In a suit for the administration of A's estate, an account of rents and profits was directed against B.'s representative, who claimed credit against the minors for the rent of 54*l.* 7*s.* 8*d.*, since the sale to B. Held, that B. had purchased a rent of 33*l.* 12*s.* only, and was prevented by his fiduciary position from claiming credit against the minors for 54*l.* 7*s.* 8*d.* *Craugh v. Craugh*, 13 Ir. Ch. R. 504, Ch. App.

Quare, Whether the landlord could recover any greater rent than that stated in the schedule to the Incumbered Estates Court conveyance to be payable, though the instrument under which it was payable was also referred to, and incorporated with the conveyance. *Id.*

Obtaining possession under guardian. By an agreement in writing in the form of an accepted proposal, dated the 12th of February, 1839, A. gave to his son B., on his marriage, a moiety of the lands of X. B. entered into possession and continued in possession until his death in 1840, when by his will he left all his estate and interest in the said lands to his

daughter C., then an infant B's widow entered into occupation of the lands, but was subsequently induced, by the representation of A. and D., a brother of B., to give them up the possession in consideration of receiving a sum of money. A. and D. continued to hold the lands jointly until A.'s death, after which, and up to the time of the present suit, D. remained in exclusive possession. C. attained the age of 21 years in 1861, and having unsuccessfully endeavoured to get possession of the lands from D., she instituted the present suit, seeking to obtain possession, and an account of the rents and profits from D. The answering affidavit of D. set up a title to the lands under a registered deed of 1840, whereby A., in consideration of a sum of 150*l*, conveyed the lands to D. and E, his brother; and D. claimed to be a purchaser for valuable consideration without notice. Notice having been clearly proved, Held, that D., having confessedly taken possession from the minor's guardian, could not set up a title adverse to the minor, and *Semble*, that the question of notice was sufficiently put in issue without an amendment of the cause petition. *Kennedy v. Kennedy*, 8 Ir. Jur., N. S., 181. Ch.

Testamentary guardian.] An appointment of a testamentary guardian is not "a devise or other testamentary disposition of or affecting real estate" within the 68th section of the 20 & 21 Vict., c. 79, so as to admit of being proved by "the probate of the will or the letters of administration with the will annexed, or a copy thereof, stamped with any seal of the Court of Probate." *Semble*—That the notice directed to be served by said section need not specify the particular purpose for which the probate is intended to be used. *Cope v. Mooney*, 8 Ir. Jur., N. S., 342. C.P.

Semble—That one of two testamentary guardians can determine a tenancy from year to year. *Id.*

Quære—Whether an infant may maintain an ejectment where there are testamentary guardians. *Id.*

Quære—Whether, since the changes in the law of inheritance, a mother can be guardian in socage. *Id.*

HABEAS CORPUS.

Age of discretion of male infant.] The age of discretion at which a male infant may choose his place of abode is fourteen, not sixteen, and, therefore, where a male infant had passed the former, but had not attained the latter age, the court refused to deliver him against his will into the custody of his father. (*Dissentiente*, O'Brien, J.) *Re Connor*, 8 Ir. Jurist, N. S., 323. Q.B.

Costs.] Where a writ of habeas corpus had been allowed to go, and had been obeyed without argument, held, that the Court had no authority to grant costs against the defendant. *In re Reilly*, 8 Ir. Jur., N. S., 342. Q.B.

HUSBAND AND WIFE.

Validity and invalidity of marriage.] A marriage between British subjects, at the celebration of which no ordained clergyman of the Established Church of England and Ireland intervened, is not valid at common law, so as to avoid a marriage subsequently solemnized in due form, between one of the parties to the first marriage and a third party, and bastardize its issue. *Du Moulin v. Drumit*, 13 Ir. C. L. Rep., 212. Q.B.

Separate estate of wife.] A married woman has no power of disposition over an interest in realty limited to her for her separate use upon a contingency, viz., the insolvency of her husband, until the event has happened upon which her estate arises. *Bestall v. Bumbury*, 13 Ir. Ch. Rep., 318. Ch. Ap.

By a post nuptial settlement, the wife's father conveyed a term of years to trustees, in trust for the husband, for life, or until he should become bankrupt, or take the benefit of any Act for the relief of insolvent debtors, or assign his property for the benefit of his creditors, or otherwise fall in his circumstances; and from and after the happening of any such events, or from and after the decease of the husband, on trust to pay the wife during her life the rents, &c.; and after the decease of both, in trust for the children of the marriage: provided that, if the husband should become bankrupt, or take the benefit of the Insolvent Act, or assign his property for the benefit of his creditors, or otherwise fall in his circumstances, his life interest should cease, and the trustees should pay the rents to the wife, for her separate use. The husband and wife, by a deed not acknowledged by the

wife, mortgaged all the estate and interest of which the wife "was then or should or might, upon or after the death of the husband, be in anywise entitled to," and all the estate, &c., both at law and in equity, of the wife, to the premises. A petition was filed to foreclose the mortgage, to which the trustees, or the children of the marriage were not parties. The husband, pending the suit, took the benefit of the Insolvent Act. Held, first, that temporary embarrassment of the husband did not bring into operation the limitation to the separate use of the wife.

Secondly, that the insolvency of the husband, after the filing of the petition, did not entitle the mortgagee to a decree for the sale of the wife's separate estate.

Thirdly, that the trustees should have been made parties to the suit.

Fourthly, that the separate estate did not pass by the terms of the mortgage deed. *Bestall v. Bumbury*, 13 Ir. Ch. Rep., 348. R.

Semble, a *feme covert* cannot by a deed not acknowledged convey a contingent interest in a term of years settled to her separate use. *Id.*

See PROBATE (COURT OF).

INCUMBERED ESTATES COURT.

Effect of conveyance by.] A lessee subdemised lands at the clear yearly rent of 21*l* 8*s* 4*d*, which the Court of Chancery, in a subsequent suit, reduced to 14*l* 6*s* 9*d*, until further order. Afterwards the Commissioners of the Incumbered Estates Court sold the fee-simple of the lands, discharged of the head lease, and conveyed them to the purchaser, subject to the sub-lease "made to, &c., at the yearly rent of 14*l* 6*s* 9*d*, payable, &c." The Court was divided in opinion on the question, whether the purchaser was entitled to the yearly rent of 21*l* 8*s* 4*d*, or the abated rent only. *Rockfort v. Emma*, 13 Ir. C. L. Rep., 324. Q.B.

Effect of statement in rental and conveyance.] A held certain lands from B. under an agreement for a lease at a rent of 54*l*. A receiver was appointed over B.'s interest, and the rent was abated by the Court to 38*l*. A. died, having appointed C. executor and guardian of his children. B.'s interest was sold in the Incumbered Estates Court and purchased by C. The rental and conveyance referred to the agreement, but stated that the lands were held at the abated rent (38*l*). Held, in a suit for the administration of A.'s estate, that C.'s executrix was entitled to credits for the abated rent only. *Creagh v. Creagh*, 13 Ir. Ch. Rep. 28. R.

Compensation in cases of sales &c.] In 1851 an order for the sale of the estate of O., a tenant for life, was, upon the petition of a mortgagee, made by the Commissioners of the Incumbered Estates Court of the estate. Lot 14 was sold by private sale, and in 1855 conveyed by the Commissioners to the purchaser. It was described in the rental as containing, amongst other denominations, "Coolacarra mountain in common to tenants, 363*a*. 2*r*." A map, approved of by the Master of the Court, was annexed to the conveyance, which, however contained no reference to the map, but the denominations and quantities in both were the same. A portion of O.'s estate, sufficient for the payment of all incumbrances thereon, having been sold by the Incumbered Estates Court, an order was made, on the application of the petitioner, dismissing the order for sale as to the unsold portions. O. undertaking to pay petitioner's post costs and a certain balance of interest due; and also to abide any further order to be made by the Commissioners in the matter. The purchaser was put by the sheriff into possession of lot 14, including the 363 acres called "Coolacarra" in the map and rental. In 1859 H. having disputed the purchaser's title to a portion of Coolacarra containing 270 acres, the purchaser brought an action of trespass against H., and obtained a verdict. That verdict was set aside; and on a second trial the jury found the 270 acres in question had never been known as Coolacarra, and were the property of H. The purchaser applied to a Judge of the Landed Estates Court that the order dismissing the order for sale as to the unsold portion of O.'s estate should be varied, and further portions sold sufficient to pay him compensation for the loss of the 270 acres, and also the costs incurred in the two trials. The Judge ruled that the purchaser was entitled to compensation for the value of the 270 acres; and that O., in accordance with his undertaking, was bound to pay the same; but refused to grant any compensation for the costs incurred in the trials. O. having ap-

pealed from the whole order, and the purchaser having appealed from the latter portion, it was held that the decisions as to compensation in cases of sales in the Court of Chancery do not apply to sales in the Incumbered Estates Court, in which Court the conveyance contains no covenants, and the purchaser has no opportunity of investigating title. *In re Otway's Estate*, 13 Ir. Ch., 222. Ch. App.

That O. was not responsible for the compensation by reason of the undertaking given by him when the order for sale was dismissed as to the unsold portions of the estate, as the true construction of that undertaking was, that he would abide any further order the Court might make in the matter as it then stood. *Id.*

Held lastly, that there being no fund upon which the Court could act, and the Court having no jurisdiction to sell any further portion of the estate, the purchaser could not obtain any compensation whatever. *Id.*

INFANT.

Age of discretion of male infant. See HABEAS CORPUS.
Transfer of shares to. See SHARES IN PUBLIC COMPANY.

INJUNCTION.

A. being entitled for life, with remainder to her children as she should appoint, to the interest in a chattel lease, at a rent of 63*l.* the legal estate being outstanding in a trustee for her, made an underlease to B., reserving a rent of 78*l.* 10*s.*, and executed a contemporaneous bond, reciting that A. and her trustee had a power to dispose of the interest in the lease, and had entered into an agreement to sell and convey to B. all her interest for a sum which had been paid; and that A. was unable until one of her children should attain age, to make out title, and that it had been agreed between A. and B. that A. should execute the underlease; and that A., within three months after the first of her children attained age, should make out to B. a good title; and that in the meantime, and until such title was made out, A. should accept the rent of 63*l.* in discharge of the rent of 78*l.* 10*s.* The condition of the bond was, that A. should, within three months after the first of her children should attain age, make out a good title to B. A. did not make out good title accordingly, and the lease having been afterwards evicted for the nonpayment of rent, A. brought an action for the rent reserved by the underlease against B.'s assignee. The court granted an injunction to restrain A. from proceeding in the action. *Murphy v. Stratton*, 13 Ir. Ch. R., 423, R.

JOINT STOCK COMPANY.

Personal liability of promoters of. The summons and plaint complained that the defendant, with others, caused a prospectus to be issued and circulated, stating the object the company had in view; and that the plaintiff paid to the company's banker, to wit, &c., the agents of the defendant in that behalf, a sum of 400*l.*; and that the scheme so detailed in said prospectus thereupon failed and became abortive. To this count of summons and plaint the defendant demurred, on the ground that no personal liability existed in his sole and individual capacity; that no promise had been given by the defendant to plaintiff to refund said sum of 400*l.* Held, that money paid on behalf of a project which subsequently failed and became abortive must be treated as money had and received by the promoters in their sole individual capacity, and that the persons who paid the money were entitled to proceed against said promoters for its recovery. *Hayes v. Stirling*, 8 Ir. Jur. N.S., 308, Exch.

Held, also, that payment to the bankers was payment to the defendant. *Id.*

JOINTURE.

A. demised lands to B., with a *tenies quoties* covenant for renewal on payment of a renewal fine. B. demised on like terms to C., D., E., F., and G. C. conveyed his share of the lands on trust to secure a jointure for his wife. D., who was a creditor of C., went into possession of C.'s share, with notice of the settlement; and while he was so in possession, a large arrear of rent and renewal fines accrued due from B. to A., and the lands were distrained for the rent. D. thereupon purchased A.'s interest, took a conveyance to a trustee for himself, served a notice on B. and the under tenants to pay the rent and fines, and, on non-payment, brought an ejectment in the name of his trustee, and recovered possession of

the lands. Held, that the lands were subject to the jointure notwithstanding the eviction. *Lombard v. Hickson*, 13 Ir. Ch. R., 562, R.

JUDGMENT.

Effect of on ecclesiastical benefice. A judgment does not operate as a charge upon an ecclesiastical benefice, under the 3 & 4 Vict., cap. 105, s. 22, and the judgment creditor is not entitled to have a receiver appointed over the profits of the benefice. *Sweeney v. Fleming*, 8 Ir. Jur. N.S. 241, Ch. App.

Winter v. Homan, (6 Ir. Ch. 479) overruled; *Hawkins v. Gathercole*, (6 De G. M'N. and G., 1) considered and acted upon. *Id.*

JUDGMENT MORTGAGE.

Samble, that a statutable mortgagee is a purchaser for value. *Nolan v. Gurnley*, 8 Ir. Jur. N.S., 258, C.P.

Sufficiency of affidavit to register. The entry by the officer of the parties' names, &c., on the roll of a judgment under the 9 G. 4, c. 85, s. 8, is not the title of a judgment. *Wolsley v. Worthington*, 13 Ir. Ch. R. 341, R.

In the said entry, and in the judgment, the statements of the residence of the plaintiff were different. An affirmation made for the purpose of registering the judgment under the 13 & 14 Vict., s. 29, followed the statement in the judgment. Held, that the title of the judgment was correctly stated. *Id.*

An affirmation taken under the 3 & 4 Wm. 4, c. 82, stated that the affirmant was a member of a religious sect called "Separatists." It did not follow in terms the form of affirmation required by the Act, but it purported to be supplemental to another affirmation which did, and to have been made before an officer authorised to administer it. Held, that it must be assumed to have been properly made. *Id.*

LACHES.

A, the rector of the parish of T, and proprietor of a neighbouring estate, was seized in fee of the advowson and right of presentation to the living; and was also entitled to a rent of 28*l.* 7*s.* 5*d.* per annum, payable out of certain glebe lands by the incumbent of T. for the time being. The estate of A, including the advowson, having been put up for sale under an order of the Incumbered Estates' Court, the printed rental, in giving the particulars of the advowson, stated that there were attached to the living 19*a.* 1*r.* 7*p.* statute measure, of glebe, valued at 1*l.* 10*s.* per acre (not mentioning that this land was subject to any rent). In the same rental, in the lot which comprised the lands of T, a portion of them was set down as "glebe lands not sold;" and in the map attached the glebe land was left uncoloured and marked as "not in the estate." In an advertisement subsequently published for the sale of the advowson, it was again stated that 19*a.* 1*r.* 7*p.* of glebe land, valued at 30*l.* per annum were held with the living. A was a party to all the proceedings in the Incumbered Estates' Court. The advowson was sold and conveyed by the commissioners to B, from whom it was afterwards purchased by C, a clergyman of the Established Church. Previous to this latter sale C. visited the parish of T; and X, the son of A, on that occasion shewed C. a copy of the advertisement before mentioned, and represented the particulars contained in it as being correct. On the death of A, C. presented himself to the living of T. Shortly afterwards a demand for rent of the glebe lands was made of C. by X, the son and devisee of A; and on his refusing to pay it, an action of ejectment was commenced for the recovery of the lands. In a suit instituted by C for an injunction to restrain the proceedings at law, on the ground that by the acts and conduct of A, C. had been led to suppose that the glebe lands were not subject to rent, Held, that as A. had lain by and not asserted his claim during the proceedings in the Incumbered Estates Court, the relief sought should be granted. *Belcher v. Brady*, 8 Ir. Jur., N.S., 268, G.

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The glebe lands of T. were held under a lease of lives renewable for ever, the last life in which had dropped on the death of A. The petition of C, prayed, first, to have the glebe lands declared discharged from any lease or rent; secondly, that, if subject to the lease, compensation should be made to C. for his loss as purchaser; and lastly, that, if necessary, a renewal of the lease should be executed by X. to C. Held—That the frame of the petition was not open to objection, and that the prayer for alternative relief was admissible. *Id.*

LANDED ESTATES COURT.

Jurisdiction and practice of.] The Landed Estates Court will not set aside deeds where they deal with other properties not under the control of the Court, or where they contain obligations of an important character not connected with the estate which the Court is required to sell, or has sold, but will leave the parties to proceed in Chancery; but the Court has jurisdiction to dispose of all questions which arise incidentally in reference to any estate or fund under its control. *In re Ronayne's Estate*, 13 Ir. Ch. Rep. 444, L. E. C.

The Landed Estates Court will not allow the party having the carriage of the order for sale to buy up charges on the estate at an undervalue for his own benefit, pending the proceedings, and it is sufficient proof of undervalue if a greater sum is reported on foot of the charge than the amount given for it with interest. *Id.*

The Landed Estates Court will set aside the sale of a charge at an undervalue made to the party having the carriage, on the application of the party making the assignment, who has even a better equity to set aside the sale than the owner or puisne creditors have to have it declared a trust for them. *Id.*

Practices on petition by owner.] The Landed Estates Court always requires that an owner and petitioner proceeding for sale should be in the actual or virtual possession of the estate or in the receipt of the rents. *In re Butler*, 13 Ir. Ch. Rep. 453, L. E. C.

Selling subject to lease, though affected by prior registry of incumbrance.] A. B. having made a lease, dated the 18th of October, 1852, of part of the lands of Blackacre, by a deed purporting to be for value, dated the 16th of January, 1853, conveyed the inheritance in remainder expectant on his own decease to his son F. This deed was registered two days after. The lease was not registered until the 25th of May, 1854. F. had notice of the lease at the time of the execution of the deed of 1853. By deed dated the 16th of November, 1857, F. mortgaged his reversion to L., who had not notice of the lease. Held, that whether the deed of the 16th of January 1853, was a voluntary deed, or a deed for value, L.'s mortgage was entitled to priority over the lease of 1852, and that his title was not affected by the intermediate registration of the lease. But held also, that, as it appeared on the evidence before the Court, that the lease was *bona fide* for a proper period, and at a fair rent, and as the sale would not be materially

affected by it, the sale should be made subject to it, and that it should not be set aside for a slight difference between the rent and the value. *In re Flood's Estate*, 13 Ir. Ch. Rep. 312, L. E. C.

If the Court is constrained to set aside a *bona fide* lease, it will reserve to the lessee the right of applying for compensation as against any interest remaining in the lessor. *Id.*

LANDLORD AND TENANT.

Effect of Landlord and Tenant Act, 1860, 24 & 25 Vict., c. 154, on relation between landlord and tenant.] The Marquis of Conyngham, by his agent, by parol, agreed to let to the plaintiff a fishery for a year at a rent of 150l. Held, Christian J., *dissentiente*, that, though an incorporeal tenement, the interest passed to the plaintiff under the 3rd and 4th sections of the Landlord and Tenant Law Amendment Act, 1860, so as to enable him to sue for the disturbance. *Bailey v. Marquis of Conyngham*, 8 Ir. Jur. N.S., 212, C. P.

Held also, Christian J., *dissentiente*, that the 3rd section of that statute impliedly repealed the 2nd section of the Statute of Frauds, 7 Will. III. c. 12. *Id.*

And per Christian J., that the 2nd section of the Statute of Frauds is not repealed by the 3rd section of the Landlord and Tenant Law Amendment Act, 1860. *Id.*

And that that section being in full force, the 3rd section of the new act was, in any event, inapplicable, since this latter requires an agreement between the parties to constitute the relation of landlord and tenant; which agreement by the 2nd section of the Statute of Frauds, must be in writing. *Id.*

And that the 4th section was, by its very terms, inapplicable. *Id.*

And that the effect of the 3rd section of the Landlord and Tenant Law Amendment Act is simply this, that wherever there is a transaction which, but for certain technicalities, would have created the relation of landlord and tenant, that relation shall be deemed to have been created. *Id.*

And that there is nothing in the law of England which can be called codification. *Id.*

A. and B. by lease dated the 13th of January, 1831, reciting that A. had mortgaged to B. the premises included in the lease demised certain premises to C. The rent was reserved to A, the mortgagor, and also the power of distress and re-entry. A. and B. in the year 1836, assigned their interest to D. who brought ejectment for non-payment of rent. Held that C. was not estopped from disputing the title of A. *M'Arreey v. Hannan*, 13 Ir. C. L. Rep. 70, E.

Held also, that independently of the Landlord and Tenant Law Amendment Act, D. could not maintain ejectment for non-payment of rent. *Id.*

Held also, per Fitzgerald, Hughes, and Deasy, BB., that the relation of landlord and tenant, within the meaning of the 3rd section of the Landlord and Tenant Law Amendment Act, 23 & 24 Vict., c. 154, did not subsist between D. and C. *Id.*

Per Pigot C.B.—The 3rd section of that statute is not retrospective. *Id.*

Retrospective operation of st. 23 & 24 Vict. c. 154.] The summons and plaint complained that by indenture of 1st March, 1826, and made between R. P. C., of the one part, and J. B., of the other, the said R. P. C. demised unto J. B. the mill and premises in indenture described, to hold to J. B., his heirs and assigns, for ever; and J. B., for himself, his heirs and assigns, covenanted with R. P. C., his heirs and assigns, that J. B., his heir and assigns, would keep the premises and all improvements in good order, condition, and repair, and at the end or sooner determination of that demise should and would so yield up same to R. P. C., his heirs and assigns. Averment—that before the breaches of covenant therein-after mentioned were committed, and before the passing of the Landlord and Tenant Act, the estate of R. P. C. became, was, and continued to be vested in the plaintiff, and one moiety of the estate of the said J. B. became, was, and continued to be duly vested in the defendant. Breach—that the defendant did not, during the continuance of said lease keep the premises in good order and repair, but that, on the contrary, while the plaintiff was such assignee, and before the passing of said act the said mill became, and was, and from thence hitherto continued to be, and was now burnt down, to the plaintiff's damage of 8,000l. To this summons and plaint the defendant demurred, on the grounds, firstly, that the provisions of the Landlord and Tenant Act did not apply to fee-farm-grants; secondly assuming

that they did so apply, yet that that application must have regard to grants in fee-farm made after the coming into operation of the statute, and not to those made previous thereto. *Held*, (Pigot, C.B. abstaining from giving any opinion thereon,) that fee-farm grants are within the operation of the Act. *Chas v. Buxton*, 8 Ir. Jur. N.S., 309, Knob.

Held also, Pigot, C.B., *dissentiens*, that the Act had a retrospective operation, and that, therefore, the assignee of a grantor of a fee-farm grant can take advantage of covenants entered into between the original grantor and grantee of a grant made before the coming into operation of the 23 & 24 Vic., c. 154, "The Landlord and Tenant Law Amendment Act (Ireland), 1860." The demurrer was overruled accordingly. *Id.*

To an action against an assignee for several gales of rent, due on a lease made before the passing of the Landlord and Tenant Law Amendment Act, 1860, (23 & 24 Vic., c. 154), and some of which gales accrued before, and some after the Act, the defendant pleaded that during all the time he was assignee, the plaintiff and his under-tenants were in actual possession and occupation, and in the receipt of the rents and profits of a portion of the premises against his will, whereby the defendant was deprived of the rents and profits of the same. The plaintiff replied, setting out the several times when the rent accrued. *Held* on demurrer, that the plea was an answer to so much of the action as claimed the rents which accrued due prior to the passing of the Act; but that with respect to the gales which accrued subsequently the plea was bad, and that the plaintiff had a right, under s. 44, to recover a proportion of each of the latter gales. *Mercer v. O'Reilly*, 18 Ir. C. L. Rep., 153, C. P.

Held also, that the 44th section operates upon contracts of tenancy made prior to, and in force at the time of the passing of the Act, but only as to future breaches of same. *Id.*

Motion for security under s. 75 of 23 and 24 Vic., c. 154. An application to the Court to compel a defendant in ejectment to give security for costs under the 75th section of the Landlord and Tenant Law Amendment Act (Ireland), 1860, ought to be listed. *Bell v. Bell*, 8 Ir. Jur. N.S., 152, C. P., a. c. 13 Ir. C. L. R., app. xlvii.

An affidavit by the plaintiff making such an application, that he has no copy or counterpart of the lease, and that there never was any, and a notice to the defendant requiring him to produce the original, will not be taken by the Court in substitution of "the lease, or other instrument, or counterpart or duplicate thereof," whose production by the plaintiff is required by the said section. *Id.*

A landlord cannot under s. 75 of the Landlord and Tenant Law Amendment Act, 1860, obtain security against a tenant from year to year unless there is a lease or other written instrument regulating the terms of the tenancy. *Beakey v. Murphy*, 8 Ir. Jur. N. S. 161, Q. B.

For Loftoy, C.J., and Hayes, J.—The schedule to a Landed Estates Court conveyance stating the tenant's name, his tenure and rent, and the time at which his tenancy might be determined, is an "instrument regulating the terms of the tenancy" within the meaning of section 75 of the Landlord and Tenant Act. *Id.*

For O'Brien and Fitzgerald, J.J.—Such a schedule is not such an instrument. *Id.*

What sum to be lodged in Court on application for writ of restitution. Defendant in ejectment for non-payment of rent, applied for a writ of restitution, and thereupon lodged in court the rents and arrears of rent endorsed on the *hobere*, together with the costs of the action, which sums plaintiff declined to accept, on the ground that a subsequent gale should have been lodged with said sum. *Held*—that the sum marked on the *hobere* was sufficient, and that the writ of restitution should thereupon issue, the defendant undertaking to pay such sum, if any, as the Master to whom the case was referred should report. *Trent v. Irvine*, 8 Ir. Jur. N. S., 306, E.

LEASE.

Right to cut turf. Demise of a part of the lands of L, together with the bog in the possession of this lease, situate in the bogs of L and R. The lease was in possession of part of the bog of R, in which he had cut turf for his own consumption, but not for sale. *Held*, that the lease did not confer a right to cut turf for sale on the bog of R. *Foster v. Beakey*, 18 Ir. Ch. Rep., 56. R.

Suit to reform lease. By an agreement in writing, A

agreed to let to B a slip of ground "bounded on the north by a road dividing said lot from Mr. T's holding." At the corner of the agreement, under the signatures, was the following memorandum signed with B's initials, "The little angle at the road, opposite to T's, to be added to the road,"—the little angle was at the south side of T's road. The lease executed, in pursuance of the agreement, stated the lot to be bounded "on the north by a road dividing said lot from Mr. T's holding;" and referred to a map, which erroneously described T's road as straight line instead of a curve, and did not contain the memorandum at foot of the agreement. *Held*, that parol evidence was not admissible to show that it was intended that the angle should be excluded from the lease. *Held* also, that according to the true construction of the agreement, T's road, as it existed at the time, was to be the northern boundary; but that B was bound to throw the angle into the road, and that a covenant to that effect should have been inserted in the lease. Assuming parol evidence to be admissible, the evidence of the parties being conflicting, as to their intention to include the angle in the lease,—*Held*, that the lease could not be reformed in that respect. *Gray v. Russell*, 18 Ir. Ch. Rep., 77. R.

B undertaking, by the decree, to throw the angle into the road, the petition was dismissed with costs, except so far as might be necessary to enforce the undertaking. *Id.*

By an agreement in writing, G agreed to let to B a plot of ground, "bounded on the north by a road dividing said lot from Mr. T's holding." On one corner of the agreement, B indorsed the following memorandum, signed with his initials: "The little angle at the road opposite to T's to be added to the road." A lease in pursuance of this agreement was prepared and executed, and in it the northern boundary of the demise premises was stated to be "the road dividing the said lot from Mr. T's holding," and no provision was made by it for adding the little angle to the road." In a suit instituted by G to reform the lease, by excepting the little angle from the demise—*Held*, that inasmuch as the prayer of the petition sought to retain the angle in G's dominion without any obligation on him to add it to the road, no relief could be granted. *Gray v. Russell*, 8 Ir. Jur. N.S., 81, Ch. Ap.

Liability of lessee to pay "Public Water Rate." The lessee of a house and premises in Dublin, having covenanted to pay the rent reserved in the lease, "without any deduction or abatement for or in respect of any taxes, charges, or assessments, or other dues whatsoever, or for any other matter or thing, ordinary or extraordinary," and "from time to time, during the term of said lease, to bear and pay all manner of taxes, charges, and assessments, ordinary and extraordinary, and by any power or authority whatsoever to be laid, taxed, or imposed, either on the premises or upon the owners, or occupiers, or landlords thereof, or in respect of the rent reserved, or the premises demise." *Held*, on appeal, that the lessee was liable to pay the "Public Water Rate" levied under the provisions of the 24 & 25 Vic. cap. 72, sections 2, 54. *Bourne, appellant, Longfield, respondent*, 8 Ir. Jur. N. S. 270, Concl. N. P. Court.

Exemption of tenant from future taxes. A lease made in 1848 contained a clause exempting the tenant from the payment of "all rates and taxes charged and chargeable on the demise premises, except the tenant's proportion of poor rate." *Held*, that under the clause the tenant was exempted from payment of the domestic water rate imposed by the Dublin Corporation Waterworks Act, 24 & 25 Vic. c. cxvii, loc. and pers. *Scovell v. Gardiner*, 8 Ir. Jur. N.S. 361, Q.B.

LEGACY.

Bequest of £1000 in the 3½ per cent. Irish stock to A, and if she died unmarried or without children, over. The executor did not appropriate stock to answer the legacy. *Held*, that this was a general legacy of so much money as would have purchased £1000 stock at the death of the testatrix: that the executor was liable to pay A. interest at 5 per cent on that sum, from the period of a year after the death of the testatrix. *O'Mahony v. Burdett*, 18 Ir. Ch. Rep., 68. R.

LEGACY DUTY.

What bequests exempted from. A bequest of personality in a will, so given as by analogy to the statute, 48 Elin. c. 4, (English) to be a valid charitable bequest is a legacy for a "purpose wholly charitable," within the meaning of the 38th

section of the 5 & 6 Vict., c. 82, and is exempt from legacy duty. *Attorney-General v. Bagot*, 13 Ir. C. L. Rep., 48. Exch.

A testator directed a sum of £2000 to be disposed of by his executors to such charitable purposes, or for the promotion of art and industry in Ireland, in such manner and portion as his executors should in their discretion think most advisable. This having been held, in a suit to administer the testator's assets, a valid charitable bequest, a scheme was settled, by which the executors applied the fund for the establishment of a perpetual endowment for the encouragement of students of the Fine Arts in Ireland. Held, that this was a legacy for a "purpose merely charitable," within the 38th section of the 5 & 6 Vict., c. 82. *Id.*

Effect of secret trust for charity. B. F., the testatrix, by will bearing date the 10th February, 1829, after giving several legacies, bequeathed the residue of her real and personal estate "to the Rev. P. D. and the Most Rev. D. M., and to the survivor of them, his heirs, executors, &c., requesting that the intentions expressed in her will might be carried into effect." To this will there was a codicil dated 7th October, 1839, as follows: "To remove any doubt as to my intention as to the devise and bequest of my real, freehold, and personal estates, I declare that the same shall go to the said P. D. and the Most Rev. D. M. named in my will, according to the directions therein, and it is not intended that same or any part thereof should be given or bequeathed to any other person." Testatrix died 5th May, 1850, Most Rev. D. M. died February, 1852, and Rev. P. D. died in December, 1852, having bequeathed by will said residue to Archbishop C., who, in 1853, obtained probate of said last mentioned will. For this residuary sum so bequeathed by testatrix, legacy duty, under and by virtue of the Legacy Duty Acts, at the rate of £10 per cent. was sought to be enforced, same having been bequeathed to strangers in blood. Defendant declined to pay same, on the ground that certain charitable trusts were declared by letters written by testatrix to said Most Rev. D. M. and Rev. P. D., received and acceded to by them during her life, and acted upon after her death, and that, therefore, the personal representatives of testatrix were bound as trustees to apply said residue to purposes merely charitable, and that the trust was one which a court of equity would enforce, and that therefore the bequest of the residue to the said Most Rev. D. M. and Rev. P. D. was a bequest for charitable purposes, and that no duty was payable in respect thereof. Held, that a secret trust cannot be made available by the legatee for the purpose of exemption from legacy duty, and that, therefore, the gift of the residue contained in the will of testatrix, B. F., was subject to legacy duty, and was not exempted by the 38th section of 5 & 6 Vict., c. 82, exempting charitable bequests from duty. *The Attorney-General v. Cullen*, 8 Ir. Jur. N.S., 189. Exch.

LIBEL.

Publication of records. A party publishing a copy of a judgment does so at his peril; and if the judgment has been satisfied by payment before the publication, and he publishes it as an existing liability, he is liable in an action for libel, and if special damage has followed, in an action for a false representation. *M'Nally v. Oldham*, 8 Ir. Jur., N.S., 86. Q.B.

Justification. Where a libel charged a landlord with harshness and oppression in evicting his tenants, and the writer added that he had seen the tenants' receipts for payment of rent up to the 29th September, two months and a-half preceding the eviction. Held, that this statement formed matter of aggravation which should be justified, that a statement in the defence that the tenants had paid their rents up to the March previous, was not a sufficient justification, and that, therefore, the defence was bad, though covering other parts of the libel. *Brabazon v. Potts*, 8 Ir. Jur., N.S., 6. Q.B.

Where the charge in a libel was, that the writer had seen in the hands of tenants receipts for rent up to a certain period, a defence that the writer had seen documents purporting to be those receipts is bad. *Id.*

A libel must be justified in the sense charged by the innuendo. *Id.*

Plea of privileged communication. In an action by a solicitor for libel:—a plea in a letter to the Secretary of the Law Society the defendant pleaded, setting out certain conduct of

the plaintiff which he said he believed to be improper and unprofessional; that he believed it to be his duty as a member of society, and, as such interested in the good conduct of the profession, to bring the plaintiff's conduct under the notice of the Society, who, he believed, had the power and duty of instituting inquiry so as to prevent the repetition of this conduct complained of; and that he wrote the letter for the *bona fide* purpose of procuring inquiry and preventing the repetition of the conduct. Held, *dissentiente* Fitzgerald, J., that this defence was good, and that the communication was privileged. *Hamerton v. Greene*, 8 Ir. Jur. N.S., 293, Q. B.

In an action for libel the first count of the summons and plaint alleged that the plaintiff, having employed an attorney to recover a sum of 33l due to him by one Henderson, the defendant, maliciously contriving and intending to injure the character of the plaintiff's wife, and to deter the plaintiff from prosecuting his suit, and cause it to be believed that the conduct of the plaintiff's wife was of so atrocious a nature that her life would be sacrificed by the persons in the neighbourhood if she remained, addressed a letter to the attorney employed to recover the 33l. The second count commencing with, "the said defendant, contriving, and intending, as in the preceding paragraph particularly set forth," proceeded to set out the letter, which was a history of the plaintiff's supposed cause of action against Henderson, and contained this sentence, "This Mrs. Halloran has been very troublesome for some time past and has brought the neighbourhood in which she lives into a turmoil by the most reprehensible conduct, so much so that it is as much as her life is worth to remain here." The defendant pleaded to the second count of the summons and plaint that the plaintiffs were the tenants of P. H. T.; that the defendant was the agent of P. H. T.; that the said Henderson was in the employment of the defendant as bailiff on the estate of P. H. T.; that in pursuance of an agreement between all the parties, the said Henderson, by the defendant's directions, sold the good-will of the plaintiffs in the lands held by them for 33l; that the plaintiffs afterwards refused to comply with the agreement as to the application of the said sum, and employed the said attorney to sue the said Henderson for the same, and that the defendant did write and publish the said letter, believing the matter therein stated to be true, and to protect his said servant, the said Henderson, from vexatious litigation. Held, that the letter was a privileged communication. *Halloran and Wife v. Thompson*, 8 Ir. Jur. N.S. 332, C.P.

Held, also, that as malice was impliedly rebutted by the plea, the absence of the words, "*bona fide* and without malice," would not make it bad on demurrer. *Id.*

Held, also, that if the occasion was exceeded, the alleged excess was a question for the jury. *Id.*

The rule in *Ruckley v. Kiernan*, 7 Ir. C. L. R. 75, regarding the treatment of a plea upon general demurrer, repeated. *Id.*

Pleading in action for In an action of libel a defence that the alleged libel was a fair comment in a newspaper upon the plaintiff's acts, must allege that the article was a fair comment upon the plaintiff's conduct on the occasion therein referred to. *Clinton v. Henderson*, 18 Ir. C. L. Rep. app. xliii. Exch.

The pleas in *The Earl of Lucan v. Smith*, 26 L. J. Exch. 94, note 2, Bullen and Leake's Prec. in Pleading, 2nd edn. p. 614, disapproved of. *Id.*

The introduction of untraversable averments into the summons and plaint, such as laudatory statements relative to the plaintiff, is a very objectionable practice, and tends to mislead juries from the real questions in dispute. *Id.*

LIMITATIONS (STATUTE OF.)

Non-payment of interest on charge. A term of 500 years was vested in trustees for the purpose of raising a charge of 3,000l. No part of this charge was raised, but interest on 2,000 was paid to the parties entitled to the entire charge when raised. No interest had been paid on the remaining 1,000 for upwards of 40 years. *Quare*, was a claim on foot of this 1,000l barred by the Statute of Limitations? *In re Coane*, 8 Ir. Jur. N.S. 124, Ch. App.

Adverse possession. A., being seized in fee of lands in Ireland, granted an annuity in the year 1812. In 1820, A. became resident in England, and the then usual deeds of conveyance were executed. In the year 1822, the grantees of the annuity filed a bill in Chancery in Ireland, for a receiver, and

prayed process against the assignees in the English insolvency, who however never answered. The possession of A. remained undisturbed by the assignees; and in the year 1828 a receiver was appointed over, and went into possession of the lands, and was in possession at the time of the filing of the petition for sale in this matter. On the 31st of July, 1861, the assignees conveyed the lands to the owner in this matter, subject to the annuity. On a petition for sale presented by the owner—Held, that the conveyance of the 21st July, 1861, was inoperative; that the title of the assignees was barred by the Statute of Limitations, and that the possession had always been adverse to them. *In re Butler*, 13 Ir. Ch. Rep. 453, L. E. C.

LUNACY.

Carrying on trade for benefit of lunatic.] Where a lunatic is the proprietor of a trading establishment yielding large annual profits, the true value of which cannot be realised by a sale, *Semble*, the Court will allow it to be carried on for his benefit under a manager. *In re Rowles, a lunatic*, 8 Ir. Jur. N.S. 63, C.

MAGISTRATE.

Actions against.] To an action of assault and false imprisonment, the defendant pleaded that he was a Justice of the Peace for the County of K.; that F. M. made an information on oath that he had lent a gun to P. L., who had afterwards neglected to return same, and that he had reason to believe that it was in the possession of the plaintiff, who was a pawnbroker at A.; that thereupon the defendant issued a warrant to the constabulary to search for the gun, and to arrest the party in whose possession it was found; that the police found the gun in the plaintiff's possession, and arrested him, and brought him before the defendant and another Justice, who thereupon caused the plaintiff to enter into a recognizance to answer the charge at a subsequent sessions, when an order was made for the restitution of the gun; and that the order and warrant had not been quashed upon *certiorari*, and still remained in force. Held, that so far as the defence proceeded on the Pawnbroker's Act (26 G. 3, c. 43, s. 13), the act of the defendant could not be justified, inasmuch as it neither appeared that the gun had been unlawfully pawned, nor was there any charge of felony alleged in the information; and that the defendant had to that extent acted without any jurisdiction; but that, regarding the warrant as one for procuring the attendance of the plaintiff at the Petty Sessions, the subsequent orders had been made in the same matter, and that the defendant had not acted wholly without jurisdiction; and that until the orders had been quashed pursuant to the 12 Vic. c. 16, s. 2, no action in respect of what was done under the warrant was maintainable against the defendant, *McDonald v. Bulwer*, 13 Ir. C. L. R. 549, C.P.; s.c. 8 Ir. Jur. N.S. 12.

Notice of action against.] In an action against a Justice, for acts done by him in the execution of his office, the defendant cannot, at the trial, avail himself of the provisions of the Protection of Justices Act (11 & 12 Vict. c. 16), requiring the service of a notice of action, unless the want of such notice has been relied upon in pleading (Lefroy, C. J., *dis-sentiente*). *Lawrenson v. Hill*, 13 Ir. C. L. Rep. 1, Exch. Ch.

Legality of order.] *Quære*—Is an order or conviction, though drawn in exact conformity with the form sanctioned by the Lord Lieutenant in council, pursuant to the statute, legal, if it does not state the fact which gave jurisdiction to the justices? *The Queen v. The Justices of Peace for the County of Dublin*, 13 Ir. C. L. Rep. 375, Q.B.

Justices acting out of Petty Sessions.] Summary conviction (made by two justices out of Petty Sessions) quashed, because it did not appear, on the return to a writ of *certiorari* to remove the conviction, &c., that the now prosecutor (the defendant in the Court below), was in fact unable to give bail for his appearance at Petty Sessions. *The Queen v. The Justices of Peace for the County of Dublin*, 13 Ir. C. L. Rep. 375, Q.B.

Semble, that it is the duty of two justices acting out of Petty Sessions to take the initiative, and require the defendant to give bail. *Id.*

Conviction for tipping in house not duly licensed.] The 3rd and 4th section of the 17 & 18 Vic. c. 89, apply exclusively to where there is no licence at all; therefore, where A. B. was

convicted under the 4th section by the magistrates of the Metropolitan Police Court, of having been found to be tipping on unlicensed premises, and C. D., the owner of the premises, was convicted under the 3rd section of having sold and kept for sale beer, not being duly licensed, and it appeared that the premises in question were licensed, but not licensed for the sale of beer to be consumed on the premises, such convictions were quashed. *Cunningham, appellant; Withers, respondent*, 8 Ir. Jur. N.S. 392, C.P.

MAINTENANCE.

Deed void under statute against.] A. brought an ejectment on the title, for the recovery of certain premises which he claimed under a conveyance from B., who was the grantee of C., who had at the time of the grant been out of the actual possession of, and of the receipt of, the rents and profits of the premises for several years, and which possession the plaintiff sought to obtain by the present action. Held, that the 10 Car. 1, sess. 3, c. 15 (1r.), against maintenance, &c., and the unlawful buying of titles, was still in force, and was not repealed or affected by the 8 & 9 Vic. c. 106, s. 6, which applied exclusively to England, and consequently that the deed under which A. claimed was void. *Nelson v. Small*, 13 Ir. C. L. Rep. 558, C.P.

Semble, that the latter enactment was not intended to apply to transfers of disputed rights of entry. *Id.*

Action for.] Where the first count of the summons and plaint complained that defendant unlawfully, maliciously, and without reasonable or probable cause, and without having any interest in the suit thereafter mentioned, did advise, procure, instigate, and stir up one J. B., then being a pauper, to commence and prosecute an action for slander in the Court of Queen's Bench, against the plaintiff, in which action the now plaintiff did appear and defend the same, and the now plaintiff further saith, that by and through such advice, procurement, instigation, and stirring up as aforesaid, the said J. B. did in fact, without reasonable and probable cause, commence and prosecute the said action for slander, and that such proceedings were thenceforth had, &c. The third count complained that the defendant wrongfully, unlawfully, vexatiously, and maliciously, and without having any ground for the thereafter mentioned action, caused to be commenced and prosecuted in the Queen's Bench an action of slander against the said plaintiff by the said J. B., in which action the now plaintiff did appear and defend the same by reason whereof, &c. Held, that the counts should be set aside, inasmuch as there was no averment of the termination of the action of slander before the bringing of the present action, or that same was brought without reasonable and probable cause. *Pope v. Coates*, 8 Ir. Jur. N.S. 398, Exch.

MARSHALSEA (FOUR COURTS).

Regulation and discipline of.] The power of making and altering the rules and regulations of the Four Courts Marshalsea, and of every prison in Ireland, was transferred by the 19 & 20 Vic. c. 68, s. 3, from the Court of Queen's Bench to the Lord Lieutenant. The powers of inspection and punishment given to the marshal by the thirtieth of the rules of 1857 for the regulation of the Four Courts, Marshalsea, may be exercised by the local inspector, under the thirty-seventh of those rules, when the marshal is present in the prison, as well as when he is absent, or ill. *Carpenter v. Testing*, 13 Ir. C. L. Rep. 525, Exch.

Semble, that the deputy-marshal can exercise the powers of the marshal only during the illness or absence of the latter. *Id.*

MEDICAL ACT.

When the registrars of the Branch Medical Council insert in, and afterwards, by order of such Branch Council, and without notice to the party registered, strikes out of the register the description of a qualification which the evidence produced to the registrar by the claimant did not show that he had obtained, the Court will not by mandamus compel the registrar to re-insert such description. *The Queen v. Steele*, 13 Ir. C. L. Rep. 398, Q.B.

NATIONAL DEBT.

Commissioners for reduction of.] On motion to make absolute a conditional order to substitute service of the writ of

summons and plaint on the Commissioners for the Reduction of the National Debt, who were living out of the jurisdiction of the Court, by serving the secretary of the Bank of Ireland, it was held, that the commissioners could not sue or be sued in the capacity of a corporate body, inasmuch as they were not a corporation having perpetual succession, and that they existed no further than the paying off the National Debt, and that therefore the motion must be refused. *McDonald v. The Commissioners for the Reduction of the National Debt*, 8 Ir. Jur. N.S. 346, Exch.

NEGLIGENCE.

Responsibility of railway company for defects in engines. A railway company are responsible for all defects in their engines, whether concealed or not, and are not protected by pleading that they bought the engine from a competent manufacturer. *Burns v. The Cork and Bandon Railway Company*, 8 Ir. Jur. N.S. 71, Exch.; a. c. 13 Ir. C. L. Rep. 543.

Plea of contributory negligence. The summons and plaint complained that the defendant was possessed of a certain horse and carriage, which horse and carriage was under the care and government of a servant of the defendant; and defendant, by his said servant, so carelessly, negligently, and unskillfully managed and drove the said horse and carriage in a public street and highway, that by and through the carelessness, negligence, and want of skill of the defendant by his said servant the said horse and carriage were forced and driven against the plaintiff, whereby the plaintiff was thrown down and wounded, and was for a large time sick and permanently disabled. The 3rd defence thereto, "That plaintiff might, by the exercise of ordinary care, have avoided the consequence of the carelessness, negligence, and want of skill of defendant's servant; and that the plaintiff did not exercise such ordinary care; and that by reason of such want of ordinary care the plaintiff contributed to the occurrence of the injury in summons and plaint complained of," was ordered to be amended by inserting the word "directly" before the word "contributed." *Lawlor v. Wheeler*, 8 Ir. Jur. N.S. 397, Exch.

NEW TRIAL.

Insufficient grounds for granting. An allegation in this Court, that the verdict at the trial was upon the whole unsatisfactory, and that a new trial ought to be granted, is not a ground for disturbing the judgment of the Court below. *Hayes v. Dexter*, 13 Ir. C. L. Rep. 22.

See EJECTMENT—EXCEPTIONS (BILL OF).

NOTICE.

Constructive notice. J. R., the owner of the estate, who was also a solicitor, executed a mortgage on the 20th of March, 1856, to M. S. to secure the repayment of £4,000, which was registered on the 3rd April, 1859. J. R. executed another mortgage on the 1st of February, 1859, to A. B. to secure £3,000, and this mortgage was registered on the 23rd March, 1859. And on the 7th March, 1859, J. R. executed a lease of the lands to P. M. for thirty years, at a rent of £845, P. M. paying one year's rent in advance, and a fine of £15,00. The lease was registered on the 16th of March, 1859, and was drawn and registered by J. R. the lessor, for which P. M. paid the costs out of pocket. P. M. alleged a custom for the landlord's solicitor to prepare the tenant's lease, and denied that he retained or employed J. R. as his solicitor. Held, that J. R., the lessor, having drawn and registered the lease, was the solicitor for P. M., the lessee; and therefore that P. M. had notice, through J. R., his solicitor, of the prior unregistered mortgages executed by J. R., and accordingly that he was not entitled to priority over the mortgages by reason of his lease being first on the registry. *Re Rorke's Estate*, 8 Ir. Jur. N.S. 53, L. E. C.; a. c. 13 Ir. Ch. Rep. 273.

A., the owner of an estate, and also a solicitor, executed a mortgage to B., dated the 29th of March, 1856, and registered the 3rd of April, 1859. On the 1st of March, 1859, a lease, on fine, of the same lands were executed by A. to C., and this was registered on the 16th of March, 1859. This lease was drawn and registered by A., for which he was paid by C. the costs out of pocket. Held, that A. having drawn and registered the lease, was the solicitor of C. in the transaction, and that C., therefore, had notice through A. of the prior un-

registered mortgage to B. *Re Rorke's Estate*, 8 Ir. Jur. N.S. 245, Ch. App.

PARTITION.

Return of commissioners. Where the commissioners' return to a writ of partition varied in some respects from the directions given in the Master's report, and also made no provision for the allotment to an owner in own possession of portion which he had purchased *pendente lite*, the Court refused to set aside the return, the other owners not objecting to the allotments made to them, and no misconduct on the part of the commissioners being proved. *Fitzgerald v. Massey*, 8 Ir. Jur. N.S. 229, R.

PAYMENT.

Effect of payment into Court of Bankruptcy before action. A. issued a trader-debtor summons under the Bankruptcy and Insolvency Act, against B., claiming £104. B. appeared in the Bankruptcy Court, and admitted a sum of £39 to be due, which sum, upon the refusal of A. to accept it, he paid into the hands of the official assignee. A. subsequently brought an action against B. for goods sold and delivered, claiming £104. B. pleaded payment; and in his particulars of payment, amongst other items, specified the £39 paid into the Court of Bankruptcy. Before the defence, but after the issuing of the summons and plaint, A., with B.'s consent, had drawn the £39 out of the Bankruptcy Court, the order to pay the money out being made without prejudice to A.'s right to proceed for the recovery of the balance claimed by him. The questions in the actions in the action were referred to the Master of the Court, who, after giving the defendant several credits, including credit for the £39 paid into Bankruptcy, found that he still owed the plaintiff £15. Held, that the payment into the Bankruptcy Court of the £39 must be treated as a payment by the defendant to the plaintiff before action; that all that A. had recovered in the action was £15, and that therefore he was entitled to half costs only. *Jacobs v. Bernal*, 8 Ir. Jur. N.S. 183, Q.B.

PLEADING.—I. EQUITY.

Charge of fraud. Though fraud be charged, and not proved, if, on the facts stated and proved, without reference to the charge of fraud, a right of relief is established, the Court ought not to dismiss the petition. *Lombard v. Hickson*, 13 Ir. Ch. Rep. 562, R.

Where a petitioner pleads facts which disclose grounds of equitable relief, he is entitled to obtain that relief, although the petition contain charges of fraud which fail in evidence, and its frame is merely pointed to obtain relief upon the case of fraud. *Lombard v. Hickson*, 13 Ir. Ch. Rep. 553, Ch. App.

A petition which makes unsubstantiated charges of fraud is not, on that account, to be dismissed, if there be in it facts properly pleaded and sustained in proof, which, if not connected with the charge of fraud, would confer a right to relief. *Beale v. Billing*, 18 Ir. Ch. Rep. 250, C.

Wilds v. Gibson, 1 H. of L. Cas. 605, considered and explained. *Id.*

Wilful default. General allegations of wilful neglect in a petition against a land agent, though supported by specific evidence of neglect in particular cases, are not sufficient to entitle the petitioner to an inquiry respecting wilful neglect. *Bond v. M'Watty*, 18 Ir. Ch. Rep. 174, C.

In a petition praying a reference to the Master on the ground of wilful default on the part of a land agent—Held, that the rule which requires some specific case of wilful default to be charged, is sufficiently fulfilled by a reference in the petition to certain accounts put in evidence, on the face of which such wilful default is apparent. *Pennefather v. Bolton*, 8 Ir. Jur. N.S. 45, R.

In a petition praying a reference, on the ground of wilful default on the part of a land agent, Held, that the rule which requires some specific instance of wilful default to be charged was not sufficiently fulfilled by a reference in the petition to certain accounts put in evidence, on the face of which such wilful default was alleged to be apparent. *Pennefather v. Bolton*, 8 Ir. Jur. N.S. 221, Ch. App.

Pennefather v. Bolton, 8 Ir. Jur. N.S. 45, reversed. *Id.*

Prayer for alternative relief. The globe lands of T. were held under a lease of lives renewable for ever, the last life in which had dropped on the death of A. The petition of C.

prayed, first, to have the glebe lands declared to be discharged from any lease or rent; secondly, that, if subject to the lease, compensation should be made to C. for his loss as purchaser; and lastly, that, if necessary, a renewal of the lease should be executed by X. to C. Held—That the frame of the petition was not open to objection, and that the prayer for alternative relief was admissible. *Belcher v. Brady*, 8 Ir. Jur., N.S., 205. Ch.

PLEADING—II. LAW.

Action by husband and wife—Misjoinder. In an action by A, jointly with B, his wife, to recover from D. a sum of £22, "money received by the defendant for the use of the plaintiff." The defendant demurred, upon the ground, amongst others, that it did not appear whether A was suing in his own right or in the right of his wife. Held, that it ought to have appeared from the summons and plaint in what interest B. had been joined as co-plaintiff with A; and that, notwithstanding the Common Law Procedure Act, 1853, secs 84-7, the misjoinder was the subject-matter of a demurrer. *Cuhill v. McDowell*, 13 Ir. C. L. Rep., 481. C.P.

Account stated. A count in a summons and plaint complaining "that the defendant is indebted to the plaintiff in the sum of £63 14s., money payable by the defendant to the plaintiff on an account stated between them," held, good on demurrer. *Lord Aldborough v. Hagarty*, 8 Ir. Jur., N.S., 841. Q.B.

Action for excessive distress. On a motion to set aside a paragraph of summons and plaint alleging that defendant distrained for certain "pretended arrears" of rent goods of plaintiff of greater value than "the actual arrears." Held, that the form was good. *McGurkin v. Dobbin*, 8 Ir. Jur., N.S., 811. Consol. Ch.

Count for malicious prosecution. Where the first and second counts of the summons and plaint complained of an assault and false imprisonment, and the third count complained "that the defendant falsely and maliciously, and without any reasonable or probable cause, charged the plaintiff with having committed a certain offence punishable by law, to wit, having feloniously stolen, &c., and upon said last-mentioned charge, the defendant falsely and maliciously, and without any reasonable and probable cause, caused and procured the plaintiff to be arrested and taken into custody by a certain police constable, and to be brought along certain streets in the town of C, and to be imprisoned, to the plaintiff's damage," &c., it was Held, that the third count was bad as a count for malicious prosecution, in not averring that the process had terminated before action brought, and that the averments of malice and absence of reasonable and probable cause were unnecessary and embarrassing. *Allen v. McCoombe*, 8 Ir. Jur., N.S., 811. Exch.

Difference between amount stated in body of plaint and in prayer of judgment. A summons and plaint contained two counts, one upon a bill of exchange, and another for goods sold and delivered, making together, £96 10s. 7d. The prayer of the plaint prayed judgment for £106 10s. 7d., and interest. The bill of particulars included a sum for interest upon the bill of exchange, which, when added to the two sums claimed in the two counts, amounted to £106 10s. 7d. The Court refused to set aside the summons and plaint as embarrassing. *Walkington v. Greer*, 8 Ir. Jur., N.S., 239 C.P.

Setting aside summons and plaint. The first count of the summons and plaint complained that the defendant "maliciously contrived, and did contrive to injure the plaintiff." Held, that this must be set aside. *Madden v. Maxwell*, 8 Ir. Jur., N.S., 269. C.P.

The second count of the same summons and plaint complained that the defendant, wilfully and wrongfully intending to injure the plaintiff, wrote the words, "No one would trust Mr. Madden." The words "falsely and maliciously" were wanting. Held, that this count was not open to objection, *ib.*

Setting aside demurrer. Where in an action of covenant upon a deed, the defendant who had the deed in his custody, pleaded by referring to the deed, making *proferat* of it, and then demurred to the summons and plaint, on the ground that the deed contained no such covenant as that sued upon, the Court set aside the demurrer as irregular. *Maher v. Purcell*, 13 Ir. C. L. Rep., 133. Exch.

Plea of liberum tenementum. In an action of trespass to land, the plea of *liberum tenementum* will not, as a general rule be allowed, and if pleaded will be set aside. *Prendergast v. Lord Plunket*, 13 Ir. C. L. Rep., 93, Ex.

Defence in ejectment for non-payment of rent. Ejectment for non-payment of rent, claiming six years' arrears. Plea: "That the rent of the said premises is not in arrear, and that the defendant discharged the said rent and every part thereof to the said plaintiff, before the commencement of the action." Held, a bad plea, because it did not go on to show how the rent had been discharged. *Hughes v. Browne*, 13 Ir. C. L. Rep., app. v. Q.B.

Plea justifying acts under easement. The 81st section of the Common Law Procedure Act, 1853, has not altered the rule that a plea which justifies an act complained of under an easement must set out the particular title upon which the defendant relies. *Hall v. Burton*, 8 Ir. Jur., N.S., 391. C.P.

Plea of payment. A plea of payment to an action for the price of goods sold and delivered from time to time in such a manner that the items constituting the plaintiff's claim are, many of them, infinitesimal, and an endorsement of particulars alleging the impossibility of furnishing the dates and amounts of the payments so pleaded, from the nature of the transactions between the plaintiff and defendant, will not be set aside, upon the ground that by the same the plaintiff is exposed to the risk of being taken by surprise at the trial, and this, though the plea in question does not purport to be pleaded to the whole cause of action, and there be other pleas pleaded, the plea of payment being supported by an affidavit. *Curley v. Clarke*, 8 Ir. Jur., N.S., 132. C.P.

Payment into Court on foot of contract different from that set forth in plaint. The defendant to a writ of summons and plaint for £83 7s. 6d., for arrears of rent out of the lands of K., pleaded a denial of the contract in plaint mentioned—that as to a moiety of the lands of K., he holds them as tenant from year to year from the plaintiff, and in respect to such moiety the sum of £83 7s. 6d. is due and owing to the plaintiff, and brings same into Court. Defence set aside, on the ground that money cannot be paid into Court on foot of a contract different from that in plaint set forth. *Bedford v. Oranmore*, 8 Ir. Jur., N.S., 151. Q.B.

Embarrassing defence. A defence to an action for breaking up pasture and meadow land, and cropping and sowing the same without good and sufficient manure, that the defendant did not break up or convert into tillage, or crop or sow the same, without sufficiently manuring the same, and using good and sufficient manure, is embarrassing. *Lysaght v. Lee*, 8 Ir. Jur. N.S. 112, C.P.

A defence to an action for use and occupation, that the defendant did not use and occupy at the time in paragraph and bill of particulars mentioned, is embarrassing. *ib.*

A defence to an action brought to recover the rent of premises let by the plaintiff to the defendant, that the defendant paid all rent due up to, &c., in manner hereon endorsed with an endorsement of particulars which sets out two bills of exchange, and their dates, will not be set aside as embarrassing. *ib.*

Motion to set aside defence.—The summons and plaint complained that the defendant used slanderous expressions imputing embezzlement to the plaintiff. Defence: privileged communication, that defendant suspected the plaintiff of embezzlement (without stating on the face of the plea the ground of his suspicion). The Court would not, on motion, set aside the defence, which, had they followed *Hennessey v. Morgan*, they should be compelled to do. *Fox v. Broderick*, 8 Ir. Jur. N.S., 194, Exch.

A defence to an action of trespass for breaking and entering the plaintiff's fishery, and expelling him therefrom, that the plaintiff had not the fishery alleged at the time, will be set aside as embarrassing. *Bailey v. Marguis of Conyngham*, 8 Ir. Jur. N.S., 93, C.P.

Defence leaving portion of count uncovered. To the common count in the summons and plaint for money had and received, on which was endorsed a bill of particulars, whereby it appeared that plaintiff paid defendant two sums of £23 and £10 for concave oat soil, and also for concave meadow, defendant pleaded "that the money paid by the plaintiff to the defendant for concave meadow amounted to £6, and no more, and that said payment was made at the risk of the plaintiff, who was aware before, and at the time of such payment, that

legal proceedings were pending against the lands on which said consacre was, and defendant says that plaintiff agreed with the defendant to pay said sum, running the risk of being disturbed in the cutting and carrying away said consacre crop." Defence set aside, as leaving a portion of the count uncovered, and also as embarrassing. *Lynch v. Irwin*, 8 Ir. Jur. N.S. 155, Exch.

What matters put in issue by traverse.] To an action for wrongfully keeping and maintaining a weir at a height beyond its ordinary level, whereby plaintiff's lands were flooded, the defendant pleaded that he "did not wrongfully keep and maintain the weir at a greater height than its ordinary level." The issue followed the words of the defence. Held, affirming a judgment of the Court of Exchequer, that the plea only put in issue the fact of the maintenance of the weir, and that evidence, on behalf of the defendant, that such maintenance was rightful, was inadmissible. *Keller v. Blood*, 13 Ir. C. L. Rep. 19, Exch. Ch.

References to documents in.] Where a party, in pleading, sets out partially, and relies upon, a document not under seal, the Court may, under sections 63 and 64 of the Common Law Procedure Act (1853), treat such document as if set out in pleading *in extenso*, and give judgment upon it accordingly (*Fitzgerald, B. dissentiente*). *Fitzpatrick v. Pine*, 18 Ir. C. L. Rep. 32, Exch.

Per *Fitzgerald B.*—This rule only applies to documents of which *oyer* was demandable before the Common Law Procedure Act. *Id.*

Intendment after verdict.] The plaintiff obtained judgment in an inferior Court for the breach of an agreement that in consideration that the plaintiff would become surety to the defendant the defendant would not put said suretyship in force until after the death of one B. A. The Court refused to reverse the judgment. *Hoare v. Flynn*, 8 Ir. Jur. N.S., 215, C. P.

Departure.] A departure in pleading is still, even since the passing of the Common Law Procedure Act, 1853, ground of general demurrer. *M'Kenna v. Mouray*, 8 Ir. Jur. N.S. 233, Q. B.

PORTIONS.

Period of vesting.] A had power to charge real estates with any sum not exceeding 20,000*l.* for portions for his younger children, said sum, or such less sum as should be charged, to be vested in and to be paid to or shared between and amongst all and every such children or child, or any one or more of them, exclusively of the others or other of them, at such age or time, or respective ages or times, or, if more than one, in such proportions and upon such terms and conditions, and in such manner as he should think proper, and should by deed or will appoint. A, by his will, reciting the power, charged 20,000*l.* on the estate, and bequeathed it, share and share alike, to his four younger children. Held, that the shares of the younger children became vested on the death of A, and bore interest from that time. *In re Charlevilla, Minors*, 13 Ir. Ch. Rep., 6, R.

A testator directed that the rents, issues, and profits of certain property should be invested in the funds, and kept there till his second son should come of age, at which time the sums so invested should be divided among his younger children. Held, that the shares in the accumulated fund vested at the testator's death. *Id.*

When to be raised. Interest on.] The question as to the time when portions become payable is one of construction; and when, according to that construction, the period has arrived when the portion is directed to be raised and paid, this must be done, although it can only be done by a waste of property and sale or mortgage of a reversionary term. *Masey v. Lloyd*, 8 Ir. Jur. N.S. 102, H. of L.

A portion is not properly said to be payable by trustees until two things have occurred, namely, when the time appointed for raising has arrived, and when the person entitled is able to give a discharge; but a portion is often said to be payable to a child so soon as the event has happened which gives the child a vested right in it. *Id.*

Circumstances in which, under a settlement, held (reversing the decree of the Court of Appeal in Chancery in Ireland) that there could be no severance of the interest from the principal. but that both should be raised and paid at the same time. *Id.*

When to be raised.] Lands were settled to the use of A, and B, his wife, for their lives, and the life of the survivor of them, and after the death of the survivor of them, to the use of a trustee, for 300 years, upon trust, if there should be no children of A and B, living at the time of the death of A other than X, and an eldest son (which event happened), to raise £5,000 as the portion of X, to be paid to her on attaining twenty-one or marriage, with interest in the meantime, at the rate of £5 per cent. for her maintenance, education, and advancement; but if there should be any children of A and B living at the decease of A, other than an eldest son, and X, to raise £10,000 (including the first-mentioned sum of £5,000) as portions for all the children of A and B (except as aforesaid) as A and B, or the survivor of them, should by deed or will appoint, and in default of such appointment, among all such children equally at twenty-one or marriage, with interest from the decease of the survivor of A and B in the meantime, and until their portions should become payable, for their maintenance and education. A died, leaving B surviving him. Held, that X was entitled to have her portion raised by sale of the reversionary term of 300 years, with interest from the time of A's death. *In re Aylward's Estate*, 13 Ir. Ch. Rep., 478, L. E. C.

Acceleration of.] A tenant for life under a marriage settlement, after having encumbered the life estate in the lands settled to its full value, cannot charge the remainder limited by the settlement to his eldest son by accelerating the payment the portions provided for younger children, or burden that remainder with interest accruing in his lifetime. Such charge nevertheless would be valid in case the incumbrance on the estate for life should be paid off, but the tenant for life would be bound to keep down the interest. *In re Green's Estate*, 8 Ir. Jur. N.S. 848, L. E. C.

Held, that such power of acceleration is a power appendant to the life estate. *Id.*

POWER OF APPOINTMENT.

Construction of.] E, the wife of T, being seized of fee-simple lands, E and T conveyed, by fine and deed leading its uses to a trustee and his heirs, to the use of E and T, and the survivor, for life, with remainder to enable E, by will, to devise the lands to and among the issue of E and T, in such shares as she should appoint, "it being, however, expressly declared that E is to have power only to devise such shares and proportions in strict settlement upon such child or children, and their lawful issue, whether male or female, but that if such child should die without having such lawful issue, who should attain the age of twenty-one years or be married, that then and in such case the said lands should be devised, and go to and among the surviving children and their issue, who should attain the age of twenty-one years, or be married, share and share alike. The deed contained a further provision in case of E not making a will, that it should be lawful for T, by his will, "to give, devise, and bequeath the said town and lands to and among their issue, in the manner aforesaid, in such shares and proportions as he should thereby direct, limit, and appoint;" in default of appointment, to go equally among the said children, and their lawful issue for ever. Held, that T could not appoint greater great estates than life estates to his children. *Bell v. Bell*, 13 Ir. Ch. Rep., 513, Ch. Ap.

T had power to appoint life estates to his children *in case* at the date of the deed, with remainder to their issue in strict settlement. *Id.*

Execution of.] A testator having power to appoint to his children in remainder, after his brother's death, made his will, by which he left all property of every kind he died possessed of, or was entitled to by reversion or otherwise, to his wife, giving her the power of dividing his property among his children as she might think proper; and by a codicil reciting that he had, on the marriage of his eldest son, executed a deed conveying over his interest in other lands, over which he had also a power of appointment, he desired the trustees of his will to hand over to his eldest son the reversionary property of every kind to which he was entitled after the death of his brother, the son binding himself to pay 8,000*l.* to his younger brother and sisters, and he appointed the eldest son joint executor with his wife. The testator had no other property on which the codicil could operate, which would be sufficient to pay the charge of 8,000*l.* Held, that the codicil was a good execution of the power. *Jones v. Jones*, 13 Ir. Ch. Rep. 409, R.

PRACTICE.—I. EQUITY.

Substitution of service on petty bag side of Court.] The recognition of a tenant under the Court was put in suit against R. G., one of his sureties, resident out of the jurisdiction, and service of notice of the proceedings was acknowledged in writing on behalf of R. G. by his solicitor in this country. A writ of *scire facias* having been issued, *semble* that the Court had jurisdiction to direct substitution of service of the writ on R. G.'s solicitor. *The Queen v. Gibbings*, 8 Ir. Jur. N.S., 44. C.

Special case, frame of.] A special case should be brought forward in the form of a statement of the facts, followed by a series of interrogatories, signed by counsel on both sides. *In re Guinness's trusts*, 8 Ir. Jur., N.S., 24. R.

Special case.] *Semble*, in a special case under the Court of Chancery (Ireland) Regulation Act, 1850, parties having conflicting rights should not be made co-petitioners. *In re Charlevilla, minors*, 18 Ir. Ch. R., 6. R.

Petition under 15th section.] It is erroneous to describe a cause petition as under the 15th section until an order of reference has been made. — *v. Keogh*, 13 Ir. Ch. Rep., 495. Ch.

Time for setting down petition.] Where an order was made by consent giving further time to file additional affidavits, held that this did not extend the time for setting down the petition, but that the two terms ran from the filing of the answering affidavits. *Wynne v. Know and Swan*, 8 Ir. Jur., N.S. 341. R.

Necessity of affidavit to raise question.] A petition by an executor for the administration of the testator's personal estate stated and relied on a deed, whereby a portion of the assets was assigned to petitioner. The matter having been referred to the Master under the 15th section of the Chancery Regulation Act, no charge or affidavit was filed impeaching the validity of the deed. Held, that the Master had no jurisdiction to decide on oral evidence and documents produced before him, whether the deed was or was not fraudulent and void against creditors under the statute 10 Car. 1, c. 3, Ir.; 13 Eliz. c. 5, English. *Carter v. Dickenson*, 13 Ir. Ch. Rep., 109. R.

Held also, that it was not necessary to give the Master such jurisdiction that a cross-petition should be filed to set aside the deed. *Id.*

Insufficiency of affidavit verifying charge where party put on proof.] The verification of a charge is not a sufficient affidavit to discharge an accounting party of items under forty shillings mentioned in the charge. *Palmer v. Goodwin*, 13 Ir. Ch. Rep. 171. C.

Re-hearing.] The Master of the Rolls has jurisdiction to re-hear cause petitions heard before himself, within the limits and restrictions contained in the 30th section of the Court of Chancery (Ireland) Regulation Act, 1850. *Sloan v. McCallen*, 13 Ir. Ch. Rep. 357. R.

A petition was filed for an injunction, and an account of the profits of a coal mine. On the 27th of May a decree was made, granting the injunction, but not the account. On the 21st of June an action at law was brought for the profits, which was stayed by injunction on the 4th of July. An order for a re-hearing was granted on a motion made early in November. *Id.*

Where a cause has been sent by the Lord Chancellor to the Rolls Court, and has been heard before the Master of the Rolls, *semble*, no practice exists by which it can be re-heard by the Master of the Rolls. *Sloan v. McCallen*, 8 Ir. Jur., N.S., 201. Ch. App.

Attestation of power of attorney.] Where a power of attorney was witnessed by a notary public, and attested under his notarial seal, held, that the handwriting of the party by whom the power of attorney purported to be signed should be verified by the affidavit of some person resident in this country. *In re Mann*, 8 Ir. Jur., N.S., 861. R.

Privilege of junior counsel.] When a case comes before the Court for hearing on report, exceptions, and merits, junior counsel must be instructed on both sides. *Brereton v. Barry*, 8 Ir. Jur., N.S., 226. Ch.

PRACTICE.—II. LAW.

84th G. O. 1854.] The concluding sentence of the 84th general order, 1854, applies to counsel, as well as to attorneys. When in a summons and plaint the money counts did not commence in a new paragraph the plaintiff was ordered to

amend the summons and plaint on the file at his own cost. The Court will not impose costs upon a defendant ordered to amend a defence read to and pleaded by leave of the Court. *McAnulty v. Nanties*, 13 Ir. C. L. Rep. app. xl, Ex.

Per Deasy, B.—Counsel ought to number each paragraph when drawing pleadings. *Id.*

Irregular indorsement on writ of summons and plaint in ejectment.] Where the indorsement of service of the writ of summons and plaint was irregular in respect to some of the defendants, the Court, after verdict, refused to allow the indorsement to be amended, but permitted the plaintiffs to strike out the names of these defendants. *Galwey Commissioners v. Doyle*, 8 Ir. Jur., N.S., 95, Cons. Ch.

Particulars of payment into Court.] To a summons and plaint containing the common *indebitatus* counts where the bill of particulars included twenty-eight items amounting to 400*l.*, the defendant pleaded payment into Court of 30*l.*; and as to the residue of the demand traversed the several paragraphs of the plaint *seriatim*. On motion by the plaintiff that the defendant be required to specify the items of the bill of particulars to which his payment into Court was applicable. Held, that the case was not one in which the Court would order the defendant to give the particulars required. *Ryan v. Horgan*, 13 Ir. C. L. Rep., app. xxxiv, Q.B.

Defence filed but not served.] Where the defendant, in a personal action, filed his defence within the time required by s. 48 of the Common Law Procedure Amendment Act, 1853, and omitted for some days afterwards to serve a copy thereof, but did so before the plaintiff had given notice of a motion for liberty to mark judgment, held, that notwithstanding that the plaintiff had been prevented from marking judgment, in consequence of the filing of the defence, though without notice, that defence became regular as soon as the copy was served, and the plaintiff could not afterwards object to it. *Moore v. McElroy*, 13 Ir. C. L. Rep. app. xlix. C.P.

Effect of pleading several defences without a rule.] Where counsel for the defendant has obtained leave to plead several defences, but has omitted to give in his certificate, and no rule consequently appears on the records of the Court, the plaintiff, when the time for pleading has expired, is entitled to mark judgment under the 45th General Order. *Cullinan v. Walker*, 8 Ir. Jur., N.S., 93, Cons. Ch.

When called on to mark judgment under this order, the Master should exercise a judicial authority in determining whether the case comes within the order or not, and if he experiences any difficulty, should submit the matter to the Court for its consideration. *Id.*

Where judgment has been marked for pleading several defences without a rule, and a rule warranting them would have existed but for the inadvertence of counsel in not giving in a certificate, the Court will set aside the judgment on terms. *Id.*

Setting aside order to plead double; suppression.] Where a judge's order for liberty to plead several defences has been obtained, and the affidavit verifying the pleas suppresses important facts, or is inconsistent with another affidavit previously made by the same party on application to the same judge, the order for liberty to plead several defences will be set aside, if the facts of the case are such as, if known to the judge, would have led him to refuse making the original order. *Finn v. The Albert Assurance Company*, 8 Ir. Jur., N.S., 94, Cons. Ch.

Filing additional defences.] See *Shane v. Nedham*, 8 Ir. Jur., N.S., 414, C.P.

Where leave given to file replication.] Where the defence shows by dates that two years and upwards have elapsed between the granting of an original civil bill decree and the renewal thereof, and does not state that proof of notice of application for renewal was made in open court, pursuant to the 142nd section of the Civil Bill Act, the Court will allow plaintiff to reply that two years have in fact elapsed, and that no proof of notice of application was given pursuant to the statute. *Gilligan v. Whedon*, 8 Ir. Jur., N.S., 873, Exch. And see *Curtis v. Morewood*, 8 Ir. Jur., N.S., 415, C.P.

Amendment.] See *Murphy v. Lancashire and Yorkshire Railway Company*, 8 Ir. Jur., N.S., 411; and *Alexander v. Robinson*, 8 Ir. Jur., N.S., 414. C.P.

Sending case to Consolidated Nisi Prius Court.] See *Blood v. Berrie*, 8 Ir. Jur., N.S., 269, C.P.

Motion to change verdict.] If a judge reserve liberty to turn a verdict for one party into a verdict for the other, and there be a point which would render that reservation nugatory,

tory, and which, if made at the time, might be met by evidence and yet was not made, it cannot be made afterwards. *Cobille v. Hall*, 8 Ir. Jur., N.S., 303, C.P.

New trial.] Time for applying for new trial extended. *Bloomfield v. Johnston*, 8 Ir. Jur., N.S., 93, C.P.

Affidavit contradicting judge's report.] The Court will not listen to an affidavit stating that an amendment of the pleadings made at the trial was not made by consent, when the judge's report states that it was so made. *Atkinson v. Mills*, 8 Ir. Jur., N.S., 92, C.P.

Time for appeal.] Liberty given to appeal, notwithstanding the lapse of four days from the decision complained of. *Montgomery v. Middleton*, 8 Ir. Jur., N.S., 93, C.P.

Amendment of summary of judgment.] Where at the trial there is a verdict for the defendant on several of the issues joined, and a verdict for the plaintiff, with damages, on another issue, a summary of the judgment which omits the judgment for the defendant on the issues found for him is irregular and will be amended. *Mookan v. Bloomfield*, 13 Ir. C. L. Rep. 86. Exch.

Expunging statement from judgment roll.] In making up the judgment-roll the Master caused the following statement to be inserted:—"Also, though there is no certificate of the judge who tried the case, yet, as the Court in banc by an order dated the 80th day of May, 1862, declared that though both parties resided within the jurisdiction of the Civil Bill Court of the Queen's County, where the cause of action arose, yet that it was a fit and proper case to be tried in this Court; therefore it is considered that the said plaintiff do recover against the said defendant the said sum of 2l. 10s. with 6d. for his expenses and costs; also the sum of," &c. The Court upon motion by the plaintiff, ordered this statement to be expunged. *Bennett v. Scott*, 8 Ir. Jur., N.S., 394. C. P.

Changing venue.] There is no general rule that the venue must be in Dublin, whenever any of the witnesses reside in England. *Shallow v. Savage*, 8 Ir. Jur., N.S., 268. C. P.

Where two of three defendants had taken defence, the third being out of the jurisdiction, the Court refused with costs, a motion to change the venue made by the defendants who had taken defences upon the ground that the motion was premature the cause not being at issue. *Corah v. Ward*, 13 Ir. C. L. Rep., app. xlii. Exch.

A motion by the defendant to change the venue before defence filed is irregular, and will be refused with costs. *Wilson v. Drugg*, 8 Ir. Jur., N.S., 266. C. P.

Re-changing venue.] A trial being had, and the verdict set aside upon grounds irrespective of the merits of the action, the Court, upon an affidavit by the plaintiff disclosing the improbability of getting a fair trial in the county to which it had previously changed the venue, upon the defendant's application, allowed the venue to be restored to the place in which the plaintiff had originally laid it. *Atkinson v. Mills*, 8 Ir. Jur., N.S., 153. C. P.

Motion to direct plaintiff to proceed.] Action on the common money counts, and on a bill of exchange, against the executor, as such, of a deceased testator. The defendant died after the plaintiff had withdrawn the notice of trial. Nearly four years after the defendant's death, his executor moved the Court to direct the plaintiff to proceed with the action pursuant to the Common Law Procedure Act (Ireland) 1856, s. 93. Motion refused on the ground that the action did not survive against the personal representative of the deceased defendant within the meaning of the Common Law Procedure Act (Ireland) 1853, s. 158, and the Common Law Procedure Act, (Ireland) 1856, s. 93. *Chamberlaine v. Dromgoole*, 13 Ir. C. L. Rep., app. i. Q. B.

Quære.—Whether in a case which comes within the latter section, the motion is granted as of right. *Id.*

Rule to proceed under 178th G. O.] Where the delay in proceeding to trial was occasioned by an order staying proceedings, the Court, upon an application to make absolute a rule for liberty to proceed under the 178th General Order, distinguished the case from that in which the delay was owing to the plaintiff himself. *Kelly v. Stator*, 8 Ir. Jur., N. S., 93. C. P.

Staying proceedings in action, where there is cross-action.] In an action for the price of a cargo of timber by A. a foreigner against B, and a cross-action by B against A., claiming damages for the detention of a ship, the Court, before judgment, refused to stay the former action upon the terms of the defendant in it bringing into Court the amount of the damages

claimed by him in the cross-action, to abide the result of the cross-action, and undertaking to pay the balance claimed in the former action above the amount of such damages claimed in the cross-action. *Bland v. Carew*, 8 Ir. Jur., N.S., 8. Q. B.

Exhibiting interrogatories.] The Court will not permit a plaintiff to file interrogatories to discover the defendant's case: the right is limited to the discovery of matters bearing on the case of the plaintiff himself. *McClintock v. Langan*, 8 Ir. Jur., N.S., 381. Q. B.

Where to an action by a simple contract creditor an executor has pleaded *plene administravit*, the Court will, upon production of the affidavit required by the 57th section of the Common Law Procedure Act, 1856, allow interrogatories to be exhibited requiring particulars and dates of the payments made by him out of the assets of the testator. *Peck v. Nolan*, 8 Ir. Jur., N.S., 417. Exch.

After plea pleaded the motion to exhibit interrogatories to the defendant should be upon notice. *Id.*

Defendant's right to inspect the books of plaintiff.] An application by a defendant sued by the Wexford Harbour Commissioners for the amount of his promissory notes for an order to inspect the plaintiff's books, and take extracts from them was granted, the defendant being a shareholder and director. *Wexford Harbour Commissioners v. Redmond*, 8 Ir. Jur., N.S., 153. Exch.

Conditional order, service of.] The Court will not dispense with the 138rd General Order, unless the non-compliance with it was caused by a fatality. *May v. May*, 18 Ir. C. L. Rep., app. xxxvi. Q. B.

Charging order.] Upon the marriage of the defendant's father and mother, the father being in contempt of Court, a Master in Chancery in his report, made under the directions of that Court, approved of the draft of a marriage settlement, by which the personal property of the wife was to be vested in trustees in trust, to pay the proceeds thereof to the wife during her life for her separate use, and after her decease, in trust for the child and children of the marriage, in such shares as she should by deed or will appoint; and in default of appointment, amongst them equally, if more than one. The proposed settlement was never executed, but was subsequently acted upon in several instances by the Court and by the parties. Held—That the defendant, the only surviving issue of the marriage, had an interest in two sums of 1012l. 10s. 4d., government stock, and 16,989l. 12s. 2d., bank stock, standing in the Bank of Ireland to the credit of the cause of *Thomas Hodgson and Anne Hodgson, otherwise Walker, his wife v. Elizabeth Wheeler and Lydia Carr*, and to the separate credit of Anne Hodgson (portion of the said personality) chargeable, at the instance of a judgment creditor, under the 184th section of the Common Law Procedure Act, 1853. The defendant resided out of the jurisdiction. *Johnston v. Hodgson*, 8 Ir. Jur., N.S., 187. C. P.

Held—That service of the charging order authorized by the said section might be substituted upon the defendant's father and an attorney of the Court, who had acted for the defendant in a suit some years previously, and whose name appeared in several affidavits made to resist the motion of the judgment creditor, though in such affidavits the defendant's father and the attorney severally repudiated the character of the defendant's agent. *Id.*

Garnishee order.] Under the 63rd section of the Common Law Procedure Act, 1856, several distinct debts due to the judgment debtor may be attached by a single order. *Guinness v. Hill*, 8 Ir. Jur., N.S., 95. Con. Ch.

Where rents are attached under this section, *semble*, the tenants will not be required to shew cause until that time at which their rents would otherwise have been probably collected. *Id.*

A judgment creditor obtained a garnishee order to attach certain rents, to which the judgment debtor was alleged to be entitled. Prior to the obtaining of the absolute order for payment, the plaintiff ascertained that a judgment mortgagee had filed a cause petition under the 15th section of the Court of Chancery (Ireland) Regulation Act, 1850, against the defendant, under which an order of reference had been made for the appointment of a receiver. No notice of the motion had been served upon the mortgagee, and no one appeared to resist the making absolute of the order, nor was the Court informed of the above fact. The mortgagee having, subsequently, moved to set the order aside, Held, that it was the duty of the plaintiff to have apprised the Court of the ex-

instance of the judgment mortgage, and proceedings there under; and that, without imputing *malæ fides* to the plaintiff, it amounted to such a suppression of fact on his part as entitled the mortgagee to have the order set aside with costs, without prejudice to any further application the plaintiff might be advised to make, to have the primary garnishee order made absolute. *Collins v. Thompson*, 18 Ir. C. L. Rep., app. ii. C.P.

The plaintiff having accordingly moved *de novo* to this effect upon notice to the mortgagee—Held, that the existence of a judgment mortgage affecting the defendant's lands, was, *per se*, sufficient to disentitle the plaintiff to obtain an absolute order for the payment of the rents. *Id.*

Retainer of counsel.] A retainer on behalf of the defendant was left at the Dublin residence of a Q.C., then absent in London attending in Parliament. The cause being in the special jury list of causes for trial on Monday, June 23rd, the plaintiff's attorney, not knowing of the defendant's retainer, sent a brief to London to the Q.C., who, in ignorance of the previous retainer, sent a reply that he would be in Court on the following Wednesday morning. The cause was unexpectedly called on Monday, and a postponement having been refused, was proceeded with, and concluded the following day. Counsel did not arrive until after its termination on Tuesday, and he was in Court the following morning, and subsequently returned the defendant's retaining fee. Plaintiff having obtained a verdict, the taxing officer allowed the above brief and fee on taxation against the defendant. Held, on a motion to review taxation, that these items had been properly allowed, inasmuch as at the time of the delivery of the brief there was a *bona fide* intention on the part of the plaintiff's attorney that the Q.C. should attend the trial on behalf of the plaintiff, and a reasonable probability of his being able to do so; and that the fact of his not having attended did not alter the case. *Taylor v. Clarke*, 18 Ir. C. L. Rep., 571, C.P.

Held also, that this Court had no jurisdiction to interfere between counsel and their clients in a question of retainer, which must be settled by the counsel themselves, guided by the opinion of the leading members of the Bar. *Id.*

Reference to affidavit on crown side on return to writ of certiorari.] *Semble*, that on the argument on the return to a writ of certiorari, reference cannot be made to the affidavits used on the motion to make absolute the conditional order for the writ. *The Queen v. The Justices of Peace for the County of Dublin*, 18 Ir. C. L. Rep., 375. Q.B.

PRINCIPAL AND AGENT.

General and particular authority.] A ship-broker, employed by a ship-owner, has no such general authority as will enable him to charter the ship for a voyage in a manner contrary to instructions expressly given to him by the owner, although such instructions have not been communicated to the parties dealing with him. *Spaight v. Beyerlieb*, 8 Ir. Jur. N.S. 146. Exch. Ch.

Plea in action for not accounting by principal against agent.] To an action for not accounting, the defendant, an auctioneer, pleaded that "as to the sum of £16 3s., portion of the said sum of £ , that goods to the amount of £16 8s. were purchased from him by J. S.; that the said J. S. is a solvent person, and resident in Armagh; and that the said goods were by the custom of Armagh delivered to him without being paid for; and that the plaintiff was indebted to the said J. S. in the sum of £16 8s. for money paid, and for work and labor; and that the said J. S. refused to pay to the defendant the said sum of £16 8s. although requested to do so, of all which the plaintiff had notice." Held, a bad plea upon demurrer. *Cumming v. Bell* 8 Ir. Jur. N.S., 391. C.P.

Discharge of surety.] To an action for 300l. 12s. 4d., the amount of two promissory notes, the defendant pleaded (by way of defence on equitable grounds) that he had accepted a bill of exchange for the accommodation of A, and that A. afterwards endorsed the same to the plaintiff with notice that it had been accepted by the defendant as a surety only, and for the sole accommodation of A; and that the plaintiff without the knowledge and consent of the defendant, and for good and valuable consideration, gave to A. time for the payment of said bill of exchange, beyond the time when same was due and payable; that, after the time for payment was so given, the defendant, upon the representation of the plaintiff's attorney that he was still liable for said bill, deposited certain title deeds as security for the payment thereof, and that after-

wards, for the purpose of obtaining possession of the said title deeds, he made and gave to the plaintiff the promissory notes in the summons and plaint mentioned, and that, save as aforesaid, there never was any consideration for the deposit of the said title deeds or for the making of the said notes. Held, upon demurrer, that this was a good equitable defence. *Bristow v. Brown*, 18 Ir. C. L. Rep. 201. C.P.

What negligence of creditor will not discharge surety.] Mere negligence, even if gross, on the part of a creditor, unaccompanied by positive acts of concurrence in the defalcation of the debtor, will not discharge the surety, and is no ground of equitable defence. *Madden v. M'Mullen*, 18 Ir. C. L. Rep., 305. Q.B.

Independently of the general principles of law, a surety under the provisions of the 6 & 7 Vict. c. 91, (the Loan Fund Act) is precluded from raising this defence. *Id.*

Averments in summons and plaint against a surety.] A summons and plaint complained that the defendants undertook and agreed by a written agreement if the plaintiff would deliver a quantity of corn to M, and in consideration of their so doing would pay to the plaintiff the sum of £44 17s. 7d.; and the plaintiff did deliver said corn to M, yet the said defendants have not, nor has any other person on their behalf, paid the same to the said plaintiff. On demurrer thereto it was Held that this was an action against a surety, and that the plaint should have averred that the principal had not performed the condition, though required thereto, and that the demurrer should be allowed accordingly. *Silo v. Langeri and Gordanick*, 8 Ir. Jur., N.S., 397. Exch.

PROBATE AND ADMINISTRATION.

Omission from probate of words in favour of drawer of will.] Where a testatrix was in *extremis*, and her capacity doubtful, and the drawer of the will gathered her intentions as to the dispositions from previous declarations, words in favour of himself and his wife, which he introduced into the will, were omitted from the probate—the Court not being satisfied that the testatrix understood their meaning, or intended them to be inserted. *Daly and wife v. Burke*, 8 Ir. Jur., N.S., 73. Pr.

Evidence of lost will.] Since the Probate Act of 1857, (20 & 21 Vict., c. 79, s. 68) a will, or the contents of a lost will, may be established by the evidence of one witness only. *Daly and wife v. Burke*, 8 Ir. Jur., N.S., 73. Pr.

Probate of documents executed in Scotland by person deceased previous to statutes 21 & 21 Vict., c. 56.] Where a confirmation was made in Scotland of testamentary papers executed by a person who was domiciled there, but died before the 21 & 22 Vict., c. 56, (the Probate and Confirmation Act) came into operation, there being assets in this country, the Court will allow such documents to be proved here, the clause about re-sealing the confirmation not applying to the case. *In the goods of Oag*, 8 Ir. Jur., N.S., 134. Pr.

Administration to felo de se.] Administration of the goods, &c., of a *felo de se* granted to the nominee of the Crown, though there was a will appointing executors. *Goods of Ure*, 8 Ir. Jur., N.S., 186. Pr.

Administration to creditor.] Administration refused to a creditor who had cited next of kin to accept and refuse, though the estate was insolvent, and considerable delay on the part of next of kin in applying for a grant had occurred; but in such case the creditor was allowed his costs out of the estate. *Forster v. Murphy*, 8 Ir. Jur. N.S., 135. Pr.

Where a sum of £70 or thereabouts, was lying in the hands of the Commissioners of Police, being the balance due to the deceased for his pension as a police magistrate, the Court refused to grant administration to a creditor of the deceased's to whom his pension of £500 a year had been assigned as a security for an annuity, and to whom the sum of 38l. 2s. was due, limited either to the said sum of £70, or to receiving and giving a discharge for £38 2s. part of said sum of £70. *In the goods of Fleming*, 8 Ir. Jur., N.S., 39. Pr.

Administration granted to widow.] It is no ground for passing over the widow in the choice of an administrator that the assets consist principally of a farm, which would require the superintendence of an active and intelligent farmer—the widow being advanced in life—a joint grant never forced by the Court. *Kelly v. Kelly*, 8 Ir. Jur., N.S., 137. Pr.

Limited administration with will annexed to legatee.] Administration to the goods of a testatrix, with a copy of her will annexed, granted to a legatee for life in the will, limited

to receiving the dividends of the legacy for her life, the legacy having been lodged in the Court of Chancery, in Ireland, by the trustees in the will, under the Trustee Relief Act, and invested, and that Court having declared the legatee entitled to the dividends: the will had been proved in an English Diocesan Court and no other assets were in this country. *In the goods of Airey*, 8 Ir. Jur., N.S., 118. Pr.

Administration de bonis non to administrators of deceased administrator.] The personal representative of a deceased administrator preferred to the next of kin for a grant *de bonis non* to the original intestate where the next of kin was an aged and delicate lady, the property very large and requiring a person of active and business habits to manage it, and the representative of the deceased administrator, having himself a considerable interest in the assets.

Semble, that, in such a case, the Court, independently of the powers given by the 78th section of the Probate Act of 1857, could pass over the next of kin. *In the goods of Bradley*, 8 Ir. Jur., N.S., 114. Pr.

Probate of will of wife of alien.] The wife of an alien can by will dispose of her chattels real situate in the United Kingdom as a *feme sole*; and where probate had been granted to her will limited to such property as she had power to dispose of, the same was, on motion amended, by making it a general grant irrespective of the power. *In the goods of de Chateauneuil*, 8 Ir. Jur., N.S., 197. Pr.

Letters of administration to lunatic as in case of intestacy notwithstanding will.] Where a will, on its face rational, was made by a person who was sworn to have been at the time of unsound mind, and was soon after its execution confined as a lunatic in an asylum, where he died, the Court gave administration as in case of intestacy to one of the next of kin, reciting in the order its opinion of the invalidity of the will. *In the Goods of Holmes*, 8 Ir. Jur., N.S., 159, Pr.

Effect of renunciation by executor before the Probate Act, 1857.] An executor who, before the Probate Act of 1857, had renounced, was not permitted to retract, and accept a grant of administration *de bonis non* with the will, &c; but having become next of kin, he was allowed to take a grant in that character. *In the Goods of Evans*, 8 Ir. Jur. N. S., 197, Pr.

Presumption of death.] Where the father of the deceased had not been heard of for 26 years, and was believed to be long since dead, and the deceased died recently, the court allowed administration to the son's goods to issue without extracting a grant to the father. *In the Goods of Lindley*, 8 Ir. Jur., N.S., 217, Pr.

Undue influence.] The Court refused a conditional order for a new trial, where the verdict had been found against an alleged will, the evidence being conclusive of undue influence practised on the testator by the person principally benefited, and who was most active in giving the directions for, and in the preparation of the will, and Held that no part of the will in favour of other persons could stand, nor the appointment of executor. The degree of proof necessary when the case is suspicious, the drawer, an attorney, taking great benefit under it. *Moloney v. Casey*, 8 Ir. Jur., N.S. 156, Pr.

PROBATE (COURT OF) PRACTICE.

Legitimacy, mode of raising question of.] Where a question of legitimacy of a person represented as the father of an alleged next of kin is raised by a party alleging himself to be next of kin, the practice is to raise the question by petition and affidavit, and if either party asks for an issue, to direct an issue on that point to a jury. *Davidson v. Woods*, 8 Ir. Jur. N.S., 40, Pr.

Administration pendente lite.] It is not necessary to present a petition in order to have an administrator *pendente lite* appointed. It may be done on motion grounded on affidavit. *Finn v. Gorman*, 8 Ir. Jur. N.S., 217, Pr.

Petition by way of peremptory exception.] *Semble*, a petition by way of peremptory exception in an interest suit is irregular, and, having an erroneous title, was dismissed with costs. *In the Goods of Bradley*, 8 Ir. Jur. N.S. 114, Pr.

Several wills not pleaded.] Unless by consent, several earlier wills of the deceased, not propounded by any party, cannot be put in issue in a suit by an executor to establish a later will, nor can the next of kin, by a citation on the peremptory exception, oblige them to litigate them in that suit. *Bradley v. Reilly* 8 Ir. Jur. N.S., 185, Pr.

Administration in case of presumption of death.] It is not necessary, in a case of administration on presumption of death, in the affidavit for administration, to negative the existence of the persons who would, if alive, have prior interests to the applicant at the time of the death of the deceased, if the applicant is unable to do so. It is enough to negative their existence at the time of swearing. A grant in this case was made under the 78th section of the Probate Act. *In the Goods of Sloane*, 8 Ir. Jur. N.S. 314, Pr.

Suit to establish contents of lost will.] It is necessary in a suit to establish the contents of a lost will to set out the contents in an affidavit or a copy lodged in the registry, and to refer to it in the declaration; and a record which had been made up in the ordinary form applicable to an existing will, was at the hearing, ordered to be amended accordingly. *Connor v. McGettigan*, 8 Ir. Jur. N.S. 338, Pr.

Caveat.] The 20th rule of April, 1861, does not apply to cases of persons lodging caveats "in the goods" who are not by interest entitled to do so; and an appearance entered, accompanied by a notice in the terms of that rule, and the caveat, will, in such cases, be set aside with costs. *Russell v. Russell*, 8 Ir. Jur. N.S. 40, Pr.

A caveat lodged by a person having no right to prevent a grant of administration issuing, dismissed with costs. *In the Goods of Bradley*, 8 Ir. Jur. N.S. 114, Pr.

Setting aside caveat, appearance, and plea—Costs.] In certain cases where the facts are peculiar, a petition is the proper course to adopt in order to have a caveat, appearance, and plea set aside. The costs of proving a will in common form are always paid out of the residue, and should not be charged on a legatee. *Nugent v. Nugent*, 8 Ir. Jur. N.S. 52, Pr.

Duplicate citation.] When a citation which had been served abroad was on its way back rendered by shipwreck of the packet and from the effect of salt water illegible; but the affidavit of service was forthcoming, and also the precept for the citation, the court ordered a duplicate to issue and to be filed instead of the original in the office. *Robinson v. Ince*, 8 Ir. Jur. N.S., 52, Pr.

Citing heir-at-law and devisees.] Where an heir at law and devisees are cited by the leave of the Court, in a cause where pleadings have been filed, a notice should be given with the citation, stating that proceedings in the cause would be suspended for ten days, so as to allow the parties cited to intervene. *Rorke v. Flinn*, 8 Ir. Jur. N.S. 314, Pr.

Time for filing declaration.] Where the plaintiff in a suit to establish a will cites devisees under a former will to see proceedings, he is bound by the 33rd rule of 1858 to file his declaration within a month from the appearance, otherwise the defendant may move to limit a time for filing it. The 17th & 19th rules of 1861 only apply to the case of a principal defendant or defendants. *Gumley v. Gumley*, 8 Ir. Jur. N.S. 336, Pr.

Joining husband as co-plaintiff.] In testamentary causes, the husband of a plaintiff propounding a will should be joined as a co-plaintiff. *Gamble v. Williams*, 8 Ir. Jur. N.S., 159 Pr.

Amendment of Pleadings.] At the hearing the Court will allow the pleadings to be amended by filing a further plea to meet the evidence. *Gumley v. Gumley*, 8 Ir. Jur. N.S., 198. Pr.

Notice of trial.] In future it will be necessary for parties going to trial to give regular notice of trial under the 44th Rule (contentious), besides the eight days' notice heretofore given under the 40th Rule, and which was considered sufficient notice of trial. *Crossley v. Andrews*, 8 Ir. Jur. N.S., 186. Pr.

Issues on different wills.] Where several wills were propounded by different parties, which were each impeached on the ground of undue influence exercised by persons different and distinct as regarded each will, the Court ordered the issue to be confined at the trial to the validity of the will latest in date. *Gamble v. Robinson*, 8 Ir. Jur., N.S., 373. Pr.

As to sending case to Assizes.] Where the assets do not by affidavit or otherwise appear to be small, the Court will not send the case to the assizes, though all the witnesses and parties reside in the country. *Adams v. Quinn*, 8 Ir. Jur. N.S. 52. Pr.

Case sent to Sessions.] On consent, a case was sent to the sessions, in which a will was in litigation, a creditor of the deceased propounding it. *Quare*—Can a creditor be allowed, without consent, to propound and litigate a will? *Devlin v. McCarthy*, 8 Ir. Jur. N.S. 159. Pr.

Decree on pleas withdrawn.] Where the defendant on con-

sent withdrew his plea, the Court under the 66th section of the Probate Act of 1857, made an order in the nature of a decree, declaring the validity of the will to be proved, without further proof. *Berry v. Berry*, 8 Ir. Jur. N.S., 217. Pr.

Obtaining final judgment where hearing of cause commenced in Vacation and concluded in Term.] Where the hearing of a cause was commenced in Vacation and concluded in Term, in order to get final judgment, it is requisite for the party who got a verdict to apply to the judge to limit a time within which the other party shall, if he thinks fit, move to set aside the verdict, pursuant to the power reserved in the 35th Rule, contentious. *Moloney v. Casey*, 8 Ir. Jur. N.S., 184. Pr.

Photograph of will.] Where a will lodged in the Registry was impeached as a forgery, the court refused to allow the party propounding it to get a photograph copy of the testator's and witnesses' signatures to it, without an affidavit explaining the circumstances, but on consent made an order that a copy might be taken of the body of it. *Ternan v. Ternan*, 8 Ir. Jur. N.S., 51. Pr.

Security for assets.] Security not required for assets brought into the Court of Chancery. *In the goods of Bradley*, 8 Ir. Jur. N.S., 114. Pr.

Where a party applying for administration with the will annexed would be beneficially entitled to the whole of the deceased's assets under his will, if valid, made in America, and proved there by the executors, who gave the applicant a power of attorney to take the grant, and would, if the will were not valid, be entitled to a moiety, the Court required justifying security for only one moiety. The deceased had been originally domiciled in Ireland, but, it was alleged, had acquired an American domicile, and had returned and died here in itinere. *See* *semble*, he never lost his domicile of origin, and if he did, it was revived by the return to this country. *In the goods of Sullivan*, 8 Ir. Jur. N.S., 813. Pr.

Assignment of administration bond.] A notice of motion is required for a conditional order to assign an administration bond. *Russell v. Russell*, 8 Ir. Jur. N.S., 198. Pr.

The assignment of an administration bond refused, where it appeared that the two persons sought to be made liable had, for payment, signed the bond as sureties, but on going before the officer, who explained the liability to them, they declined to act, and were rejected by the officer; but afterwards, a third person signed the same bond, and administration had issued. *Id.*

Writ of habeas corpus ad testificandum.] Parties referred to a Law Court for a writ of habeas corpus to bring up a prisoner to give evidence in the Probate Court. *Ternan v. Ternan*, 8 Ir. Jur. N.S., 185. Pr.

Costs.] Where the heir at law successfully resists probate of a will of real estate, the Court of Probate has no jurisdiction to charge the real estate with the costs of the litigation. *Newton v. Newton*, 13 Ir. Ch. Rep. 245, Ch. App.

Where the estate is small, and fraud and undue influence have been pleaded in opposition to a will, which is established on the evidence of the party supporting it, though parts of the case were suspicious; the party failing was excused from paying costs, but did not get costs out of the estate. *Finn v. Gorman*, 8 Ir. Jur. N.S., 814. Pr.

Legatees in a former will, failing, are not so favourably considered as next of kin, as to costs. *Id.*

Costs out of estate means only out of personal estate. *Id.*

An executor in a former will, who was also an express trustee for charities, was justified in pleading, as to a latter will with a clause of revocation, undue execution and want of capacity, and was allowed his costs, where the latter will was made when testatrix was in extremis, and contained peculiar words in favour of the drawer and his wife, and was destroyed by the drawer; but nevertheless the jury found it was a valid will. *Daly and wife v. Burke*, 8 Ir. Jur. N.S., 73. Pr.

A person having an interest as creditor, &c., is not, in general, entitled to the costs of citing next of kin to accept or refuse administration, if the latter appear and accept, unless a conditional decree has been made; and unless such person has cited all the prior parties, the 81st rule (contentious) does not apply, which directs him to enter a side-bar rule that the defendant do extract within 14 days, or, in default, the administration be given to the plaintiff. *Wade v. Stephens*, 8 Ir. Jur., N.S., 158, Pr.

As a general rule, intervenients do not get costs, but where the Attorney-General is a necessary party, and intervenes,

he will be allowed them. *Daly and wife v. Burke*, 8 Ir. Jur. N.S., 73, Pr.

The Attorney-General having been served with notice of a motion for administration in goods in which the Crown had not any interest, and as to which the Crown made no case, and where other persons unsuccessfully impeached the legitimacy of the deceased, is not entitled to the costs of appearing on the motion. *Redmond v. Barber*, 8 Ir. Jur., N.S., 812, Pr.

PUBLIC COMPANY.

Pleading by.] In an action brought against a company on the supposition that they form a corporate body, when they have sued and obtained judgment in previous actions as if incorporated, *semble*, liberty will not be given them to plead that they should be sued as individuals. *Finn v. The Albert Assurance Company*, 8 Ir. Jur., N.S., 94, Cona. Ch.
See *SHARES IN PUBLIC COMPANY.*

PURCHASER FOR VALUE WITHOUT NOTICE.

A, by his marriage settlement, executed on the 10th of August, 1787, covenanted with the trustees, within three years after the marriage, to pay to them, their executors or administrators, the sum of £2,500, which (with £500, the fortune of A's intended wife,) they were to invest in the purchase of land, to be held in trust for A for life, and after his decease, for the children of the marriage. By the settlement it was provided that until such investment, the trustees should lay out these two sums on public or private security, and pay the interest to the persons entitled to the rents of the purchased lands. On the same day, A passed his bond to the trustees for the penal sum of £6,000, and judgment was entered up against him by the trustees on the 11th August, 1787. On the 10th of November, 1800, A became entitled to an equitable interest in the lands of Blackacre. Under the limitations contained in a deed for valuable consideration, dated the 14th of May, 1812, this equitable interest became vested in B, without notice of the judgment. A died in the year 1845. C, one of A's daughters, in 1862, presented a petition for the sale of the equitable interest in the lands of Blackacre, for payment of the judgment. No payment of principal or interest was ever made on foot of the judgment, nor was there any acknowledgment in writing, nor revivor, within twenty years before the filing of the petition. Held, even supposing the two sums of £2,500 and £500 were represented by the judgment, that B was entitled as a purchaser for valuable consideration without notice, to hold the lands of Blackacre discharged from the judgment, and that therefore the petition must be dismissed with costs. *In re Grady's Estate*, 13 Ir. Ch. Rep. 154, L. E. C.

Semble, that a judgment creditor claiming against an assignee for value, should aver notice, to give himself any equity. *Id.*

QUARE IMPEDIT.

Upon the trial of an action of *quare impedit*, the plaintiff went into a rebutting case, and, as evidence of an award by which all matters in dispute between the party under whom he claimed, and the party whom the defendant represented, had been adjusted, offered in evidence two documents, and a duplicate of one of them, which purported to be receipts, dated in the year 1829, acknowledging money paid by the party in the year 1801 pursuant to the award. They were signed by a person describing himself as surviving partner of the firm to which the money was paid, and which firm were also stated in them to have been the attorneys for the party between whom and the plaintiff's ancestor the award was made, and one of the documents expressly professed to be a substitute for a previous lost receipt. The latest evidence of any litigation was in the year 1805. Held (Keogh, J. dissentiente) that these documents were admissible in evidence to prove not only the receipt of the money, but the fact of the award. *Whaley v. Massereene*, 8 Ir. Jur., N.S., 281, C. P.

Held, also, (Keogh, J., dissentiente,) that the objection that there was no extrinsic evidence of the character of the party signing the documents not having been taken at the trial, could not be relied on upon the argument of the bill of exceptions. *Id.*

Upon the plea *non concessit*, the judge at the trial refused to leave a question of fraud to the jury. Held (the judge himself *concurrente*), that the judge was wrong. *Id.*

Held, also, that the want of a valuable consideration in the conveyance, want of possession, pendency of a suit, non-presentation upon vacancies in the living, and a conveyance and re-conveyance between the plaintiff and a third party during the continuance of the suit to set aside the original conveyance, were evidence to go to a jury of fraud in the procuring of the original conveyance. *Id.*

QUARTER SESSIONS.

Sessions, whether original or adjourned. The sessions held at the towns in the divisions of counties are all original and distinct sessions and not merely adjournments; and therefore where a statute directed an appeal to be brought to the next General Quarter Sessions for the county, division, town, or place where the judgment appealed from is delivered, held twenty days next after the delivery of the judgment. Held, that this appeal should be brought to such next sessions in the very town where the judgment was delivered, and that a party passing over those sessions and appealing to the next sessions held in the first town for the division was too late, and that the appeal could not be entertained at those sessions. *The Queen v. The Justices of Antrim*, 8 Ir. Jur., N.S., 47, Q. B.

RAILWAY COMPANY.

Obligation of company to keep road in repair. A railway company, for the purpose of carrying their line of railway over a country prementment road, and giving to the bridge which spanned it the proper legal height, had lowered the level of a portion of the road, and put it into a state of permanent repair. Held, that they were not bound to keep in repair the surface of the portion of the road so lowered. *Ferry, appellant; Waterford and Limerick Railway Company, respondents*, 8 Ir. Jur., N.S., 88, C. P.

And, per Monahan, C. J., that the portion of the road so lowered was neither an "approach," nor a "necessary work connected" with the bridge within the 46th section, but came within the provisions of the 53rd and 56th sections of the 8 Viet., c. 20. *Id.*

And, per Christian, J., that the excavation of the road so lowered was so far a "necessary work connected" with the bridge within the 46th section, that the company would be bound in all future time to repair an alteration of the level to which they had lowered it. *Id.*

A decision of one of the Superior Courts, from which an appeal lay, is binding upon a court of co-ordinate jurisdiction; but where there was no appeal it is not binding. *Id.*

Compensation for lands injuriously affected, but not taken by. The arbitrator appointed by the Board of Works having declined to give compensation to a party whose lands, though not taken, were injuriously affected by the works of a railway company, and having also refused to provide accommodation works, the Court granted a *mandamus* to him to compel him to entertain the questions. *The Queen v. Rynd*, 8 Ir. Jur. N.S. 202, Q. B.

RECEIVER.

Appointment of, notwithstanding impeachment of petitioner's security. A general power of appointment given to V J B, enabling him to charge the respondent's estate with £1,500 and interest, had been exercised in favour of petitioner, his only son by a second marriage, who now sought to have a receiver appointed over the estates, as no interest had been paid for fifteen or sixteen years. The respondents impeached petitioner's security, it being alleged that the deed by which the power of appointment was given was meant to carry out the terms of a prior contract; that the power was too general, and should have been confined to the children of the first marriage; and that a cross bill had been already filed to remedy the mistake. Held—that notwithstanding the impeachment of petitioner's security, a receiver should be appointed pending the litigation. *Blake v. Blake*, 8 Ir. Jur. N.S. 801, R.

Right of remainderman, on death of tenant for life where there is a receiver. Where a receiver has been appointed over the estate of a tenant for life, the remainderman has a right, immediately on the death of the tenant for life, to go into possession, without making any application to the Court. *In re Stack*, 18 Ir. Ch. Rep. 213, Ch. App.

Scire facias against. A receiver who has gone into receipt of rent under the Court, will not be allowed to plead to

a *scire facias* upon his recognizance, that the recognizance was taken by an unauthorised person. *Wellesley v. Mornington*, 13 Ir. Ch. Rep. 559, C.

REGISTRY.

As to priority by reason of. A sheriff, under a writ of *scire facias*, seized, on the 16th July, 1860, the interest of the execution debtor in a term of years, and having sold to the plaintiff in ejectment on the 31st of July, executed to him the usual conveyance of the debtor's interest on the 20th of August. The debtor, on the 30th July, after the seizure, conveyed the term to the defendant. This deed was registered on the 2nd of August. The plaintiff's deed was not registered. Held, that the conveyance of the 30th of July acquired no priority by registry. *O'Connor v. Stephens*, 13 Ir. C. L. Rep. 63, Exch.

Where the conflict is between two deeds, of which that one alleged to be postponed only by reason of the registry of the other, and which, but for that registry, must have priority, is not capable of being registered, so as to maintain its priority, the registration of the other deed will not give that other deed priority. *Id.*

RELEASE.

Three grantors, and each of them, by deed, granted, &c., released, &c., to the plaintiff, three several plots of ground, "with all and singular.....ways, paths, and passages." Held, that the release in the deed was a release by each grantor of his right of way over the plots conveyed by his co-grantors. *Burke v. Blake*, 18 Ir. C. L. Rep. 390, Q. B.

RENEWABLE LEASEHOLD.

On 25th Dec. 1825, a lease for lives renewable for ever was made of certain lands in the county of Dublin, by W.S. to G.F.M. in consideration of G.F.M. paying the rent thereof and performing the several covenants therein contained. On the 21st July 1831, said G. F. M. assigned to a trustee, in consideration of ten shillings, said leased premises, upon trust, to permit his wife after his death to receive the rents and profits after payment of head-rent, reserving no life interest for himself. On the 13th December, 1853, G. F. M. (junior) and H. C. K. were appointed new trustees of the settlement of 21st July, 1831, for the benefit of the wife of G. F. M. On the 30th September, 1856, a deed, purporting to be a fee-farm grant, was made by A. S., the devisee of W. S., to the said trustees, G. F. M. (junior) and H. C. K., their heirs and assigns for ever, upon the trusts of the settlement of 21st July, 1831, he said G. F. M. (senior) paying the annual rent thereof to said A. S. who, in 1859, assigned his interest to H. K., whose widow and devisee plaintiff was. On the trial of an ejectment for nonpayment of the fee-farm rent, the plaintiff was non-suited on the ground, amongst others, that the deed of the 30th September, 1856, was not a fee-farm grant under the Renewable Leasehold Conversion Act. Held, that the relation of landlord and tenant did not exist as between the plaintiff and the trustees of the settlement, or any other person within the meaning of the 7th section of the Renewable Leasehold Conversion Act, inasmuch as the legal estate was in the trustees, the rent being payable by G. F. M. (senior.) *Keegan v. Moulds*, 8 Ir. Jur. N.S. 173, Ex.

Held, also (Fitzgerald B. *dissentiente*) that where a lease for lives is conveyed with a partial declaration of uses, there is no resulting use to the grantor. *Id.*

RENEWAL.

Where the reversioner in a lease for lives renewable for ever, in reply to a request from the tenant to execute a renewal, postpones the execution for his own convenience, he is not entitled to require septennial fines which might otherwise become due in the interim; and he is not entitled to impose upon the tenant any condition respecting the tenant making out title to the lease, before the time at which he will be prepared to execute such renewal. *Allen v. Aldworth*, 13 Ir. Jur. N.S. 190, Ch.

It is not necessarily fraudulent on the part of an equitable tenant for life of renewable leaseholds, to require the renewal to be made to him, without mentioning the settlement by which the legal estate is vested in trustees. *Id.*

Renewal refused where object for which lease was granted, had ceased to exist. Under the provisions of the 3 Geo. III.

c. 34, a tenant for life made a lease for lives renewable for ever of certain premises to be continued and used as a bleach-green. Owing to a decline in the linen trade, the bleach-green had been converted into pasture, and for several years previous to the present suit it had wholly ceased to be employed for any bleaching purpose. In a suit for a specific performance of the covenant for renewal, Held, that the covenant to renew could not be enforced, the object for which the lease was granted having ceased to exist. *Bennett v. Richardson*, 8 Ir. Jur. N.S. 61, Ch.

Apportionment of renewal fines where lands sold in Landed Estates Court. Where the court sells under the condition that the purchaser will be bound to execute, at the tenant's expense, a fee-farm grant of the premises to the tenants, or a trustee for them, the sum paid into court by tenants for renewal fines is not apportionable. *Re Tybando's Estate*, 8 Ir. Jur. N.S., 889, L. E. C.

Semble—Where lands are held under a lease for lives renewable for ever, and for a long period of years, there has been no renewal, the representatives of parties who have not renewed have no claim for fines against the person who subsequently grants the renewal. *Id*

Description of life. In a lease for lives renewable for ever the name of "Beauchamp Colclough, the younger, son of Beauclamp Colclough of Zion Hill, in the county of Carlow, Esquire, now of the age of 15 years or upwards," was inserted. No person answered the entire description. There was a Beauchamp Urquhart Colclough, son of Beauchamp, who did not reside at Zion Hill, and there was also a Beauchamp, son of Henry, who did reside at Zion Hill. Held, that the case was governed by the rule, "*Veritas nominis tollit errorem demonstrationis*;" that the name being substantially correct, the false description should be rejected, and that Beauchamp Urquhart, son of Beauchamp, was therefore the life in the lease. *Colclough v. Smith*, 8 Ir. Jur. N.S. 408, R.

Held, also, that evidence of reputation was inadmissible to prove a person's age. *Id*

RESIDENCE.

What, within section 9 of Common Law Procedure Act, 1853. The house in which a party always sleeps, and not the house within the same city to which his letters are directed, and at which he transacts his business, is his "residence," within the meaning of the ninth section of the Common Law Procedure Act, 1853. *Tom v. Nagle*, 18 Ir. C. L. R., App. xxxviii, Exch.

RIGHT OF ENTRY.

Where a right of entry for breach of covenant, in a lease for lives renewable for ever, accrued to the reversioner, prior to the sale of his interest in the Landed Estates Court, Held, that such right of entry did not pass to the purchaser of the reversion under the conveyance of the lands from the Landed Estates Court, and that ejectment for the forfeiture could not be maintained. *Bergin v. Warburton*, 18 Ir. C. L. R. 187, Ex.

The conveyance from the Landed Estates Court granted the lands "subject to the lease." Per Pigot C.B.—The saving of the lease in the conveyance, amounted to a stipulation binding on the purchaser, that the lease was, at the date of the conveyance, a subsisting interest for lives renewable for ever. *Id*

ROAD.

Obligation on Railway Company to repair. A railway company, in constructing their line of railway across a public road lowered a portion of the surface of the road in order to give the railway bridge the legal height, and to have the proper ascent and descent on the road. The portion so lowered was not used by the company, but, having become worn by the public traffic, it was sought to make the company liable under the 46th section of the 8th Vic., c. 20, for its repairs. Held, that there was no obligation on the company to keep in repair the portion of the road in question, not being an approach to the bridge within the meaning of that section. *Fosberry v. Waterford and Limerick Railway Company*, 18 Ir. C. L. R., 494, C.P.

SETTLEMENT.

In a marriage settlement, executed in 1812, the husband covenanted with the trustees of the settlement that his heirs, executors, administrators, and assigns would, from and after his death, pay to his widow, if she survived him, an annuity of 40*l*. a-year, and that they would pay the trustees a sum of 400*l*. for the children of the marriage. The husband having become indebted to one of the trustees, the latter, in 1828, entered up a judgment against him for 600*l*.; and also effected a policy of insurance upon the husband's life for a similar amount. The judgment was subsequently assigned to B., who also became the purchaser of a judgment obtained against the husband in 1834 for 200*l*., on which occasion a policy of insurance had been effected upon the life of the husband. In 1860 the property comprised in the settlement of 1812 was sold in the Landed Estates Court; and upon the settling of the final schedule of incumbrances, a judge of that Court declared that the jointure of 40*l*. per annum and the sum of 400*l*. for the children were entitled to priority over the judgment of 1828, and that the judgment of 1834 had been satisfied by the payment of the amount reserved by the second policy above mentioned. Held, upon appeal (reversing the decision below) that both the judgments should have precedence of the jointure and of the sum of 400*l*. *In re McKenna's estate*, 18 Ir. Ch. Rep. 239, Ch. App.

That the provision made in the settlement of 1812 for the widow and children was only to affect such property as the settlor should leave after payment of his just debts. *Id*

That the trustee was not, as a trustee, disqualified from dealing with the settlor, even though such dealing might have the effect of injuring the provision for the widow and children. *Id*

And lastly, that where such transactions have been, with full knowledge of the state of facts, acquiesced in by certain trusts for a long period of time, it would be dangerous and against public policy to allow them to be re-opened. *Id*

In an ordinary marriage settlement, where the lands settled are the property of the husband, the latter cannot be considered a purchaser for valuable consideration of the life estate in those lands limited to him by the settlement. *Brown v. Billing*, 18 Ir. Ch. Rep. 263, Ch. App.

Therefore, where A., by a settlement executed in contemplation of his marriage, settled lands of which he was owner in fee to himself for life, remainder to provide a jointure for his wife, remainder to the children of the marriage, it was held that a judgment which was previously to the execution of the settlement a charge on the lands was still a subsisting charge upon the husband's life estate, notwithstanding that the said judgment had not been registered pursuant to the 7 & 8 Vic. c. 90, within the time (*viz.*, five years) required by the 18 & 14 Vic. c. 29, s. 2, for keeping it in force against purchasers under the settlement. *Id*

By a deed of settlement, executed in contemplation of the marriage of A. with B., A., the settlor, granted the lands of X. to trustees, to the use of himself for life, with remainder after his death to the use of the trustees for a term of ninety-nine years, if B. should so long live, upon trust, to pay an annual jointure of 400*l*. to B. out of the rents and profits of the lands, and as to the surplus rents, upon certain trusts for the issue of the marriage. It was also provided by the settlement that if the rents and profits should at any time during the term of ninety-nine years be insufficient to pay the jointure of 400*l*. per annum, it should be lawful for the trustees, by the direction in writing of B., to raise the deficiency by mortgage or demise of the lands for any term of years. There was no issue of this marriage. A. having died, B., by her will, after reciting that there were due to her arrears of her jointure amounting to 1,200*l*. bequeathed these arrears to C. A petition for a sale of the fee of the lands of X. was presented by the executor of B. Held that B.'s will did not amount to a direction in writing to the trustees within the meaning of the language of the settlement, and that there was no estate in the lands which the Court could sell for the purpose of raising the arrears of the jointure. *In re St. George's Estate*, 8 Ir. Jur., N.S., 277, Ch. App.

SHARES IN PUBLIC COMPANY.

Transfer to infant. A *mandamus* to compel the registry of a transfer of shares in a railway company to an infant, refused. *The Queen at the prosecution of Blackburn v. The Mid-*

land Counties and Shannon Junction Railway Company, 8 Ir. Jur., N.S., 250, Q.B.

Transfer of shares to pauper.] A conditional order for a mandamus to register a transfer of shares in a railway company made absolute, although it appeared that the transfer which, however, was a transfer out and out, not subject to any secret trust for the transferor, was made to a pauper, in order to enable the transferor to get rid of liability, and that the consideration money stated in the deed was a mere fiction. (*dubitante Fitzgerald, J.*) *The Queen at the prosecution of Crea v. The Midland Counties and Shannon Junction Railway*, 8 Ir. Jur., N.S., 246, Q.B.

SHERIFF.

Legal expenses of an executing writ of fi. fa.] In an interpleader suit settled by consent of the parties before trial, the sheriff, out of moneys realised from a sale directed by an order of the Court, is not entitled to deduct head-rent paid by him, poundage, or the expenses of keepers prior to the date of the summoning order. *Kelleher v. Lane; Costello v. Kelleher*, 8 Ir. Jur., N.S., 419, Cons. Ch.

SLANDER.

In an action for oral slander the plaintiff complained that he carried on the business of wine merchant at Naas, and had in that capacity furnished to the poor-law guardians of the union of Naas a proposal to supply to them wine of a certain quality, as per sample, and at a certain price; and that at the time the proposal and sample were under the consideration of the guardians the defendant spoke and published of him, and of him in his trade and business of a wine merchant, these words,—"No matter what price is given for wine in Naas, it will be South African Sherry" (meaning that if the proposal of the plaintiff for the supply of wine to the guardians should be accepted, he would, in performance of his part of the contract, supply a wine different from the sample, and of worse quality and price than as shown). The defendant pleaded, in addition to other pleas, that before and at the time of the speaking of the words, he was a paid medical officer of the poor-law union of Naas, and as such it was part of his duty to see that the wines and spirits provided by the guardians for the use of the hospital should be good and proper for that purpose; and that it was also part of his duty to report to the guardians the probable quantities which would be likely to be required and used by him, and to express to the guardians the views and opinions of the suitableness of the several qualities and descriptions of wines provided or to be provided for such purposes, as well as to inform the guardians if any of the wines and spirits so provided for such purpose by them were bad and unsuitable in quality or otherwise; and the defendant averred that before the speaking of the words proposals for the supplying of the workhouse with wine and spirits had been advertised for in the public newspapers; and that the plaintiff had sent in a proposal for the supplying of wine; and that at the time of the speaking of the words the proposals were under the consideration of the guardians; and that the defendant, as such medical officer, and in the discharge of his duty, attended, and that he spoke the words *bona fide* and honestly in the discharge of his duty, and without malice; and that at the time he so spoke and published the words he believed them to be perfectly true in substance and in fact. Held, on demurrer, to be a good plea of privilege, inasmuch as it set forth an occasion which warranted the interference of the defendant, and contained averments that he acted without malice, and that he spoke the words believing them to be true. *Murphy v. Kellett*, 18 Ir. C. L. Rep. 488, C.P.

Imputation of incontinency.] The summons and plaint, in an action for oral slander, alleged that the defendant spoke and published of the plaintiff, whose employment was that of a female domestic servant, the following words in relation to her employment, "I was so incensed with that girl for coming to hire with me, after having had a miscarriage at Mrs. B.'s house, and sent away by her in a car; and she afterwards to give the girl a good discharge!" No special damage was alleged. Held, that the words were actionable *per se*, as relating to the plaintiff's employment. *Connors v. Justice*, 18 Ir. C. L. Rep. 451, C.P.

Words spoken by Commissioner of Fisheries at meeting of proprietors.] A, a Commissioner of Fisheries in Ireland, in

meeting of proprietors and persons interested, convened under the 5 & 6 Vict. c. 108, to inquire into all matters relating to certain fisheries, charged B, a neighbouring magistrate, with a violation of the Fishery Laws. Held, that the occasion was privileged. *Bennett v. Barry*, 8 Ir. Jur. N. S. 167, C.P.

Held, also, that the utterance of the words in question was not such a thing done by virtue or in pursuance of the "Act to regulate the Irish Fisheries," the 5 & 6 Vic. c. 108, as entitled the defendant to twenty-one days' notice of action under the 110th section. *Id.*

Implication of averment of defamatory sense.] The summons and plaint stated that the defendant spoke of the plaintiff the defamatory words—"You" (meaning the plaintiff) "are a robber, and I" (meaning the defendant) "will prove it." Defence, that the defendant did not speak the words in the defamatory sense alleged. Issue thereon—The jury, to questions put by the judge at the trial, answered that they were of opinion, first, that the words were spoken of the plaintiff; secondly, that they were not spoken in the sense of imputing to him the crime of robbery. Held, that the defendant was entitled to a verdict. *Croghan v. M'Enroe*, 8 Ir. Jur. N.S., 64, Q.B.

Particulars of occasions.] An application by the defendant, that the plaintiff's attorney might be required to furnish to him a statement of the occasions on which words were uttered for which an action of slander had been brought was granted; following *Early v. Smith*, 12 Ir. C. L. R. App. xxxv. *Slator v. Slator*, 8 Ir. Jur. N.S. 182, C.P.

STATUTE.

Weights and Measures Act, 25 & 26 Vict. c. 76.] W M purchased a given weight of flax from M C for £14 17s. 6d., and only paid therefor a sum of £14 14s. 6d., being three shillings less than he ought to have paid for same, and having declined to pay the said sum of £14 17s. 6d., he was summoned to appear before the justices of the peace of the B Petty Sessions District, under the 25 & 26 Vict. c. 76 (Weights and Measures Amendment Act). The justices of said district, having heard the complaint, fined said W M ten shillings and costs £1, to be paid within one fortnight. From this sentence an appeal in the shape of a case stated was brought. Held, that the conviction of justices was wrong, inasmuch as the Act was conversant with weights and measures alone, and not with the prices of the articles purchased. *M'Cullagh v. M'Garry*, 8 Ir. Jur. N.S. 195, Exch.

Held, also, that in the arguments of cases stated for the opinion of the Court by the justices, the junior counsel for the appellant opens the argument. *Id.*

STATUTE OF FRAUDS.

Evidence of constructive delivery of goods.] The judge at the trial is to decide whether the evidence of a constructive delivery of goods bargained and sold, is sufficient to satisfy the Statute of Frauds. *Kealy v. Tenant*, 18 Ir. C. L. R. 394, Q. B.

TENANT IN TAIL.

Protector of settlement where tenant in tail in possession a lunatic.] Where there is under the same settlement a tenant in tail in possession, and a tenant in tail in remainder, the tenant in tail in possession is protector of the settlement as to the tenant in tail in remainder. And where the tenant in tail in possession is a lunatic, the Lord Chancellor can, as such protector, consent to a disentailing deed by the tenant in tail in remainder. *Re Mahony, a lunatic*, 8 Ir. Jur. N.S. 48, C.

Disentailing deed. Enrolment.] W I R, a tenant in tail, executed a disentailing deed which was enrolled within the period prescribed the Act (section 41), but not in the lifetime of W I R. C M W, who was entitled to an estate in remainder expectant on the estate tail, upon the death of W I R, executed a disentailing deed, which was duly enrolled before the previous deed of W I R. Held, that the enrolment of the deed by W I R was a valid enrolment, notwithstanding his death. *Re Pier's Estate*, 8 Ir. Jur. N.S. 76, L. E. C.; s.c. 13 Ir. Ch. Rep. 459.

Held, also, that the subsequent deed, being for valuable consideration, and being first enrolled, took priority over the prior deed by W I R. *Id.*

Held, also, that the 74th section of the Act applies to a

remainder in fee, or for life, as well as to a remainder in tail, expectant on the determination of an estate tail. *Id.*

A, a tenant in tail, executed a disentailing deed, which was enrolled within the six months allowed by the Fines and Recoveries Act, but not in the lifetime of A. B, who was entitled to an estate tail in remainder expectant on A's estate tail, after A's death executed a disentailing deed to a purchaser for value, which deed was duly enrolled before the enrolment of the prior deed of A. Held, that the enrolment of the deed executed by A was valid, although not made in A's lifetime. *In re Pier's Estate*, 8 Ir. Jur. N.S. 401, Ch. Ap.

Held, that the priority and validity of A's disentailing assurance were not affected by the prior enrolment of B's disentailing deed. *Id.*

Held, that the 66th section of the Fines and Recoveries Act (Ireland) does not contemplate the enrolment of a deed executed by an owner in fee, nor the disposition of lands otherwise than by a tenant in tail by virtue of the Act. *Id.*

TITHE RENT CHARGE.

Effect of applotment. The title of the lay impropriator, G L S, to the rectorial tithes of K, was traced from the Crown by patents of 8 Jas. 1, and 14 Car. 2, to the Earl of Clanrickarde, and by deeds from the Earl to S, and up to the present time, the family of S have remained in the undisputed possession thereof. The rectorial were exactly equal in value to the vicarial tithes paid by the parish of K to the vicar. In 1824, the commissioners appointed under 4 G. 4, c. 99, made out their certificate of composition, and by a 31 of the Act, the certificate is made conclusive. The certificate was ambiguous, and departed from the plain directions of the statute. Having stated that the parish was liable for £118 8s. 1½d., it concluded as follows—"of which sum of £118 8s. 1½d. one-half is due and payable to the rector," [not naming who the rector was] "and one-half is payable to the vicar, the Rev. J M, as the vicar." By the 38th section of the Act, the applotment is made conclusive evidence of the sums payable in respect for such composition for tithes in any parish. After the making of the applotment, which adopted the words of the certificate, the Rev. J M demanded not only the payment of £8 8s. 1d., as his predecessors had always done for vicarial tithes, but also another sum of £8 8s. 1d. due to him for rectorial tithe, and the owner of the lands of B yielded to the demand, and accordingly, ever since, these lands have paid both the vicar and the S family the rectorial or impropriate tithes; and subject thereto, the lands of B were, in 1852, conveyed by the Incumbered Estates Court to A M, the present owner in fee, who, in 1860, declined to pay the vicar the sum claimed by him as rectorial tithes, on the ground that same was payable to G L S. The Rev. T P, successor to Rev. J M, has been paid the rectorial tithe in dispute since his induction in 1840. Held, under the circumstances, that the Court was not bound by the applotment as conclusive evidence of the incumbent's right to the entire of the sums apportioned in the lands of B. *Plunkett v. Malley*, 8 Ir. Jur. N.S. 85, C., Master Fitzgibbon.

Held, also, that when the Acts prescribe things to be done by the parties themselves, they are to be construed as mandatory and imperative; but so far as they require things to be done by the public functionary, they are only directory. *Id.*

Held, also, that the petition was properly framed within the 15th section of the Chancery Regulation Act, and the 9th General Rule, 1851. *Id.*

TRADE-MARK.

A, having infringed B's trade-mark on a blistering ointment manufactured by A, it was agreed between them that all claims in respect of such invasion, not only with respect to A, but to include all parties who might have purchased the ointment from him, should be settled and discharged by payment of a sum of money; and B undertook to execute a release of all claims and demands in respect of the above infringement. Before the agreement, A had sold large quantities of the ointment to different persons, who, after the agreement, sold it with B's trade-mark; and suits were commenced against them by B for injunctions. A thereupon sued B for a specific performance of the agreement to execute a release, and to restrain B from proceeding in the several suits. Held, that the agreement was confined to sales by A, and all other persons to whom he had sold the ointment prior to the

agreement, and did not authorise a sale by the latter after the agreement. *Oldham v. James*, 13 Ir. Ch. Rep. 393, R.

Seemingly, a suit will not lie to restrain the respondent from proceeding for an injunction against third persons who are not parties to the suit. *Id.*

TRUSTEE AND CESTUI QUE TRUST.

Breach of trust. Personal estate was, by settlement, vested in trustees upon trust for R., a married woman, for life, without power of anticipation; and in case there should be no issue of the marriage; in case M., the husband of R. should survive her, as R. should by deed or will appoint, and in case R. should survive, for her absolutely. W., the acting trustee of the settlement, as the instance of R., applied the settled property in discharge of M.'s liabilities. M. died, and by R.'s request the trustee took no steps to realise M.'s assets. R. married again after the lapse of some years, and in her marriage settlement recited her wish to give credit to W. for all payments made by the trustees at her request in breach of trust. Held, that R. had lost her right to make the trustee liable for his breaches of trust. *Rutherford v. Masiers*, 13 Ir. Ch. R. 204, Ch.

Discretion of trustees. The discretion which trustees possess as to the time of sale, under an instrument directing a sale "with all convenient speed," can only be exercised in the reasonable hope of the property increasing in value. *Re Dowell's and Kelly's Estate*, 8 Ir. Jur. N.S. 817, L.E.C.

Where a discretionary trust is vested in trustees, the Court will not interfere with the exercise of discretion, if it be not capricious or improper, though a suit be instituted for the administration of the trust funds. *Gray v. Gray*, 13 Ir. Ch. R. 404, R.

If the trustees do not concur, the Court will distribute the trust fund among the parties equally. *Id.*

Where one of two trustees, in whom a discretionary trust is vested, was resident in Australia, the court would not act on a scheme for the distribution of the fund, approved of by his solicitor in the suit and the other trustee. *Id.*

Parol trust of residue. A testator having declared by parol to his residuary legatee, certain trusts by which he wished £2000 to be applied, afterwards made a codicil, stating that he had instructed the residuary legatee as to the disposition of his property. Held, that the parol trust could be enforced against the personal representative of the residuary legatee. *Att.-General v. Dillon*, 13 Ir. Ch. R. 127, Ch. Ap.

TURBARY.

Held, that there is no repugnancy between a grant of "bog," and a reservation of "turbary," as turves are not the sole profit of bog. And that "turbary," not being the soil, but only a *profit a prendre*, is not within the 8 & 4 W. 4, c. 27. *Boore v. Fleming*, 13 Ir. C. L. R. 506, Ex.

WARRANT OF ATTORNEY.

The defendant applied that a judgment obtained upon a warrant of attorney signed by him seven years previously while in the custody of the sheriff might be set aside upon the ground that same had been fraudulently obtained by a person who falsely represented himself as the assignee of the judgment on foot of which he had been arrested, and for which there had been comparatively no consideration, admitting that he had no personal interest in the application. The Court, upon the grounds that there had been some consideration for the judgment, that a long period of time had elapsed; that the original judgment creditor, and the party, who obtained the judgment in question were both out of the country and that the applicant had no personal interest, refused to set it aside. *Nolan v. Gumbley*, 8 Ir. Jur. N.S. 263, C.P.

The defendant applied that the above judgment might be set aside upon the ground that there was not an attorney present on his behalf when he signed the warrant of attorney conformably with the requirements of the 98th General Order, 1854: alleging that the party who obtained the warrant from him on the day previously, dictated to him a letter to an attorney named by him, and whom he, the defendant, had never seen, requiring him to attend the next day, which he did, and witnessed the defendant's signature without explaining to him the nature of the consent. It was sworn upon the other side that at the time he said he knew the contents of

Held, that the 98rd General Order had been complied with, and that the judgment could not be set aside upon this ground. *Id.*

The defendant applied that the above judgment might be set aside upon the further ground that the warrant was not attested conformably with the latter portion of the 98rd General Order, 1854. The attestation was as follows—"Signed, sealed, and delivered, &c.,—his attorney."

Held, that the attestation was sufficient, and that the judgment could not be set aside upon this ground. *Id.*

WATER RATE, *See* LEASE.

WEIGHMASTER.

The power given to Magistrates at Quarter Sessions, by the 2nd section of the 52 G. 3. c. 134, to appoint a weighmaster of butter, is exercisable by them since, as well as before, the 1st of March, 1818. *Dexter v. Cusé*, 13 Ir. C. L. Rep., 97. Exch.

The plaintiff, a candidate for the office of weighmaster, obtained, for the sum of 5*l.*, a surrender of the office from the then holder, who was advanced in life, and had ceased to discharge the duties. The justices at Quarter Sessions acted on this, and appointed the plaintiff. The appointment of the plaintiff was put in issue at the trial. Held, that the judge was not bound to consult the plaintiff, or direct a verdict for the defendant, under the 11th section of the 52 G. 3. c. 134. *Id.*

It is not a condition of the validity of the appointment that the oath and bond mentioned in the 6th section of the 52 G. 3. c. 134, should be taken and perfected at the same sessions at which the appointment is made. *Id.*

The opening, by the defendant, of a weigh-house near that of the plaintiff, and the weighing of butter there for the public, at like fees as those prescribed by the statute to be taken by the plaintiff, and the holding out inducements to the public to resort to such weigh-house, (such acts resulting in a loss of profit to the plaintiff,) amount to a disturbance of the plaintiff in his office of weighmaster of butter, under the 52 G. 3. c. 134, though the defendant may not have "assumed" the office of the plaintiff "as such," nor done acts which the plaintiff was exclusively privileged to do under the statute; and though the defendant's acts were not in themselves deceitful, wrongful, or violent. *Id.*

The damages in such an action are not limited to the amount of actual loss of profits sustained by plaintiff. *Id.*

The town of Tipperary is not a "place of export from whence butter is commonly shipped for exportation," within the meaning of 52 G. 3. c. 134, and 7 & 8 G. 4. c. 61. *Id.*

The 6th section of the 52 G. 3. c. 134 enacts, that every weighmaster, before he enters on the execution of his office "shall take and subscribe before &c., the oath following." In the form of oath given by the statute, the weighmaster is to swear to the faithful performance of his duties "during the time I shall continue in said office." In the oath actually taken by the plaintiff, which in other respects literally followed the form, the words were "during the time I shall hold said office." Held, that the form was sufficiently complied with, per Pigot, C. B., and Hughes, B. But held, per Fitzgerald and Deasy, B.B., that the words "continue in" were part of the oath, and that their omission was fatal. *Id.*

WILL (CONSTRUCTION.)

A., seized of freeholds, and possessed of chattels real, by his marriage settlement limited them, subject to his own life estate, to the issue of the marriage, to be distributed as he should direct or appoint. A. by his will, reciting his settlement, directed his chattels to be sold, and the produce applied in payment of funeral and testamentary expenses and debts, and the charges on his real estate; and devised the residue to his then unmarried daughters as tenants in common; he gave certain provisions, in satisfaction of their claims under the settlement, to two of his sons, and devised a portion of the settled lands, and all others of which he should die seized or have a power over, to his unmarried daughters in equal shares. By deed of 1st August, 1860, made on the marriage of S., one of the daughters of A., unmarried at the date of the will, he charged the lands of D., part of the settled estate, with £800 for S., and, by a codicil of the same date, he revoked the gifts when in his will. Held, that the testator, by the words in his will "his real estate" did not mean to include the lands com-

prised in the settlement: and that the £800 was not charged upon his personal estate. *Ellis v. Ellis*, 13 Ir. Ch. Rep. 484. C.

A testatrix by her will devised and bequeathed all her real and personal estate to A., in trust, amongst other things, to pay to B. and C. an annuity of 40*l.* each during their respective lives, with remainder to the issue of B. and C. respectively as tenants in common, with remainder over on the failure of issue. The testatrix appointed A. executor, and D. residuary devisee, and legatee, and further empowered the executor to sell and dispose of any part of her property that he should think fit, to carry out the intent of her will, and as might appear advantageous for the parties interested. The residuary estate consisted of house property held in quasi fee, a portion of which at the death of the testatrix, was in the possession of a tenant who held it under a lease for 99 years, from the 13th of February, 1762. In 1824, D., the residuary devisee, made a lease of the premises comprised in the lease of 1762, with some premises adjoining, to the person at that time entitled to the tenant's interest in this lease. The lease of 1824 was made without the knowledge or concurrence of the annuitants, but was made by the advice and with the approval of A. the executor and trustee, who also acted as solicitor in the preparation of the lease. A., from the death of the testatrix to his own death, managed the residuary estate, and paid the annuities, and after his death, and up to the time of the present suit, the annuitants remained in receipt of the rents and profits, which, however, for many years were insufficient to satisfy the annuities. A sub-lease had been made of the premises demise by the lease of 1824, and the sub-lessee had expended a very large sum of money in the erection of extensive tanning concerns. On the expiration of the lease of 1762, the annuitants demanded possession of the premises, which was refused on the ground of the lease of 1824, and that the lessee was a purchaser for valuable consideration without notice. In a suit instituted by the annuitants to have the annuities declared a good charge on all the real and personal estate, and to have the lease of 1824 declared a fraud on their rights—Held, that the annuities were well charged on all the estate, real and personal of the testatrix. *Metcalf v. Ryves*, 8 Ir. Jur. N.S., 405. C.

A testator, being possessed of a chattel reversion and profit rent in a house which he had leased to a tenant, with an option to redeem the rent by payment of 400*l.*, bequeathed all his real and personal property to his son, and another whom he appointed executor, upon trust to pay 25*l.* a year to his wife for life, out of the profit rent of the house, and in case the tenant should pay the 400*l.* he directed that his executors should place it together with whatever sum or sums of money there might be in the Bank of Ireland to his credit; and whatever sum or sums might appear entered in his name or his grand-children's name in the savings bank; and together with whatever cash might be had after paying his just debts, funeral expenses, and legacies, at interest, and pay the interest to his wife for her life, and at her decease divide the principal sum between two of his grand-daughters. The tenant did not pay the 400*l.* Held, that the profit rent of the house after the wife's death, was cash applicable to the trusts of the will. *Taylor v. Dunn*, 13 Ir. Ch. Rep. 382. R.

Semble—The testator's interest in the house was devised to the executors upon the trusts of the will. *Id.*

A. B., after particularising his real and personal estate, left and bequeathed the residue thereof to his children living at his death, share and share alike, the share of his daughters to be paid to them on their respective days of marriage, provided a settlement, with the approbation of his executor, was executed on the marriage of each. And in case such settlement was not made, each of his daughters should be entitled to the interest of her share for life only, with a gift over. And the testator declared that in case any of his daughters should die unmarried, "she shall have power and liberty to dispose of, by will or otherwise, the sum of 500*l.* of her share, and the remainder of her share is to be divided, share and share alike, amongst all my other children then living, except those who may have married without the settlement aforesaid." C., one of the testator's daughters, died intestate and unmarried. Held that C. took an absolute interest in her share to the extent of 500*l.*, which was to be considered as a gross sum of money, taken out of her share, and not as an aliquot part of her share; and that it was to be considered as personalty in C., and not as partly real and partly personal. *Id.*

re Manning's Estate, In re M'Donnell's Estate, 18 Ir. Ch. Rep. 268, L.E.C.

J. G. devised to H. F. "everything I may die possessed of, except the household furniture." Held, that such a devise passed real estate. *Re Gyle's Estate*, 8 Ir. Jur., N.S., 816 L.E.C.

Joint tenancy.] A testator devised to his three illegitimate children, A. B., and C., a yearly rent-charge, chargeable on the lands of X., to be equally divided between them, share and share alike, to hold to the said A. B. C. and to their heirs, as joint tenants; and in default of such heirs, the testator directed that the rent-charge should merge in his estate in the lands of X. A., on her marriage, put her share in the rent-charge in settlement; B. and C. died subsequently intestate, and without ever having married. In a suit instituted against the owners of the lands of X. by A. claiming to be paid the entire of the rent-charge, Held, that by the true construction of the above devise A. B. and C. took estates in joint tenancy, and that as A. had severed this joint tenancy by her marriage settlement she was entitled to only one-third of the rent-charge. *Daly v. Aldworth*, 8 Ir. Jur., N.S., 141, C.

Devise of lands held *per autre vie*.] The lessee of lands *per autre vie* by his will, made in the year 1832, devised "half of his lands to his son A." Held, that under that devise when the lands were held in fee or *per autre vie*, A. took an estate for life only. *Hagarty v. Nally*, 18 Ir. C.L. Rep., 582, Exch.

Classification of the cases upon devises similar to the above. *Id.*

Implication of cross-remainders.] The following devise,— "I leave all my right, title, interest, and estate in Coney Island unto my two sons, J. E. F. and C. F., for and during the term of their natural lives, a moiety to each for and during the term of their natural lives, and from and after either of their decease I devise said Island unto the first, second, third, and to all and every other the son and sons of my said sons one moiety of said Island to the son and sons of my said son, J. E. F., lawfully begotten, and the other moiety to my said son, C. F., for and during the term of his natural life; and from and after his decease I devise the same to the first, second, third, and to all and every other the son and sons of my said son, C. F., lawfully begotten; and in default of such issue I devise said Island to my seventh son, the Rev H. F., for and during his natural life. Held, confirming the judgment of Monahan, C.J., in the Common Pleas, that on the death of C. F. without issue, a cross-remainder as regards his moiety was to be implied in favour of J. E. F. and his sons. *Fitzgerald v. Fitzgerald*, 8 Ir. Jur., N.S., 26, Exch. Ch.

Limitations void for remoteness.] N. B., by will bearing date 4th May, 1861, devised his real and personal property to trustees upon trust, to pay all debts and legacies, and the residue thereof "shall be allowed to accumulate for as long a period as the law will allow, and the proceeds as they accrue are to be invested in the Government funds; and if my nephew, J. B., have a son who shall attain the age of 25 years, such son shall be entitled at 25 to all said rent and residue of my real and personal estate, and to the said accumulation thereof; and in case the eldest son of J. B. die before 25, then the second son shall be so entitled, and so on according to priority of birth; and in case my said nephew shall not have any son who shall attain 25 years of age, then I declare my will to be, that any son of A. B. who shall attain 25 years of age shall be entitled thereto; and if A. B. shall not have any son who shall attain 25, then my will is that W. J. S. shall be entitled thereto after the lapse of 21 years after my death; and in case of the death of W. J. S. before the lapse of 21 years after my death, then the eldest and each successive son of my nephew, R. B. (if he shall have a son or sons) shall at 25 years become entitled thereto; and in case R. B. shall not have a son who shall attain 25, then that the eldest son of A. B. shall be entitled, and in case A. B. shall not have a son who shall attain 25, then that H. W., at present an infant, shall be entitled after 21 years after my death. Held, that the bequests to the unborn sons of J. B. and A. B. were void, as they did not vest within 21 years after the death of the testatrix. *Armstrong v. West*, 8 Ir. Jur., N.S., 144, Master Litton.

Held also, that the limitations over to W. J. S. and H. W., although, within 21 years, were void, depending as they did on a void gift. *Id.*

Lapse.] A. O'B., by will bearing date the 6th November

1829, having recited that she was possessed of 1800*l.*, British, bequeathed same in manner following: "I give and bequeath to my nephew, A. W. O'B., the sum of £325, to be paid to said A. W. O'B. on the day of his attaining the age of twenty-one. Item, I devise and bequeath a like sum of £325 to my nephew, J. T. O'B., to be paid in like manner as the principal and interest of A. W. O'B.; and I devise and bequeath the like sum of £325 to my niece A. O'B. on the day of her attaining twenty-one, or on the day of her marriage; and I will and desire that if either or any of my said nephews and niece shall die before their legacy shall become payable, that then the share of the person so dying shall go to the survivors or survivor; and in case the said A. W. O'B., the said J. T. O'B., and the said A. O'B., shall all die before their legacies become payable," then she bequeathed the said sum of £975 among a number of legatees in small legacies, varying from £10 to £200, among which was a legacy of £50 to J. D. The remaining £325 she divided into a number of small legacies, and she then appointed "J. D. executor of this my last will and testament, and I constitute and appoint him my residuary legatee, to take to his own use the amount of any of the aforesaid legacies which may become void by the death of the respective legatees happening before my decease." Testatrix died 12th April, 1862, leaving J. T. O'B. her surviving. A. W. O'B. and A. O'B. died in her lifetime, as also a number of the legatees of the last mentioned £325. Held, that the two respective shares of A. W. O'B. and A. O'B., who died in the lifetime of A. O'B., did not lapse, but went to J. T. O'B., the nephew living at the death of the testatrix. *Dalton v. O'Beirne*, 8 Ir. Jur. N.S. 107, Master Brooke.

Held, also, that the word "payable" had reference to the death of testatrix. *Id.*

Held, also, that "survivor" meant surviving at the death of the testatrix. *Id.*

Liability of real for deficiency of personal estate.] A testator bequeathed pecuniary legacies to his children, payable at 21 or marriage, charged primarily upon his personal property but the will contained a clause charging the lands with so much of his debts and legacies as his personal estate should not be sufficient to pay. The clause was as follows:—"I hereby charge and encumber my estate with the payment of all such parts of my debts and legacies as my personal property shall not be sufficient to pay, but my will is that my debts and legacies shall be, in the first instance, paid out of my personal estate as far as same will extend." The executor wasted the testator's personal estate, which became insufficient to pay the legacies. Held, that the real estate was answerable for the deficiency of the personal estate, and that such deficiency was proved where there was a failure to pay the legacies out of the assets. *In re Massey's Estate*, 8 Ir. Jur. N.S., 374, L.E.C.

Held, further, that the mere not enforcing payment from the executor, was not to be regarded as laches. *Id.*

Held, further, that there was no difference in principle between a trust term to raise the deficiency, and a charge of such deficiency in express terms. *Id.*

Lands charged in exoneration of personalty.] D. bequeathed lands in C. and L., to the use that M. should receive an annuity of 50*l.* per annum out of the C. lands, and a like annuity out of the L. lands, and devised the C. lands to H., in strict settlement. He devised the L. lands, subject to the annuity of 50*l.* and "to the charge of 1000*l.* hereafter mentioned" to H. in strict settlement. He then gave to X., W. and R., the sum of 1000*l.*, and charged the sum upon the L. lands, and bequeathed the residue of his real and personal estate to X., W. and R. Held, that the 1000*l.* was charged on the L. lands in exoneration of the personalty. *Dunst v. Dunst*, 18 Ir. Ch. Rep., 175 C.

Meaning of word "issue".] A testator bequeathed legacies to his nephews and nieces, and directed that if any or all of his said nephews and nieces should leave legitimate issue, that issue respectively should have, possess, and enjoy the bequest which he made and intended for the parents of such issue respectively; but the sums devised to such of his nephews or nieces respectively as should not leave issue, should go to the survivors or survivor of his said nephews and nieces, and to the issue of same. Held, that "issue" meant all descendants, and that the survivors of the nephews and nieces, at the time of the death of one of them, took her share absolutely. *In re Kavanagh's Trusts*, 18 Ir. Ch. Rep. 120, R.

Meaning of word "stock." A testator, having no Government or railway stock, but having stock-in-trade, which he specifically bequeathed, farming-stock, furniture, plate, and a small quantity of wine, &c., directed by his will that his wife should have the use of all his furniture, stock, and household-linen, and the use of his plate, until his son B should have arrived at the age of twenty-one years. Held that the farming stock passed by the bequest. *Creagh v. Creagh*, 13 Ir. Ch. Rep. 28, R.

Meaning of word "legacies." In a will, the word "legacies" held to apply to a gift of the residue, even when such residue included real property. *In re Guinness's Trusts*, 8 Ir. Jur. N.S. 24, R.

"Or" not read "and." A, by his will, *inter alia*, devised unto B the interest in certain lands, held *pur autre vie*, to have, receive, and take the rents, issues, and profits thereof; but in case B "should happen to die before he attains the age of twenty-one years or married," then over. Held, that "or" could not be read "and;" and that though B attained twenty-one, yet that having never married, he had not acquired an absolute estate. *In re Clegg's Estate*, 13 Ir. Ch. Rep. 163, L. E. C.

J B, by his will, devised the lands of X, held under a lease of lives renewable for ever, to M C, for life, with remainder to J C; but "if J C should happen to die before he attains the age of twenty-one or married," then over. Held, that J C, on attaining the age of twenty-one years, was absolutely entitled; and that the gift over could only take effect if J C died under the age of twenty-one years unmarried. *In re Clegg's Estate*, 8 Ir. Jur. N.S. 21, Ch. Ap.

Falsa demonstratio. M, being seized of the lands of B, F., G., and C, by virtue of a lease for lives renewable for ever, made a will to the following effect:—"Being possessed of a lease for lives renewable for ever of certain lands in the Co. of K., which said lands are denominated B., C., and F.

. . . I hereby require that the aforesaid lands should, as soon after my decease as possible, be sold in the Incumbered Estates Court, and, after the payment of all my just debts, be equally divided between X. and Y. as tenants in common. . . and I appoint the said X. residuary legatee of all my real and personal estate." The testator did not possess any real estate, except the lands of B., F., G., and C., and all of these, including the denomination of G. not specifically mentioned in the will, were alike subject to the payment of the testator's debts. Held, that the lands of G. passed by the specific devise, and not by the residuary devise in the will. *West v. Lowday*, 8 Ir. Jur., N.S., 224, Ch. Ap.

Precatory words. Testator devised to his wife his house at G., and declared it to be "his earnest wish that his sister should reside at G. with his wife during her life." Held, that there was not any trust created in favour of testator's sister. *Graves v. Graves*, 13 Ir. Ch. Rep., 182, C.

Revocation. G., by his will dated the 20th of November, 1834, appointed to his younger children, in pursuance of a power, a sum of 16,000*l.* late currency, giving to T., as his share 5000*l.* He also devised to T. an annuity of 150*l.* for his life, charged on land. By a codicil, dated the 13th of December, 1844, reciting that he had made a provision for T. on his marriage, he declared that the provision so made for his said son should be deemed a satisfaction of his share of the sum of 16,000*l.* late currency, in his said will mentioned, and that he should not be admitted to claim under his said will the sums appointed and bequeathed to him. By a further codicil he devised his real and freehold estates to his eldest son C. charged with the payment of the several legacies and annuities devised and bequeathed by his said will and codicils thereto, save such of them as had been revoked by said codicils. Held, that the devise of the annuity to T. was not revoked by the codicils. *Preston v. Lord Gormanstown*, 13 Ir. Ch. Rep., 329, C.

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